ADVISORY COMMITTEE
ON
CIVIL RULES

Nashville, TN
September 7-8, 2006

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
SEPTEMBER 7-8, 2006

1. Report on Judicial Conference session and chair's introductory remarks

   - Minutes of June 22-23, 2006, Standing Rules Committee meeting

2. **ACTION** – Approving minutes of May 22-23, 2006, Advisory Rules Committee meeting

3. Proposed uniform rule amendments on time computation

   A. Further revisions to the template for calculating time
   B. Adjusting time periods in specific rules
      i. Report of Subcommittee A
      ii. Report of Subcommittee B
   C. Rule 6(b) issues involving rules with time periods that may not be extended
   D. List of statutory provisions specifying time periods
   E. Memorandum on the meaning of "last day" for the purpose of computing time

4. Report of Rule 30(b)(6) and Rule 26 Subcommittee

   A. Report on depositions of witnesses testifying on behalf of an organization under Rule 30(b)(6)
   B. Materials on requiring employees giving expert testimony to furnish reports and requiring disclosure of privileged or protected material provided to testifying experts
      i. Memorandum on Rule 26(a)(2) issues
      ii. Resolution of American Bar Association and report of ABA Federal Practice Task Force
      iii. Report of New York State Bar Association Commercial and Federal Litigation Section Committee on Federal Procedure on expert witness disclosure

5. Status report of the Federal Judicial Center on "class actions" study (materials to be circulated at a later time)

6. Amending Rule 12(e) to facilitate more detailed pleading

   A. Memorandum on approaches to amending Rule 12(e)
   B. Addendum on current Rule 12(e)

7. Report of Rule 56 Subcommittee

   A. Memorandum on approaches to amending Rule 56
   B. Text of possible amendments to Rule 56
   C. Background materials from earlier committee meetings, including excerpts from minutes of committee meetings discussing amending Rule 56
   D. Memorandum on local rules dealing with summary judgment

8. Questions on Rule 62.1 raised by the Standing Committee

9. Request for consideration of amending Rule 68 to facilitate comparison of offers and judgments when nonmonetary relief is involved

10. Technical amendment to Supplemental Rule C(6)(a)

11. Next meeting on April 12-13 or April 19-20, 2007

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August 15, 2006

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Frank Cicero, Jr., Esquire

Subcommittee on Rules 26(a) and 30(b)(6)
Judge David G. Campbell, Chair
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Justice Nathan L. Hecht
Chilton Davis Varner, Esquire
Robert C. Heim, Esquire
Honorable Peter D. Keisler

ADVISORY COMMITTEE ON CIVIL RULES

			Start Date	End Date
Lee H. Rosenthal Chair	D	Texas (Southern)	Member: 1996 Chair: 2003	---- 2006
Michael M. Baylson	D	Pennsylvania (Eastern)	2005	2007
Jose A. Cabranes	C	Second Circuit	2004	2007
David G. Campbell	D	Arizona	2005	2008
Frank Cicero, Jr.	ESQ	Illinois	2003	2006
Steven S. Gensler	ACAD	Oklahoma	2005	2008
Daniel C. Girard	ESQ	California	2004	2007
C. Christopher Hagy	M	Georgia (Northern)	2003	2006
Nathan L. Hecht	JUST	Texas	2000	2006
Robert C. Heim	ESQ	Pennsylvania	2002	2008
Peter D. Keisler *	DOJ	Washington, DC	----	Open
Paul J. Kelly, Jr.	C	Tenth Circuit	2002	2007
Thomas B. Russell	D	Kentucky (Western)	2000	2006
Chilton Davis Varner	ESQ	Georgia	2004	2007
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 22-23, 2006
Washington, D.C.
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 Washington, D.C. on Thursday and Friday, June 22-23, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Deputy Attorney General Paul J. McNulty
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

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 of the Rules Committee Support Office of the Administrative Office; James N. Ishida, Jeffrey N. Barr, and Timothy K. Dole, attorneys in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., consultant to the committee. Professor R. Joseph Kimble, style consultant to the committee, participated by telephone in the meeting on June 23.

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

Deputy Attorney General McNulty attended part of the meeting on June 22. The Department of Justice was also represented at the meeting by Associate Attorney General Robert D. McCallum, Jr.; Alice S. Fisher, Assistant Attorney General for the Criminal Division; Ronald J. Tenpas, Associate Deputy Attorney General; Benton J. Campbell, Counselor to the Assistant Attorney General; and Jonathan J. Wroblewski and Elizabeth U. Shapiro of the Criminal Division.

INTRODUCTORY REMARKS

Judge Levi welcomed Supreme Court Justice Samuel A. Alito, Jr. to the meeting and presented him with a plaque honoring his service as a member and chair of the Advisory Committee on Appellate Rules.

Later in the day, Chief Justice John G. Roberts, Jr. came to the meeting, greeted the members, and spent time with them in informal conversations. Judge Levi presented the Chief Justice with a framed resolution expressing the committee's appreciation, respect, and admiration for his support of the rulemaking process and his service as a member of the Advisory Committee on Appellate Rules. Judge Levi noted that the Chief Justice had been nominated as the next chair of that committee, but his elevation to the Supreme Court had intervened with the succession. The Chief Justice expressed his appreciation for the work of the rules committees and emphasized that he had experienced that work from the inside.

Judge Levi reported that Professor Struve had been appointed by the Chief Justice as the new reporter for the Advisory Committee on Appellate Rules, succeeding Patrick Schiltz, who had just been sworn in as a district judge in Minnesota. Judge Levi pointed out that Professor Struve had written many excellent law review articles and has been described as "shockingly prolific."

Judge Levi noted that Dean Kane would retire as dean of the Hastings College of the Law on June 30, 2006. He also reported that she, Judge Murtha, and Judge Thrash would be leaving the committee because their terms were due to expire on September 30, 2006. He said that their contributions to the committee had been enormous, particularly as the members of the committee's Style Subcommittee. He also reported with sadness that the terms of Judge Fitzwater and Justice Wells were also due to expire on September 30, 2006. They, too, had made major contributions to the work of the committee and would be sorely missed. He noted that all the members whose terms were about to expire would be invited to the next committee meeting in January 2007.

Judge Levi noted that the civil rules style project had largely come to a conclusion. The committee, he said, needed to make note of this major milestone. He said that the style project was extremely important, and it will be of great benefit in the future to law students, professors, lawyers, and judges. The achievement, he emphasized, had been the joint product of a number of dedicated members, consultants, and staff.

In addition to recognizing the Style Subcommittee – Judges Murtha and Thrash and Dean Kane – Judge Levi singled out Judge Rosenthal, chair of the Advisory Committee on Civil Rules, and Judges Paul J. Kelly, Jr. and Thomas B. Russell, who served as the chairs of the advisory committee's two style subcommittees. Together, they

shepherded the style project through the advisory committee. Judge Levi also recognized the tremendous assistance provided by Professors R. Joseph Kimble, Richard L. Marcus, and Thomas D. Rowe, Jr., and by Joseph F. Spaniol, Jr., all of whom labored over countless proposed drafts, wrote and read hundreds of memoranda, and participated in many meetings and teleconferences.

Judge Levi also thanked the staff of the Administrative Office for managing the process and providing timely and professional assistance to the committees – Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, Robert P. Deyling, and Jeffrey N. Barr, and their excellent supporting staff – who keep the records, arrange the meetings, and prepare the agenda books. Finally, he gave special thanks to Professor Cooper who, he emphasized, had been the heart and soul of the style project. Professor Cooper was tireless and relentless in reviewing each and every rule with meticulous care and great insight. He helped shape every decision of the committee.

Judge Levi said that there was little to report about the March 2006 meeting of the Judicial Conference. He noted that the Supreme Court had prescribed the proposed rule amendments approved by the Judicial Conference in September 2005, including the package of civil rules governing discovery of electronically stored information. The amendments, now pending in Congress, are expected to take effect on December 1, 2006.

Judge Levi also thanked Brooke Coleman, his rules law clerk, for her brilliant work over the last several years in assisting him in all his duties as chair of the committee. He noted that she would soon begin teaching at Stanford Law School.

Judge Levi reported that Associate Attorney General McCallum had been nominated by the President to be the U.S. ambassador to Australia. Accordingly, he said, this was likely to be Mr. McCallum's last committee meeting. He emphasized that he had been a wonderful member and had established a new level of cooperation between the rules committees and the Department of Justice. He said that it is very important for the executive branch to be involved in the work of the advisory committees, especially when its interests are affected. He noted that the Department is a large organization, and its internal decision making on the federal rules works well only when its top executives, such as the Associate Attorney General, are personally involved. He emphasized that Mr. McCallum had attended and participated in all the committee meetings, and that he is a brilliant lawyer and a great person.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 6-7, 2006.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters affecting the rules system. First, he pointed out that the Rules Enabling Act specifies that, unlike other amendments to the federal rules, any rule that affects an evidentiary privilege must be enacted by positive statute. He noted that the Advisory Committee on Evidence Rules had been working for several years on potential privilege rules, including a rule on waiver of the attorney-client privilege and work product protection. But before the committee could proceed seriously with a privilege waiver rule, it should alert Congress to all the relevant issues and obtain its acceptance in pursuing legislation to enact the rule. Accordingly, he said, Judge Levi and he had met on the matter with the chairman of the Judiciary Committee of the House of Representatives, F. James Sensenbrenner, Jr.

Chairman Sensenbrenner recognized that legislation would be necessary to implement the rule. Judge Levi reported that the chairman was very supportive and had urged the committee by letter to promulgate a rule that would: (1) protect against inadvertent waiver of privilege and protection, (2) permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and (3) allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in later proceedings.

Mr. Rabiej reported that the Advisory Committee on Evidence Rules had drafted a proposed rule, FED. R. EVID. 502, addressing the three topics suggested by Chairman Sensenbrenner. He added that Judge Levi would meet on June 23 with the chief counsel to the Senate Judiciary Committee and others to discuss the proposed rule.

Second, Mr. Rabiej reported that the Advisory Committee on Bankruptcy Rules had produced a comprehensive package of amendments and new rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed out that two senators had written recently to the Chief Justice objecting to three provisions in the advisory committee's proposed rules. The Director of the Administrative Office responded to the senators by explaining the basis for the advisory committee's decisions on these provisions and emphasizing that the committee would examine afresh the senators' suggestions, along with other comments submitted by the public, as part of the public comment process.

Third, Mr. Rabiej noted that a provision of the Class Action Fairness Act of 2005 required the Judicial Conference to report on the best practices that courts have used to make sure that proposed class action settlements are fair and that attorney fees are reasonable. He said that the Judicial Conference had filed the report with the judiciary committees of the House and Senate in February 2006. The thrust of the report

emphasized that the extensive 2003 revisions to FED. R. CIV. P. 23 had provided the courts with a host of rule-based tools, discretion, and guidance to scrutinize rigorously class action settlements and fee awards. The revised rule was intended largely to codify and amplify the best practices that district courts had developed to supervise class action litigation.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending projects of the Federal Judicial Center. He directed the committee's attention to two projects.

First, he noted, the Center was working with the Administrative Office to monitor developments in the courts following the Class Action Fairness Act of 2005. He said that the study was showing that class-action filings had increased since the Act. But not many class action cases are being removed from the state courts. Rather, he said, cases that previously would have been filed in the state courts are now being filed in the federal courts as original actions.

Second, the Center was studying the issue of appellate jurisdiction and how it affects resources in the appellate courts and district courts. He said that the Center would examine the exercise of jurisdiction under 28 U.S.C. § 1292(b), and a report would be forthcoming soon. He added, in response to a question, that concerns had been expressed regarding § 1292(b) motions in patent cases. He said that it had been difficult in the past to get district courts to certify an appeal and for the courts of appeals to accept the appeal. But the reluctance seems to have diminished, and changes are being seen.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Rules for Final Approval

FED. R. APP. P. 25(a)(5)
FED. R. BANKR. P. 9037
FED. R. CIV. P. 5.2
FED. R. CRIM. 49.1

Judge Fitzwater explained that the four proposed rules have been endorsed by the Technology Subcommittee and the respective advisory committees. They comply with the requirement of the E-Government Act of 2002 that rules be prescribed "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The substance of the proposed rules,

he said, was based on the privacy policy already developed by the Court Administration and Case Management Committee and adopted by the Judicial Conference. In essence, since all federal court documents are now posted on the Internet, the proposed rules impose obligations on people filing papers in the courts to redact certain sensitive information to protect privacy and security interests.

Professor Capra added that the statute specifies that the rules must be uniform "to the extent practicable." He referred to the chart in the agenda book setting forth the proposed civil, criminal, and bankruptcy rules side-by-side and demonstrating how closely they track each other. (The proposed amendment to the appellate rules would adopt the privacy provisions followed in the case below.) He said that the subcommittee and the reporters had spent an enormous amount of time trying to make the rules uniform, even down to the punctuation. He pointed out that individual rules differ from the template developed by the Technology Subcommittee only where there is a special need in a particular set of rules. For example, a special need exists in criminal cases to protect home addresses of witnesses and others from disclosure. Therefore, the criminal rules, unlike the civil and bankruptcy rules, require redaction of all but the city and state of a home address in any paper filed with the court. Professor Coquillette added that the consistent policy of the Standing Committee since 1989 has been that when the same provision applies in different sets of federal rules, the language of the rule should be the same unless there is a specific justification for a deviation.

Judge Levi pointed out that the Court Administration and Case Management Committee had raised two concerns with the proposed privacy rules. First, that committee had suggested that the criminal rules require redaction of the name of a grand jury foreperson from documents filed with the court. But, he said, the signature of a foreperson on an indictment is essential, and there has been litigation over the legality of an indictment that does not bear the signature of the foreperson.

Second, the Court Administration and Case Management Committee had raised concerns over arrest and search warrants that have been executed. Initially, he said, the Department of Justice had argued, and the advisory committee was persuaded, that the effort required to redact information from arrest and search warrants would be considerable and that redaction of these documents should not be imposed. Now, though, the Department was suggesting that search warrants can be redacted, but not arrest warrants. Judge Levi said that he had advised the Court Administration and Case Management Committee that these matters needed to be studied further, but he did not want to delay approval of the privacy rules because of the concerns over warrants.

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

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 December 9, 2005 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 25(a)(5)

Judge Stewart reported that the advisory committee had met in April and that the E-Government privacy rule had been the major item on its agenda. He pointed out that the proposed appellate rule on privacy differs from the proposed civil, criminal, and bankruptcy rules in that it adopts a policy of "dynamic conformity." In other words, the appellate rule provides simply that the privacy rule applied to the case below will continue to apply to the case on appeal. He added that the advisory committee had been unanimous in approving this approach. The only objections raised in the committee related to some of the suggested style changes.

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Informational Items

Judge Stewart reported that the other items in the committee's report in the agenda book were informational. First, he said, the advisory committee had begun to consider implementing the time-computation template developed by the Standing Committee's Time-Computation Subcommittee by establishing a subcommittee to work on it. The subcommittee would begin work this summer to consider each time limit in the appellate rules. He added that Professor Struve had initiated the project with an excellent memorandum in which she identified time limits set forth in statutes. There is concern about statutes that impose time limits, he said, because FED. R. APP. P. 26 specifies that the method of counting in the rules is applicable to statutes. One problem is that the time limits for complying with many statutes — often 10 days — may be shortened because the template calls for counting each day, while the current time computation rule excludes weekends and holidays if a time limit is less than 11 days.

Judge Stewart reported that the advisory committee had also been asked to consider the provision in the time-computation template addressing the "inaccessibility" of the clerk's office. He said that the advisory committee would add Fritz Fulbruge, clerk

of the Court of Appeals for the Fifth Circuit in New Orleans, to the subcommittee. He has had relevant, actual experience with inaccessibility as a result of Hurricane Katrina.

Judge Stewart said that the advisory committee had conducted a thorough discussion of the "3-day rule" – FED. R. APP. P. 26(c). The committee voted unanimously not to make any change in the rule at the present time, but the members had a lively debate on the topic. Since electronic filing and service are just being introduced in the courts of appeals nationally, the committee will monitor their impact on the 3-day rule to see whether the rule should be modified.

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 24, 2006 (Agenda Item 11).

Judge Zilly reported that the advisory committee had been very busy during the last 12 months, particularly in drafting rules and forms to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. In all, the committee had held six meetings. The most recent, held in March 2006 at the University of North Carolina in Chapel Hill, had lasted three full days, and the advisory committee took two additional votes after the meeting.

He noted that a great deal of material was being presented to the Standing Committee. In all, more than 70 changes to the rules were under consideration. He said that the advisory committee was recommending:

(1) final approval of eight rules not related to the recent bankruptcy legislation;
(2) withdrawal of one rule published for public comment;
(3) final approval of an amendment to Interim Bankruptcy Rule 1007 and a related new exhibit to the petition form;
(4) final approval of seven additional changes to the forms, to take effect on October 1, 2006;
(5) publication of a comprehensive package of amendments to the rules to implement the recent bankruptcy legislation, most of which had been approved earlier as interim rules; and
(6) publication of all the revisions in the Official Forms.

Amendments for Final Approval

Judge Zilly reported that the proposed amendments to FED. R. BANKR. P. 1014, 3001, 3007, 4001, 6006, and 7007.1 and new rules 6003, 9005.1, and 9037 had been published for comment in August 2005. A public hearing on them had been scheduled for January 9, 2006. But there were no requests to appear, and the hearing was cancelled. He noted that the proposed Rules 3001, 4001, 6006 and new Rule 6003 had generated a good deal of public comment.

FED. R. BANKR. P. 1014(a)

Judge Zilly said that Rule 1014 (dismissal and transfer of cases) would be amended to state explicitly that a court may order a change of venue in a case on its own motion.

Joint Subcommittee Recommendations on
FED. R. BANKR. P. 3007, 4001, 6003, and 6006

Judge Zilly explained the origin of the proposed changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003. He said that about three years ago, the Bankruptcy Administration Committee of the Judicial Conference, chaired by Judge Rendell, and the Advisory Committee on Bankruptcy Rules had formed a joint subcommittee to examine a number of issues arising in large chapter 11 cases. As a result of the subcommittee's work, changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003 were published. He added that the advisory committee was recommending a number of minor changes to the four rules as a result of the public comments.

FED. R. BANKR. P. 3007

Judge Zilly explained that Rule 3007 (objection to claims) was being amended in several ways. It would preclude a party in interest from including in a claims objection any request for relief that requires an adversary proceeding. The proposed rule would allow omnibus claims objections. Objections of up to 100 claims could be filed in a single objection to claims. It would also limit the nature of objections that may be joined in a single filing, and it would establish minimum standards to protect the due process rights of claimants.

FED. R. BANKR. P. 4001

Judge Zilly noted that Rule 4001 (relief from the automatic stay and certain other matters) would be amended to require that movants seeking approval of agreements related to the automatic stay, approval of certain other agreements, or authority to use

cash collateral or obtain credit submit along with their motion a proposed order for the relief requested and give a more extensive notice of the requested relief to parties in interest. The rule would require the movant to include within the motion a statement not to exceed five pages concisely describing the material provisions of the relief requested. Judge Zilly noted that the advisory committee had made some changes in the rule after publication, including deletion of an unnecessary reference to FED. R. BANKR. P. 9024 (relief from judgment or order).

FED. R. BANKR. P. 6003

Judge Zilly explained that proposed Rule 6003 (interim and final relief immediately following commencement of a case) is new. It would set limits on a court's authority to grant certain relief during the first 20 days of a case. Absent a need to avoid immediate and irreparable harm, a court could not grant relief during the first 20 days of a case on: (1) applications for employment of professional persons; (2) motions for the use, sale, or lease of property of the estate, other than a motion under FED. R. BANKR. P. 4001; and (3) motions to assume or assign executory contracts and unexpired leases. He added that subdivision (c) had been amended following publication to delete a reference to the rejection of executory contracts or unexpired leases. The amendment, he said, allows a debtor to reject burdensome contracts or leases.

FED. R. BANKR. P. 6006

Judge Zilly reported that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would authorize omnibus motions to reject executory contracts and unexpired leases. It would also authorize omnibus motions to assume or assign multiple executory contracts and unexpired leases under specific circumstances. The amended rule would establish minimum standards to ensure protection of the due process rights of claimants. Following publication, the advisory committee amended the rule to allow the trustee to assume but not assign multiple executory contracts and unexpired leases in an omnibus motion.

FED. R. BANKR. P. 7007.1

Judge Zilly explained that the proposed new Rule 7007.1 (corporate ownership statement) would require a party to file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed Rule 9005.1 (constitutional challenge to a statute) is new. It would make the new FED. R. CIV. P. 5.1 applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

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

FED. R. BANKR. P. 9037

As noted above on page 7, the committee approved the proposed new Rule 9037 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee. Adopted in compliance with § 205 of the E-Government Act of 2002, the rule would protect the privacy and security concerns arising from the filing of documents with the court, both electronically and in paper form, because filed documents are now posted on the Internet.

Judge Zilly noted that the proposed new bankruptcy rule is similar to the companion civil and criminal rules. It is slightly different in language, though, because it uses the term "entity," a defined term under the Bankruptcy Code, rather than "party" or "person." Entity includes a governmental unit under § 101(15) of the Code, while "person" excludes it in the definition section of the Code § 101(41).

Withdrawal of an Amendment

FED. R. BANKR. P. 3001(c) and (d)

Judge Zilly reported that the advisory committee had decided to withdraw the proposed amendments to Rule 3001 (proof of claim) following publication. The current rule states that when a claim (or an interest in property of the debtor) is based on a writing, the entire writing must be filed with the proof of claim. The proposed amendments, as published, would have provided that if the writing supporting the claim were 25 pages or fewer, the claimant would have to attach the whole writing. But if it exceeded 25 pages, the claimant would have to file relevant excerpts of the writing and a summary, which together could not exceed 25 pages. Similarly, any attachment to the proof of claim to provide evidence of perfection of a security interest could not exceed five pages in length.

Judge Zilly said that the advisory committee had received several comments opposing the amendments. One organization objected to the rule on the grounds that

summaries would be difficult to prepare. In light of the comments, the committee discussed increasing the page limitation on proof of perfection from five to 15 pages. After considering and debating all the comments, though, the committee decided to recommend that no changes be made to Rule 3001. But it agreed to change Form 10 (the proof of claim form) to warn users against filing original documents. The proposed language on the form would advise: "Do not send original documents. Attached documents may be destroyed after scanning."

The committee without objection approved withdrawal of the proposed amendment by voice vote.

Amendments to an Interim Rule and the Official Forms

Judge Zilly explained that to conform to the 2005 bankruptcy legislation, the committee had prepared interim rules that were then approved by the Standing Committee and the Executive Committee of the Judicial Conference for use as local rules in the courts. The interim rules had been drafted as revised versions of the Federal Rules of Bankruptcy Procedure. The courts were encouraged, but not required, to adopt them as local rules. The interim rules included 35 amendments to the existing rules and seven new rules. All the courts adopted the rules before the October 17, 2005, effective date of the bankruptcy law, some with minor variations.

In addition, the advisory committee prepared amendments to 33 of the existing Official Forms and created nine new forms, all of which were approved in August 2005 by the Standing Committee and the Judicial Conference, through its Executive Committee. The forms, under FED. R. BANKR. P. 9009, became new Official Forms and must be used in all cases.

Judge Zilly reported that the advisory committee had received comments from various sources on both the interim rules and the Official Forms. Based on those comments, it was now recommending a change in Interim Rule 1007 to require a debtor to file an official form that includes a statement of the debtor's compliance with the new pre-petition credit counseling obligation under § 109(h) of the Code. The amendment would be sent to the courts with the recommendation that it be adopted as a standing order effective October 1, 2006. Also based on the comments, the advisory committee was recommending changes to OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, and 23 and new Exhibit D to OFFICIAL FORM 1. In addition, he said, the advisory committee recommended having the Judicial Conference make the changes in the Official Forms and have them take effect on October 1, 2006.

FED. R. BANKR. P. 1007

Judge Zilly explained that the 2005 Act had amended § 109(h) of the Bankruptcy Code to require that all individual debtors receive credit counseling before commencing a bankruptcy case. In its current form, Interim Rule 1007 (lists, schedules, statements, and other documents) implements § 109(h) by requiring the debtor to file with the petition either: (1) a certificate from the credit counseling agency showing completion of the course within 180 days of filing; (2) a certification attesting that the debtor applied for but was unable to obtain credit counseling within 5 days of filing; or (3) a request for a determination by the court that the debtor is statutorily exempt from the credit counseling requirement.

Case law developments have shown that some debtors have completed the counseling but have been unable to obtain a copy of the certificate from the provider of the counseling. As a result, debtors have filed a petition with the court, paid a filing fee, and then had their case dismissed by the court even when they had received the counseling but not filed the certificate. The proposed amendments to Rule 1007(b) and (c) address the problem by permitting debtors in this position to file a statement that they have completed the counseling and are awaiting receipt of the appropriate certificate. In that event, the debtor will have 15 days after filing the petition to file the certificate with the court.

Professor Morris added that the advisory committee was recommending amending both the interim rule and the final Rule 1007.

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

OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, 23
and Exhibit D to OFFICIAL FORM 1

Judge Zilly added that the advisory committee was recommending a new Exhibit D to OFFICIAL FORM 1 (voluntary petition) to implement the proposed amendment to Rule 1007(b)(3). Exhibit D is the debtor's statement of compliance with the credit counseling requirement. Among other things, it includes a series of cautions informing debtors of the consequences of filing a bankruptcy petition without first receiving credit counseling. Many pro se debtors, for example, are unaware of the significant adverse consequences of filing a petition before receiving the requisite counseling, including dismissal of the case, limitations on the automatic stay, and the need to pay another filing fee if the case is refiled. The warnings may deter improvident or premature filings, and they should both reduce the harm to those debtors and ease burdens on the clerks, who often are called upon to respond to inquiries from debtors on these matters.

Judge Zilly added that the advisory committee was recommending that the Judicial Conference make changes in the following seven Official Forms, effective October 1, 2006:

1	Voluntary petition
5	Involuntary petition
6	Schedules
9	Notice of commencement of a case, meeting of creditors, and deadlines
22A	Chapter 7 statement of current monthly income and means test calculation
22C	Chapter 13 statement of current monthly income and calculation of commitment period and disposable income
23	Debtor's certification of completion of instructional course concerning personal financial management

Judge Zilly reported that the advisory committee recommended that OFFICIAL FORMS 1, 5, and 6 be amended to implement the statistical reporting requirements of the 2005 bankruptcy legislation that take effect on October 17, 2006. The proposed amendments to OFFICIAL FORMS 9, 22A, 22C, and 23 are stylistic or respond to comments received on the 2005 amendments to the Official Forms.

Judge Zilly pointed out that each of the forms was described in the agenda book. Once approved by the Judicial Conference, he said, they would become official and must be used in all courts. But, he said, the proposed changes in the seven forms will also be published for public comment, even though they will become official on October 1, 2006, because they had been prepared quickly to meet the statutory deadline and had not been published formally.

The committee without objection by voice vote agreed to send the proposed revisions in the forms to the Judicial Conference for final approval.

Amendments to the Rules for Publication

Judge Zilly reported that the advisory committee was seeking authority to publish the interim rules – together with proposed amendments to five additional rules not included in the interim rules – as a comprehensive package of permanent amendments to implement the 2005 bankruptcy legislation and other recent legislation. They would be published in August 2006 and, following the comment period, would be considered afresh by the advisory committee in the spring of 2007 and brought back to the Standing Committee for final approval in June 2007.

Thirty-five of the rules that the advisory committee was seeking authority to publish had been approved previously by the Standing Committee. They had to be in place in the bankruptcy courts in advance of the effective date of the Act, October 17, 2005 – FED. R. BANKR. P. 1006, 1007, 1009, 1010, 1011, 1017, 1019, 1020, 1021, 2002, 2003, 2007.1, 2007.2, 2015, 2015.1, 2015.2, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 5008, 5012, 6004, 6011, 8001, 8003, 9006, and 9009. Judge Zilly explained that minor modifications, largely stylistic in nature, had been made in the rules. More significant improvements had been made to nine of the rules and are explained in the agenda book – FED. R. BANKR. P. 1007, 1010(b), 1011(f), 2002(g)(5), 2015(a)(6), 3002(c)(5), 4003, 4008, and 8001(f)(5).

Judge Zilly reported that five changes to the rules in the package were new and had not been seen before by the Standing Committee. Changes to four rules were necessary to comply with the various provisions of the Act, but did not have to be in place by October 17, 2005 – FED. R. BANKR. P. 1005, 2015.3, 3016 and 9009 (the changes to 3016 and 9009 are distinct from previous changes to those rules made by the Interim Rules). In addition, the proposed change to Rule 5001 was necessary to comply with the new 28 U.S.C. § 152(c), which authorizes bankruptcy judges to hold court outside their districts in emergency situations.

He noted that the proposed amendment to Rule 1005 (caption of the petition) conforms to the Act's increase in the minimum time allowed between discharges from six to eight years. New Rule 2015.3 would implement § 419 of the Act requiring reports of financial information on entities in which a Chapter 11 estate holds a controlling or substantial interest. The proposed amendment to Rule 3016(d) (filing plan and disclosure statement) would implement § 433 of the Act and allow a reorganization plan to serve as a disclosure statement in a small business case. The amendment to Rule 9009 (forms) would provide that a plan proponent in a small business Chapter 11 case need not use the Official Form of a plan of reorganization and disclosure statement.

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

Amendments to the Official Forms for Publication

Judge Zilly reported that the advisory committee recommended publishing for comment all the amendments made to the 20 forms amended or created in 2005 to implement the changes brought about because of the Act (*i.e.*, OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24). He noted that publishing for comment forms already in effect as Official Forms was an unusual step. But because the new law required so many changes to the forms, the advisory committee wanted to give the bench and bar a full, formal opportunity to comment on them.

Judge Zilly said that the advisory committee had, at the direction of Congress, finished drafting and was recommending publishing for comment, three new forms to be used in small business cases: Form 25A (sample plan of reorganization); Form 25B (sample disclosure statement); and Form 26 (form to be used to report on value, operations, and profitability as required by § 419 of the Act). He noted that new Rule 2015.3 would require the debtor in possession to file Form 26 in all Chapter 11 cases. He also said that the advisory committee's recommended new change to Rule 9009 was on account of the congressional directive that the sample plan and sample disclosure statement (Forms 25A and 25B) be illustrative only. The change excepts Forms 25A and 25B from Rule 9009's general requirement that the use of applicable Official Forms is mandatory.

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

Informational Items

Judge Zilly noted that when Congress enacted the 2005 legislation, it required the debtor's attorney in a Chapter 7 case to certify that the attorney has no knowledge, after inquiry, that the information provided by the debtor in the schedules and statements is incorrect. The legislation also states that it is the sense of Congress that FED. R. BANKR. P. 9011 should be modified to include a provision to that effect. In addition, he said, Senator Grassley and Senator Sessions had sent letters urging the committee to include the provision in the rule and forms.

Judge Zilly said that the advisory committee was not yet recommending any change to Rule 9011 or to any of the forms. As it stands now, he said, Rule 9011 provides that an attorney's signature on any paper filed with the court other than the schedules amounts to a certification by the attorney after a reasonable inquiry that any factual allegations are accurate. Changes made by the Act would generally extend the attorney's certification to bankruptcy schedules, at least in chapter 7. He said that it has been a long-standing, consistent principle of the committee not to amend the rules simply to restate statutory provisions. He stated the advisory committee takes the Senators' concerns seriously and has formed a subcommittee to further consider how Rule 9011 and the forms might be amended, and that the subcommittee would report on its progress at the next advisory committee meeting in September.

Judge Zilly reported that the term of Professor Alan Resnick had come to an end. He had been the advisory committee's reporter, and then a member of the committee, for more than 20 years. Judge Zilly noted that Professor Resnick has an extraordinary institutional memory and unmatched insight and wisdom that will be greatly missed by the committee. Judge Zilly also thanked the committee's current reporter, Professor

Morris, its consultant on the bankruptcy forms, Patricia Ketchum, and the staff attorneys in the Administrative Office who have supported the committee with great talent and dedication – James Wannamaker and Scott Myers.

Judge Levi concluded the discussion by observing the enormity of the work and the work product of the advisory committee in implementing the comprehensive 500-plus page legislation within such a short time period.

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 June 2, 2006 (Agenda Item 12).

Amendments for Final Approval

FED. R. CIV. P. 5.2

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

STYLE PACKAGE

Judge Rosenthal explained that the final product of the style project, presented to the Standing Committee for final approval, consisted of four separate parts:

(1) the pure style amendments to the entire body of civil rules – FED. R. CIV. P. 1-86;
(2) the style-plus-substance amendments – FED. R. CIV. P. 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78;
(3) the restyled civil forms; and
(4) the restyled version of rule amendments currently pending in Congress – FED. R. CIV. P. 5.1, 24(c), and 50 – and the electronic discovery rules – FED. R. CIV. P. 16, 26, 33, 34, 37, and 45.

Judge Rosenthal reported that the advisory committee had made a few changes in the rules following publication, two of which are particularly important. First, she said, the committee expanded the note to FED. R. CIV. P. 1 to provide more information about the style project and its intentions. She noted that the committee had decided at the very start of the style project that there needed to be a brief statement somewhere in the rules

or accompanying documents describing the aims and style conventions of the project. The committee concluded ultimately that the statement should be placed in an expanded note to Rule 1 identifying the drafting guidelines used and summarizing what the committee did and why. The committee note, for example, emphasizes that the style changes to the civil rules are intended to make no changes in substantive meaning. It also explains the committee's formatting changes and rule renumbering and its removal of inconsistencies, redundancies, and intensifying adjectives.

Second, the advisory committee responded to a fear expressed in some of the public comments that when the restyled rules take effect on December 1, 2007, they will supersede any potentially conflicting provision in existing statutes. Judge Rosenthal explained that that clearly was not the intent of the committee. Moreover, she said, supersession had not proven to be a problem with the restyled appellate rules and criminal rules.

She pointed out that Professor Cooper had prepared an excellent memorandum emphasizing that the committee intended to make no change in any substantive meaning in any of the rules. It also recommends a new FED. R. CIV. P. 86(b) that would make explicit the relationship between the style amendments and existing statutes, putting to rest any supersession concern. The proposed new rule specifies that if any provision in any rule other than new Rule 5.2 "conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007."

The committee without objection by voice vote agreed to send all the changes recommended by the style project to the Judicial Conference for final approval.

Judge Rosenthal commended Judge Levi and Judge Anthony Scirica – the current and former chairs of the Standing Committee – for their decision to go forward with restyling the civil rules after completion of the appellate and criminal rules restyling projects. She noted that an attempt had been made in the 1990's to begin restyling the civil rules, but the project had been very difficult and time-consuming. After laboring through several rules, the advisory committee decided at that time that the effort was simply too difficult and time-consuming, and it was detracting from more pressing matters on the committee's agenda. Therefore, the civil rules project had been deferred for years. She said that it took a great deal of vision, belief, and understanding of the benefits for Judges Scirica and Levi to bring it back and see it through to its successful conclusion.

Judge Rosenthal thanked the Standing Committee's Style Subcommittee – Judges Thrash and Murtha and Dean Kane – emphasizing that they had been tireless, gracious, and amazing. Also, she said, Professors Marcus and Rowe had been stalwarts of the

project, researching every potential problem that arose. The project, she added, could not have been handled without the support of the Administrative Office – Peter McCabe, John Rabiej, James Ishida, Jeff Hennemuth, Jeff Barr, and Bob Deyling – who coordinated the work and kept track of 750 different documents and versions of the rules. She added that Joe Spaniol had been terrific, offering many great suggestions that the committee adopted.

Judge Rosenthal explained that it was hard to say enough about Professor Kimble's contributions. The results of the style project, she said, are a testament to his love of language. His concept was that the rules of procedure can be as literary and eloquent as any other kind of writing. His stamina and dedication to the project, she said, had been indispensable.

Finally, she thanked Professor Cooper, explaining that he had been the point person at every stage of the project. Noting the extremely heavy volume of e-mail exchanges and memoranda during the course of the project, she emphasized that Professor Cooper had read and commented on every one of them and had been an integral part of every committee decision. His unique combination of acute attention to detail and thorough understanding of civil procedure had kept the project moving in the right direction and made the final product the remarkable contribution to the bench and bar that it will be. She predicted that within five years, lawyers will not remember that the civil rules had been phrased in any other way.

Professor Cooper added that the most important element to the success of the project, by far, had been the decision to accelerate the project and get the work done within the established time frame. The success, he said, was due to Judge Rosenthal. The project had been completed well ahead of time and turned out better than any of the participants could have hoped. Judge Murtha and Professor Kimble echoed these sentiments and expressed their personal satisfaction and pride in the results.

Informational Items

Judge Rosenthal reported that the advisory committee had approved several amendments for publication at its last meeting. The committee, though, was not asking to publish the amendments in August 2006, but would will defer them to August 2007. The bar, she said, deserves a rest. Therefore, the advisory committee was planning to come back to the Standing Committee in January 2007 with proposed amendments to FED. R. CIV. P. 13(f) and 15(a), and 48, and new Rule 62.1. The proposals, she said, were described in the agenda book.

FED. R. CIV. P. 13(f) and 15(a)

Judge Rosenthal explained that the proposed amendments to Rules 13(f) (omitted counterclaim) and 15(a) (amending as a matter of course) deal with amending pleadings. Rule 13(f) is largely redundant of Rule 15 and potentially misleading because it is stated in different terms. Under the committee's proposal, an amendment to add a counterclaim will be governed by Rule 15. The Style Subcommittee, she said, had recommended deleting Rule 13(f) as redundant, but the advisory committee decided to place the matter on the substance track, rather than include it with the style package.

Judge Rosenthal reported that the advisory committee's proposal to eliminate Rule 13(f) would be included as part of a package of other changes to Rule 15. It would also amend Rule 15(a) to make three changes in the time allowed a party to make one amendment to its pleading as a matter of course.

Professor Cooper added that the advisory committee had decided not to make suggested amendments to Rule 15(c), dealing with the relation back of amendments. The committee had not found any significant problems with the current rule. Moreover, the proposed changes would be very difficult to make because they raise complex issues under the Rules Enabling Act. Therefore, the committee had removed it from the agenda.

One member suggested that the proposed change to Rule 15 could take away a tactical advantage from defendants by eliminating their right to cut off the plaintiff's right to amend. The matter, he said, could be controversial. Judge Rosenthal responded that the advisory committee had thought that amendment of the pleadings by motion is routinely given. Moreover, it is often reversible error for the court not to allow an amendment. She said that the publication period will be very helpful to the committee on this issue.

FED. R. CIV. P. 48(c)

Judge Rosenthal reported that the advisory committee would propose an amendment to Rule 48 (number of jurors; verdict) to add a new subdivision (c) to govern polling of the jury. The proposal, she said, had been referred to the advisory committee by the Standing Committee. She explained that it was a simple proposal to address jury polling in the civil rules in the same way that it is treated in the criminal rules. But, she added, there is one difference between the language of the civil and criminal rules because parties in civil cases may stipulate to less than a unanimous verdict.

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the advisory committee would propose a new Rule 62.1 (indicative rulings). It had been on the committee agenda for several years and would provide explicit authority in the rules for a district judge to rule on a matter that is the subject of a pending appeal. Essentially, it adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) to vacate a judgment that is pending on appeal. Almost all the circuits now allow district judges to deny post-trial motions and also to "indicate" that they would grant the motion if the matter were remanded by the court of appeals for that purpose. The proposed new rule would make the indicative-ruling authority explicit and the procedure clear and consistent.

Professor Cooper added that the advisory committee was considering publishing two versions of the indicative-ruling proposal. One alternative would provide that if the court of appeals remands, the district judge "would" grant the motion. The other would allow the district judge to indicate that he or she "might" grant the motion if the matter were remanded. The court of appeals, though, has to determine whether to remand or not.

One member inquired as to why the advisory committee had decided to number the new rule as Rule 62.1 and entitle it "Indicative Rulings." Professor Cooper explained that the advisory committee at first had considered drafting an amendment to Rule 60(b) because indicative rulings arise most often with post-judgment motions to vacate a judgment pending on appeal. The committee, however, ultimately decided on a rule that would apply more broadly. Therefore, it placed the proposed new rule after Rule 62, keeping it in the chapter of the rules dealing with judgments. Judge Stewart added that the Advisory Committee on Appellate Rules would like to monitor the progress of the proposed rule and might consider including a cross-reference in the appellate rules. Judge Rosenthal welcomed any suggestions and said that the committee was open to a different number and title for the rule.

FED. R. CIV. P. 30(b)(6)

Judge Rosenthal reported that the advisory committee had heard from the bar that many practical problems have arisen with regard to Rule 30(b)(6) depositions of persons designated to testify for an organization. The committee was in the process of exploring whether the problems cited could be resolved by amendments to the rules. She noted that the committee had completed a brief summary and was looking further at particular aspects in which amendments might be helpful. For example, should the rules protect against efforts to extract an organization's legal positions during a deposition? Some treatises state that if a witness testifies, the testimony binds the organization. But that is not the way the rule was intended to operate. Therefore, the advisory committee would consider whether the rule should be changed to make it clear that this is not the case.

That, she said, is just one of the problems that has been cited regarding depositions of organizational witnesses.

FED. R. CIV. P. 26(a)

Judge Rosenthal said that the advisory committee was also considering whether changes were needed to the provision in Rule 26(a) (disclosures) that requires some employees to provide an expert's written report. She noted that the rule and the case law appear to differ as to the type of employee who must give an expert's report. The rule says that no report is needed unless the employee's duties include regularly giving testimony, but the case law is broader. She also noted that the ABA Litigation Section has asked the House of Delegates to approve recommendations with respect to discovery of a trial expert witness's draft reports and discovery of communications of privilege matter between an attorney and a trial expert witness. These questions also will be considered.

One of the members suggested that the advisory committee's inquiry of Rule 26(a) should be broadened to also include the problems that have arisen with regard to the testimony of treating physicians.

FED. R. CIV. P. 56

Judge Rosenthal said that the final area being considered by the advisory committee involves the related subjects of summary judgment and notice pleading. She added that the committee planned to address issues in a leisurely way. She noted that the committee's work on restyling FED. R. CIV. P. 56 (summary judgment) was the most difficult aspect of the style project. It was a frustrating task because the rule is badly written and bears little relationship to the case law and local court rules. Since the national rule is so inadequate, she said, local court rules abound. She said that the advisory committee had decided to limit its focus to the procedures set forth in the summary judgment rule. Some of the time periods currently specified in the rule, such as leave to serve supporting affidavits the day before the hearing, are impracticable. But, she said, there was no enthusiasm in the advisory committee for addressing the substantive standard for summary judgment. That would continue be left to case law.

Related to summary judgment, she noted, is the issue of pleading standards. Much interest had been expressed over the years in reexamining the current notice pleading standard system. To that end, she said, the advisory committee had examined how it might structure an appropriate inquiry into both summary judgment and notice pleading. Certainly, she recognized, it would be difficult, and very controversial, to attempt to replace notice pleading with fact pleading. But, she said, the advisory committee had not closed the door on the subject.

As part of the inquiry, the advisory committee has considered recasting Rule 12(e) (motion for a more definite statement) and giving it greater applicability. Today, a pleading has to be virtually unintelligible before a motion for a more definite statement will be granted. The committee will consider liberalizing the standard as a way to help focus discovery.

FED. R. CIV. P. 54(d)(2), 58(c)(2)

Professor Cooper reported that the Advisory Committee on Appellate Rules had suggested that the Civil Rules Committee consider the interplay between the rules that integrate motions for attorney fees and the rules that govern time for appeal – FED. R. CIV. P. 54(d)(2) (claims for attorney's fees) and 58(c)(2) (entry of judgment, cost or fee award) and Fed. R. App. P. 4 (time to appeal). He explained that there is a narrow gap in the current rules. But, he said, the Civil Rules Committee was of the view that the matter was extremely complex, and that it was better to live with the current complexity than to amend the rules and run the risk of unintended consequences or even greater complexity.

Judge Rosenthal reported that the Advisory Committee on Civil Rules has begun to work on the time-computation project and would consider it further at its September 2006 meeting. She predicted that the committee could likely come to the conclusion that the problem of time limits set forth in statutes will not turn out to be as great in practice as in theory. The committee planned to go forward in accord with the initial schedule.

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 20, 2006 (Agenda Item 7).

Amendments for Final Approval

FED. R. CRIM. P. 11(b)

Judge Bucklew reported that the proposed amendment to Rule 11 (pleas) was part of a package of amendments needed to bring the rule into conformity with the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), which effectively made the federal sentencing guidelines advisory rather than mandatory.

She noted that Rule 11(b) specifies the matters that a judge must explain to the defendant before accepting a plea. Under the current rule, the judge must advise the defendant of the court's obligation to apply the sentencing guidelines. But, since *Booker*

has made the guidelines advisory, that advice is no longer appropriate. Accordingly, the amended rule specifies that the judge must inform the defendant of the court's obligation to "calculate" the applicable range under the guidelines, as well as to consider that range, possible departures under the guidelines, and the other sentencing factors set forth in 18 U.S.C. § 3553(a).

Judge Bucklew said that the advisory committee had received comments both from the federal defenders and the U.S. Sentencing Commission. The defenders, she said, had argued that the proposed amendment would give too much prominence to the guidelines, and they suggested that the committee recast the language to require a judge to consider all the factors in 18 U.S.C. § 3553(a). The Sentencing Commission asked the committee to change the word "calculate" to "determine and calculate." The advisory committee, she said, had considered both suggestions in detail, but it decided not to make the proposed changes and agreed to send the proposed amendment forward as published.

Professor Beale added that the advisory committee had added a paragraph to the committee note pointing out that there have been court decisions stating that under certain circumstances, the court does not have to calculate the guidelines *(e.g., United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005)). She pointed out that the added language was limited and had been worked out with the Department of Justice to make sure that it is not too broad.

One member suggested, though, that the added paragraph was inconsistent with the developing case law in his circuit, which requires district judges to calculate the guidelines in every case. Other members suggested, though, that it is a waste of time for a judge to calculate the guidelines in, say, a case with a mandatory minimum sentence. Some participants suggested possible improvements to the language of the last paragraph of the note. Judge Bucklew and Professor Beale agreed to work on the language during the lunch break, and subsequently reported their conclusion that the language should be withdrawn.

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

FED. R. CRIM. P. 32(d) and (h)

Judge Bucklew reported that the advisory committee had proposed several changes to Rule 32 (sentence and judgment). First, it inserted the word "advisory" into the heading of Rule 32(d)(1) (presentence report) to emphasize that the sentencing guidelines are advisory rather than mandatory.

She noted that the committee had received several comments on the proposed revision of subdivision (h) (notice of intent to consider other sentencing factors) to require notice to the parties of a judge's intent to consider other sentencing factors. The current rule, she said, specifies that if the court is going to depart under the guidelines for a reason of which the parties have not been notified, the court must provide "reasonable notice" and a chance to argue. She explained that the advisory committee would expand the rule to require reasonable notice whenever the court is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence for a reason not identified either in the presentence report or a party's pre-hearing submission. She said that the advisory committee had added more specific language to the rule following the comment period, stating that the notice must specify "any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence."

Professor Beale added that there had been litigation on this matter, but the committee was of the view that non-guideline sentences should be treated the same as departures. She noted that the committee had also adopted some refinements in language suggested by the Sentencing Commission.

Judge Bucklew reported that the advisory committee had added language to Rule 32(d)(2)(F) to require the probation office to include in the presentence report any other information that the court requires, including information relevant to the sentencing factors specified in 18 U.S.C. § 3553(a). Professor Beale said that the central question is how much information the probation office must include in the presentence investigation report. As revised, the rule specifies that the report must include any other information that the court requires, including information relevant to the factors listed in § 3553(a). She noted that the probation offices in many districts already include this information in the reports. But, she added, there is quite a variance in practice, and the revised language will provide helpful guidance.

A member expressed concern about the provision requiring special notice of a non-guidelines sentence, questioning whether it would undercut the right of allocution and interfere with judicial discretion. He suggested that matters arise at an allocution that the judge should take into account and may affect the sentence. He asked whether the sentencing judge would be required to adjourn the hearing and instruct the parties to return later. He also saw a difference between the obligation to notify parties in advance that the judge is considering a departure under the guidelines and a sentence outside the guidelines.

Other members shared the same concerns and expressed the view that the language of the proposed rule might restrict the authority of a judge to impose an appropriate sentence under *Booker* and 18 U.S.C. § 3553(a). One asked what the remedy

would be for a failure by the court to comply with the requirement. He added that there is also the question of whether the defendant can forfeit rights on appeal under the rule by not raising objections in the district court.

Judge Bucklew said that the case law in the area was very fluid. She noted that the advisory committee had no intention of restricting the court or requiring that any formal notice be given. Rather, she said, the focus of the committee's effort had been simply to avoid surprise to the parties. One participant emphasized that the rule uses the term "reasonable notice," which has not changed since *Booker* and has a long history of interpretation. Another participant noted that lawyers will have to look at the law of their own circuit.

One member added that the problem of surprise arises because parties normally have an expectation that the judge will impose a sentence within the guideline range. But, he added, in at least one circuit, the guidelines are now only one factor in sentencing, and the parties do not have the expectation of a guideline sentence.

Judge Hartz moved to send the proposed amendments to subdivision (h) back to the advisory committee to consider the matter anew in light of the concerns expressed and the developing case law. One member noted that the appellate court decisions on these precise points appear to be going in different directions. Another added that the matter is very fluid, and the committee should avoid writing into the rules a standard that will change over time.

The committee with one objection approved Judge Hartz's motion to send the proposed revisions to Rule 32(h) back to the advisory committee.

The committee without objection by voice vote agreed to send the proposed amendments to Rule 32(d) to the Judicial Conference for final approval.

FED. R. CRIM. P. 32(k)

Judge Bucklew reported, by way of information, that the advisory committee had decided to withdraw the published amendment to Rule 32(k) (judgment). It would have required judges to use a standard judgment and statement of reasons form prescribed by the Judicial Conference. But, she said, a recent amendment to the USA PATRIOT Act requires judges to use the standard form. Thus, there was no longer a need for an amendment.

FED. R. CRIM. P. 35(b)

Judge Bucklew reported that the only purpose of the proposed amendment to Rule 35 (correcting or reducing a sentence) was to remove language from the current rule that seems inconsistent with *Booker*. She added that the National Association of Criminal Defense Lawyers had suggested during the comment period that any party should be allowed to bring a Rule 35 motion, not just the attorney for the government. She said that the advisory committee did not adopt the change and recommended that the rule be approved as published.

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

FED. R. CRIM. P. 45(c)

Judge Bucklew explained that the proposed revision of Rule 45 (computing and extending time) would bring the criminal rule into conformance with the counterpart civil rule, FED. R. CIV. P. 6(e) (additional time after certain kinds of service). It specifies how to calculate the additional three days given a party to respond when service is made on it by mail and certain other specified means.

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

FED. R. CRIM. P. 49.1

As noted above on page 7, the committee approved the proposed new Rule 49.1 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Amendments for Publication

FED. R. CRIM. P. 29

Judge Bucklew reported that the proposed revision to Rule 29 (motion for judgment of acquittal) had a long and interesting history. She pointed out that the proposal had been initiated by the Department of Justice in 2003. The principal concern of the Department, she said, was that a district judge's acquittal of a defendant in the middle of a trial prevents the government from appealing the action because of the Double Jeopardy Clause of the Constitution. She explained that the Department's

proposed rule would have precluded a judge in all cases from granting an acquittal before the jury returns a verdict.

Judge Bucklew noted that the advisory committee had considered the rule at two meetings, in 2003 and 2004. At the first, she said, the committee had been inclined to approve a rule in principle, and it asked the Department of Justice to provide additional information. At the second meeting, however, the committee decided that no amendment to Rule 29 was necessary.

At the January 2005 Standing Committee meeting, the Department made a presentation in favor of amending Rule 29. In doing so, it pointed to a number of cases in which district judges had granted acquittals in questionable cases. As a result, she said, the Standing Committee returned the rule to the advisory committee and asked it to: (1) draft a proposed amendment to Rule 29, and (2) recommend whether that amendment should be published.

Judge Bucklew reported that the advisory committee had considered the rule again, and it took several meetings to refine the text. The committee was in agreement on the language of the rule. But, she said, it was divided on wisdom of proceeding with the rule as a matter of policy. It recommended publication by a narrow vote of 6-5. She noted that one committee member had been absent, and his vote would have made the vote 7-5 for publication.

She emphasized that the reservations of certain members were not as to the language of the rule, but as to the policy. The objectors, she explained, were concerned that the rule would restrict the authority of trial judges to do justice in individual cases and to further case management. She added that there also was real doubt among the advisory committee members as to the need for any amendment. They accepted the fact that there had been a few cases of abuse under the current rule, but the number of problems had been minimal.

Judge Bucklew stated that the revised Rule 29 would specify that if a court is going to grant a motion for acquittal before the jury returns a verdict, it must first inform the defendant personally and in open court of its intent. The defendant then must waive his or her double jeopardy rights and agree that the court may retry the case if the judge is reversed on appeal.

One of the participants observed that a sentence in the proposed committee note declared that the rule would apply equally to motions for judgment of acquittal made in a bench trial. Professor Beale replied that the rule did not apply to bench trials, and the sentence would be removed.

Deputy Attorney General McNulty thanked the advisory committee and the Standing Committee for considering the recommendations of the Department of Justice. He said that Department attorneys felt very strongly about the subject and wanted the committee to go forward with publication. He added that the vast majority of judges exercise their Rule 29 authority wisely and in a way that allows the government to seek judicial review. But, he said, there had been some bad exceptions that have had a large impact and had undercut the jury's ability to decide the case and the government's right to have its charging decision given appropriate deference. He said that Rule 29 presented a unique situation that needed to be addressed, and he added that it had been the policy of Congress to provide greater opportunity to the government for appellate review.

Finally, he said, the waiver approach adopted by the advisory committee with the revised rule achieves a fine balance. It gives the judge the opportunity to do justice and further case management objectives, while preserving the right of the government to appeal. He concluded by strongly urging the committee to approve publication.

One of the members objected on the grounds that the rule represents a major shift in the architecture of trials that would upset the balance in criminal trials and diminish the rights of defendants. First, he said, such a large change in criminal trials should be made by Congress through legislation, and not through rulemaking by the committee. Second, he expressed concern over the closeness of the vote in the advisory committee. The 6-5 vote, he said, was essentially a statistical tie, and the fact that the matter had been debated and deferred at so many meetings demonstrates that there are serious problems with the proposal. Third, he expressed concern that the defendant must waive his or her constitutional rights. This, he said, was unsettling. Fourth, he emphasized that he was aware of many instances in which the government overcharges, particularly by including extraneous counts and peripheral defendants. The courts, he argued, should have the power to winnow out the extra charges and defendants, and the hands of judges should not be bound by the rule. Fifth, he said that it is unfair for defendants to have a "sword of Damocles" hanging over their heads for two or three years, while the government appeals the trial judge's decision to acquit. Finally, he summarized, the rule was sure to lead to unintended consequences, and the changes the government wants should not be made through the rules process.

Several members of the committee expressed sympathy for these views, but they nevertheless announced that they favored publication of the rule.

Judge Levi added some background on the history of the rules. He noted that it had been on the agenda for some time, and it had been approved originally by the advisory committee with considerable support, perhaps by an 8-4 vote. Then, however, at the next meeting the committee changed its mind.

Initially, he explained, the proposal of the Department of Justice had been to prevent a judge from entering a pre-verdict of acquittal in any circumstances. But the district judges on the advisory committee asked how they would be able to deal with problems arising from excess defendants, excess counts, and hung juries.

The waiver proposal, he said, had been developed to address these competing concerns. It would preserve the discretion of the district judges and help them manage their cases. Yet it would give the government the right to appeal a district judge's pre-verdict acquittal. Nevertheless, he pointed out, the advisory committee rejected the waiver proposal and decided that no change was needed in the rule.

At the January 2005 Standing Committee meeting, Associate Deputy Attorney General Christopher Wray made strong arguments in support of the proposed rule amendment that included the waiver procedure. Judge Levi said that the Department had been very persuasive, and the Standing Committee took a strong position and directed the advisory committee to draft a proposed amendment. Then, he said, the Department went back to the advisory committee and made the argument for the proposed amendment, which the committee approved on a 6-5 vote.

Judge Levi said that he would prefer to handle the proposal through the rulemaking process, rather than have the Department go to Congress for legislation.

One member expressed concerns over the proposal, but said that he had been convinced to support publication because the rule was supported by Robert Fiske, a distinguished member of the advisory committee who had served as both a prosecutor and defense lawyer. He added that while the number of abuses is very small, the cases in which abuse has occurred under Rule 29 have tended to be prominent.

He added that the rules do in fact affect the architecture of trials. The waiver proposal, he said, may be unique, but it is an innovative attempt to assist judges in managing cases and addressing overcharging by prosecutors. He added that it was important to foster dialogue between the judiciary and the Department of Justice and to solicit the views of the bench and bar on the proposal. To date, he said, the proposal had been debated only by the members of the committees, but not by the larger legal community. Publication, he said, would be very beneficial.

Another member said that the proposed rule is a very nice solution to the problem. He said that it can be a travesty of justice when a judge makes a mistake under the current rule. The right of a judge to grant an acquittal remains in the rule, but it is subject to further judicial scrutiny.

One member asked whether there were other rules that require defendants to waive their constitutional rights. One member suggested that an analogy might be made to conditional pleas under FED. R. CRIM. P. 11(a)(2). Professor Capra added that FED. R. CRIM. P. 7 provides for waiver of indictment by the defendant, and FED. R. CRIM. P. 16 (discovery and inspection) contains waiver principles when the defendant asks for information from the government. Both require a defendant to waive constitutional rights in order to take advantage of the rule.

Judge Levi pointed out that the committee could withdraw the rule after the public comment period, and it had done so with other proposals in the past. But, he said, as a matter of policy, the committee should not publish a proposal for public comment unless it has serious backing by the rules committees.

One member expressed concern that if the rule were published, it might lead the public to believe that it enjoyed the unanimous support of the committee. Judge Levi responded that the committee does not disclose its vote in the publication because it wants the public to know that it has an open mind. Mr. Rabiej explained that the publication is accompanied by boilerplate language that tells the public that the published rule does not necessarily reflect the committee's final position. He added that the report of the advisory committee is also included in the publication, and it normally alerts the public that a proposal is controversial.

The Deputy Attorney General stated that the Department of Justice wanted to have its points included in the record to continue the momentum into the next stage of the rules process. He said that he had been surprised over the arguments that the proposed change should be made by legislation, rather than through the rules process. He pointed out that he had worked as counsel for the House Judiciary Committee for eight years and had heard consistently from the courts that the rulemaking process should be respected. He said that it was in the best interest of all for the proposal to proceed through the rulemaking process, rather than have the Department seek legislation. He noted that while there had only been a few cases of abuse by district judges, those few tended to occur in alarming situations and could be cited by the Department if it were to seek legislation.

He said that the Department had worked for several years on the proposal with the committees through the rulemaking process and would like to continue on that route. The proposal, he said, had substantial merit and should be published.

He added that the Department disagreed with the characterization that the proposed amendment would alter the playing field. Rather, he said, it would preserve the right to present evidence and to have the court's ruling on acquittal preserved for appellate review. A pre-verdict judgment of acquittal, he emphasized, stands out from all

other actions and is inconsistent with the way that other matters are handled in the courts. He pointed out, too, that the Department was deeply concerned about the dismissal of entire cases without appellate review. On the other hand, it was not as concerned with a court dismissing tangential charges. He concluded that the Department would do all it could to work toward a balanced solution to a very difficult problem. The waiver proposal, he said, is a good approach. It is a good compromise and offered a balanced solution to the competing interests. He said that the Department appreciated the opportunity to come back to the committee.

One member suggested deleting the word "even" from line 20 in Rule 29(a)(2). It was pointed out that the word had been inserted as part of the style process. Judge Levi suggested that Style Subcommittee take a second look at the wording as part of the public comment process.

The committee, with one dissenting vote, approved the proposed rule for publication by voice vote.

FED. R. CRIM. P. 41(b)(5)

Judge Bucklew reported that the proposed amendment to Rule 41(b)(search warrants) would authorize a magistrate judge to issue a search warrant for property located in a territory, possession, or commonwealth of the United States that lies outside any federal judicial district. Currently, a magistrate judge is not authorized to issue a search warrant outside his or her own district except in terrorism cases..

She noted that the Department of Justice had raised its concern about the gap in authority at the last meeting of the advisory committee. The Department had asked the committee to proceed quickly because of concerns over the illegal sales of visas and like documents. It felt constrained because overseas search warrants could not be issued in the districts where the investigations were taking place. She explained that the proposed amendment to Rule 41(b)(5) would allow an overseas warrant to be issued by a magistrate judge having authority in the district where the investigation is taking place, or by a magistrate judge in the District of Columbia. The advisory committee, she added, had voted 10-1 to publish the rule.

Judge Bucklew advised the committee of developments that had occurred since the vote. She noted that at Judge Levi's suggestion, Mr. Rabiej had sent the proposal to Judge Clifford Wallace, who chairs the Ninth Circuit's Pacific Islands Committee. In turn, Judge Wallace contacted the Chief Justice of American Samoa, who objected to the proposed amendment. Judge Wallace suggested that the proposal be remanded back to the advisory committee in order to give American Samoa a chance to respond. She added that she was not sure exactly what American Samoa's concerns were, but it appeared that

the Chief Justice did not want judges in other parts of the country issuing warrants for execution in American Samoa.

Judge Bucklew reported that after speaking with Judge Wallace, the Administrative Office had polled the advisory committee as to whether it should wait until the Chief Justice of American Samoa and the Pacific Islands Committee of the Ninth Circuit respond. Accordingly, it voted 9-2 to allow time for a response. She noted that the Department of Justice representative objected, along with one other advisory committee member. She added that later discussions have suggested that the proposal could still be published, with American Samoa and the Pacific Islands Committee commenting during the public comment period.

She pointed out that after the advisory committee meeting, the House of Representatives passed a bill containing a provision similar to the proposal to amend Rule 41(b). Basically, it would allow investigation of possible fraud and corruption by officers and employees of the United States in possible illegal sales of passports, visas, and other documents. It would authorize the district court in the District of Columbia to issue search warrants for property located within the territorial and maritime jurisdiction of the United States. She added that she was not sure what the Department's position would be on the bill, and she noted that the legislation probably did not cover everything in the proposed rule amendment.

Professor Beale said that the Department of Justice's largest concern was with visa fraud. This, in turn, was connected with larger issues of illegal immigration and terrorism. In addition, the question arose whether the committee would have to republish the current proposal if its reference to a territory of the United States were deleted following the public comment period. She concluded that republication would probably not be required. She explained that subdivision (a) of the rule, which refers to territories, was not connected to subdivisions (b) and (c), which authorize search warrants for property in diplomatic or consular missions and residences of diplomatic personnel. She said that the committee could place brackets around subdivision (a) and invite comment from American Samoa and others as to whether subdivision (a) should be included.

Judge Bucklew also pointed out, as mentioned in the advisory committee's report, that a similar, but broader proposal had been approved by the Judicial Conference but rejected by the Supreme Court in 1990.

Judge Levi suggested bracketing the language regarding American Samoa. He noted from speaking with Judge Wallace that there is a great deal of sensitivity in American Samoa about any intrusion into its judicial process. He noted that the situation is very different from the other Pacific Islands territories, such as Guam and the Northern Marianas, both of which have Article I federal district courts. The history of how the

United States acquired American Samoa is different from that of other territories, and the relevant treaty explicitly requires the United States to respect the judicial culture of American Samoa. He noted, too, that there had been a proposal to establish an Article I federal court in American Samoa, but it has been very controversial.

Judge Levi also pointed out that Judge Wallace warned that if the proposal to amend Rule 41 is published without bracketing American Samoa, there could be a good deal of needless controversy generated. The primary concern of the Department of Justice, he said, is with oversees searches, and not with American Samoa. He asked whether the advisory committee would be amenable to bracketing the language dealing with American Samoa.

Judge Bucklew responded that the advisory committee would certainly approve placing brackets around the provision to flag it for readers. She said that the proposed amendments to Rule 41 were very beneficial, and it would be a shame not to have them proceed because of a controversy over a matter of relatively minor concern to the government.

The committee unanimously approved the proposed amendment, with the pertinent language of subsection (A) bracketed, for publication by voice vote.

MODEL FORM 9 ACCOMPANYING THE SECTION 2254 RULES

Mr. Rabiej stated that the committee needed to abrogate Form 9 accompanying the § 2254 rules. He noted that the form is illustrative and implements Rule 9 of the § 2254 rules (second or successive petitions). The form, however, was badly out of date, even before the habeas rules were restyled, effective December 1, 2004. For example, it contains references to subdivisions in Rule 9 that no longer exist and includes provisions that have been superseded by the Antiterrorism and Effective Death Penalty Act of 1996.

He added that when the restyled habeas corpus rules had been published for comment in August 2002, the advisory committee received comments from district judges recommending that the form not be continued because the courts relied instead on local forms. The courts wanted to retain flexibility to adapt their forms to local conditions instead of following a national form. The advisory committee and its habeas corpus subcommittee did not specifically address abrogation of the form. Thus, technically Form 9 still remains on the books. He added that the form had been causing some confusion, and the legal publishing companies no longer include it in their publications. In addition, Congressional law revision counsel thought that the form had been abrogated and no longer included it in their official documents. Therefore, Mr. Rabiej said, it would be best for the committee to officially abrogate the form through the

regular rulemaking process. *i.e.,* approval by the committee and forwarding to the Supreme Court and Congress.

The committee without objection by voice vote agreed to ask the Judicial Conference to abrogate Form 9 accompanying the § 2254 Rules.

Informational Items

Judge Bucklew reported that the advisory committee was still working on a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection), which would expand the government's obligation to disclose exculpatory and impeaching information to the defendant. She said that the matter was controversial, and the Department of Justice was strongly opposed to any rule amendment. Instead, she said, it had offered to draft amendments to the *United States Attorneys' Manual* as a substitute for an amendment. The matter, she added, was still in negotiation. Deputy Attorney General McNulty and Assistant Attorney General Fisher said that the Department was still working on the manual and was hopeful of making progress.

Judge Bucklew said that the committee was also considering a possible amendment to FED. R. CRIM. P. 41 (search warrants) that would address search warrants for computerized and digital data. It was also looking at possible amendments to the § 2254 rules and § 2255 rules to restrict the use of ancient writs and prescribe the time for motions for reconsideration.

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, 2006 (Agenda Item 8).

New Rule for Publication

FED. R. EVID. 502

Judge Smith reported that the advisory committee had only one action item to present — proposed new FED. R. EVID. 502 to govern waiver of attorney-client privilege and work product protection. He referred back to the report of the Administrative Office and Mr. Rabiej's description of the exchange between Judge Levi and the chairman of the House Judiciary Committee. He noted that the committee had received a specific request from Chairman Sensenbrenner to draft a rule that would:

1. protect against inadvertent waiver of privilege and protection,

2. permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and

3. allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in subsequent proceedings.

He explained that rules that affect privilege must be addressed by Congress and enacted by legislation. Thus, the rules committees could produce a rule through the Rules Enabling Act process that would then be enacted into law by Congress.

Judge Smith noted that the advisory committee had conducted a very profitable conference at Fordham Law School in New York at which 12 invited witnesses commented on a proposed draft of the rule. He said that the committee had refined the rule substantially as a result of the conference, and the improved product was ready for approval by the Standing Committee to publish. He explained that the rule incorporated the following basic principles agreed upon unanimously by the advisory committee:

1. A subject-matter waiver should be found only when privileged material or work product has already been disclosed and a further disclosure "ought in fairness" to be required.

2. There should be no waiver if there is an inadvertent disclosure and the holder of the protection takes reasonable precautions to prevent disclosure and reasonably prompt measures to rectify the error.

3. Selective waiver should be allowed.

4. Parties should be able to get an order from a court to protect against waiver vis a vis non-parties in both federal and state courts.

5. Parties should be able to contract around the common-law waiver rules. But without a court order, their agreement should not bind non-parties.

Judge Smith pointed out that the rule included some controversial matters, but it was needed badly to control excessive discovery costs. He said that the burdens and cost of preserving the privileged status of attorney-client information and trial preparation materials had gotten out of hand without deriving any countervailing benefits.

Judge Smith pointed out that selective waiver was the most controversial provision in the rule. It would protect a party making a disclosure to a government law enforcement or regulatory agency from having that disclosure operate as a waiver of the privilege or protection vis a vis non-governmental persons or entities. He explained that the advisory committee would place the provision in brackets when the rule is published and state that the committee had not made a final decision to include it in the rule.

Professor Capra agreed that the most controversial aspect of the rule was the selective waiver provision. He pointed out that the proposed rule takes a position inconsistent with most current case law. He emphasized that the advisory committee had not decided to promulgate that part of the rule, so the provision is set forth in brackets. In addition, the accompanying letter to the public states that the committee had not made a decision to proceed and wanted comments directed to the advisability of including a selective waiver provision. Judge Levi added that Chairman Sensenbrenner had specifically asked the committee to include a selective waiver provision in the rule.

Professor Capra explained that the original version of the rule had a greater effect on state court activity and sought to control state law and state rules on waiver. But the Federal-State Jurisdiction Committee of the Judicial Conference – and the advisory committee itself after its hearing in New York – concluded that the draft was too broad. Accordingly, it was amended and now covers only activity occurring in a federal court.

Judge Levi noted that the representative of an American Bar Association's Task Force on the Attorney-Client Privilege opposed the rule at the New York conference because he said that it would foster the "coercive culture of waiver." The task force, he explained, is concerned that waivers are being extorted by government agencies from businesses as part of the regulatory and law enforcement processes.

Judge Levi added that he had spoken to the chair of the task force and emphasized that the committee was not trying to encourage the use of waivers. Nor was it taking a position on Department of Justice memoranda to U.S. attorneys encouraging them to weigh a corporations's willingness to waive the attorney-client privilege in assessing its level of cooperation for sentencing purposes. Rather, he emphasized, the rules committee was just trying to promote the public interest by facilitating the conduct of government investigations into public wrongs. Judge Levi added that, in response to the concerns of the ABA task force, the committee should include a statement in the publication to the effect that the committee was not taking a position regarding the government's requests for waivers. The addition, he said, could avoid misdirected criticism of the rule.

Associate Attorney General McCallum agreed that the explanation would be helpful to the organized corporate bar. He said that the Department had been surprised by the feedback at the Fordham conference, where some participants had voiced strong

opposition to the proposal on the ground that it would foster a culture of waiver. He said that the Department supported the pending new Rule 502 and would continue to work with the organized bar over their concerns.

One member questioned the effect of the proposal on state court proceedings. He asked whether the advisory committee had examined the power of Congress under the Commerce Clause of the Constitution to effect changes in the rules of evidence in the state courts. Professor Capra responded that the committee had indeed examined the issue and had invited an expert to testify on it at the mini-conference. In addition, he said, Professor Kenneth Broun, a consultant to the committee and a former member of the committee, had also completed a good deal of research on the issue. He said that the proposed rule dealt only with the effect on state court proceedings of disclosures made in the federal courts. It did not address the more questionable proposition of whether the rule could control disclosures made in state court proceedings. The literature, he said, suggests that Congress has the power to regulate even those disclosures. But, he said, the advisory committee narrowed the rule to cover only disclosure at the federal level.

One member asked whether the Department of Justice favored selective waiver in order to promote law enforcement and regulatory enforcement efforts. He noted that he had sat on a case in which the panel of the court of appeals had asked the Department to file an amicus curiae brief on the issue, but had received none. He said that the panel had been frustrated by the uncertainty regarding the Department's views on the issue. Associate Attorney General McCallum pointed out that the Department acts as both plaintiff and defendant and that some components of the Department strongly favor selective waiver. He noted, by way of example, that the prosecutions in the Enron case would have been more difficult and time-consuming if waivers had not been given. The waivers, he emphasized, had been voluntarily given with the advice of counsel. He explained that the Department favors selective waiver, but had not yet taken an official position on the matter.

Judge Levi explained that the purpose of selective waiver is to encourage companies to cooperate in regulatory enforcement proceedings. He said that the Securities and Exchange Commission favored the proposed Rule 502, and it would be very helpful to obtain the views of other law enforcement and regulatory authorities in order to develop the record for the advisory committee. Professor Capra added that the strong weight of authority among the circuits, as expressed in the case law, was against selective waiver. Therefore, he said, there needed to be a strong showing in favor of it during the public comment period. Judge Levi concurred and added that a strong case also needs to be made by the state attorneys general and other regulatory authorities.

The committee unanimously approved the new rule for publication by voice vote.

Informational Items

Professor Capra reported that the advisory committee had been monitoring the developing case law on testimonial hearsay following *Crawford v. Washington,* 541 U.S. 36 (2004). He noted that the Supreme Court had just issued some opinions dealing with *Crawford,* but the issues in the cases were relatively narrow and do not provide sufficient guidance on how to treat hearsay exceptions in the federal rules. The advisory committee, he said, would continue to monitor developments, and it wanted to avoid drafting rules that later could become constitutionally questionable.

Professor Capra also reported that the advisory committee was considering restyling the Federal Rules of Evidence, mainly to conform the rules to the electronic age and to account for information in electronic form. He noted that the committee had had discussions on how to address the matter, and it had considered the possibility of restyling the entire body of evidence rules. He added that he planned to work with Professor Kimble to restyle a few rules for the committee to consider at its next meeting. Finally, he noted, the view of the Standing Committee on whether to restyle the evidence rules will be very important.

Professor Capra reported that draft legislation was being considered in Congress that would establish a privilege for journalists. The legislative activity, he said, stemmed in part from the controversies surrounding the celebrated cases involving the imprisonment of New York Times reporter Judith Miller and the leak of the identity of C.I.A. employee Valerie Plame. He explained that the Administrative Office had reviewed the proposed legislation and offered some suggestions on how its language could be clarified. Mr. Rabiej added that many of the suggestions had been adopted by the Congressional drafters.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of January 20, 2006 (Agenda Item 9).

Judge Kravitz reported that the advisory committees at their Spring 2006 meetings had embraced the time-computation template developed by the subcommittee, including its key feature of counting all days and not excluding weekends and holidays.

He pointed out that the Standing Committee at its January 2006 meeting had asked the subcommittee and the advisory committees specifically to address two issues: (1) the inaccessibility of a clerk's office to receive filings; and (2) whether to retain the provision that gives a responding party an additional three days to act when service is

made on it by mail or by certain other means, including electronic means. He noted that the advisory committees had decided that the issue of inaccessibility needed additional study, and the subcommittee was willing to take on the task. Professor Capra added that the Technology Subcommittee had already considered these issues as part of its participation in the project to develop model local rules to implement electronic filing.

As for the "three-day rule," Judge Kravitz reported that the sense of the advisory committees was to leave the rule in place without change at this time. He said that it seemed odd to give parties an extra three days when they have been served by electronic means, but many filings are now made electronically over weekends and the committees were concerned about potential gamesmanship by attorneys. So, the general inclination has been not to amend the rule at this point.

Judge Kravitz said that the Advisory Committee on Civil Rules had suggested some helpful improvements to the template. First, he noted, the language of the template speaks in terms of filing a "paper." But in the electronic age, he said, it makes sense to eliminate the word "paper."

Second, he pointed out that the template speaks in terms of a day in which "weather or other conditions" make the clerk's office inaccessible. He said that the advisory committee was concerned about the specific reference to "weather" because it implies that only physical conditions may be considered. Instead, the language might be improved by simply referring to a day on which the clerk's office "is inaccessible." The committee note could explain, though, that elimination of the word "weather" is not intended to remove weather as a condition of inaccessibility.

Third, the advisory committee suggested deleting state holidays as days to exclude in computing deadlines. Most federal courts, he said, are in fact open on state holidays. He noted that the subcommittee had not decided to make this change, but would be amenable to doing so if the Standing Committee expressed support for the change.

Fourth, he said that the advisory committee had noted that "virtual holidays" were not included in the template, *e.g.,* the Friday after Thanksgiving and the Monday before a national holiday that falls on a Tuesday. Some federal courts, he said, are effectively closed on those days, although their servers are available to accept electronic filings.

Fifth, he said that the advisory committee had suggested including a definition of the term "last day" in the text of the rule. He reported that Professor Cooper had drafted a potential definition, drawing on the text of local court rules implementing electronic filings. It states that, for purposes of electronic filing, the "last day" is midnight in the time zone where the court is located. For other types of filings, it is the normal business hours of the clerk's office, or such other time as the court orders or permits.

Judge Kravitz explained that the civil, bankruptcy, and appellate rules – unlike the criminal rules – apply in calculating statutory deadlines as well as rules deadlines. He pointed out that Professor Struve had completed an excellent memorandum on the subject in which she identified many important statutory deadlines. Her initial study had found more than 100 statutory deadlines of 10 days or fewer. Many of them, he added, are found in bankruptcy. Moreover, some apply not to lawyers, but to judges. Under the current rules, he said, a deadline of 10 days usually means 14 days or more because weekends and holidays are not counted. But under the approach adopted in the template, 10 days will mean exactly 10 days.

Judge Kravitz reported that the Advisory Committee on Civil Rules had suggested that the advisory committees should consider expressing all, or most, time periods in multiples of seven days. The concept, he noted, seems generally acceptable but may not work well across-the-board for all deadlines. It may be, he said, that deadlines below 30 days would normally be expressed in multiples of seven, but the longer periods now specified in the rules, such as 30, 60, or 90 days might be retained.

Finally, Judge Kravitz thanked Judge Patrick Schiltz, former reporter for the appellate rules committee and special reporter for the time-computation project, for his superb research and memoranda and for drafting the template and supporting materials that got the project moving. He also thanked Professor Struve for picking up the work from Judge Schiltz and for her excellent memorandum on statutory deadlines. He also praised the advisory committees for their dedication to the project and their invaluable help to the subcommittee.

Professor Struve highlighted the backward-counting provision in the template rule and wondered about its practical effect. Judge Kravitz explained that the advisory committee had wanted a simple rule. He acknowledged that there are scenarios under the template in which litigants may lose a day or two in filing a document, and judges would gain a day or two. But, he said, even though the subcommittee consisted mostly of practicing attorneys, all endorsed the basic principle – in the interest of simplicity – that once one starts counting backward, the count should continue in the same direction.

Professor Cooper added that the bar for years had urged the Advisory Committee on Civil Rules to make the rules as clear as possible, and one attorney recently had asked the committee to draft a clear rule telling users how to count backwards, *e.g.*, to calculate a deadline when a party has to act a certain number of days *before* an event, such as a hearing. To that end, he said, it might be advisable to put back into the template the words "continuing in the same direction," which had been dropped from an earlier draft in the interest of simplicity. Including those words would make it clear that backward counting follows the same pattern as forward counting. A member of the committee strongly urged including the clarifying language in the rule.

Judge Kravitz said that the most difficult issue appeared to be the applicability of the rule to statutory deadlines. A few statutes, he said, speak specifically in terms of calendar days. But when statutes do not specify calendar days, it can be assumed that only business days are counted under the current rule when a deadline is 10 days or fewer. He pointed out that the practical impact of the template rule would be to shorten statutory deadlines of 10 days or fewer. That result, he said, might undercut the bar's acceptance of the time-computation project.

Professor Morris added that the template rule would have a substantial impact on bankruptcy practice because a great many state statutes are in play in bankruptcy cases. Under the current bankruptcy rule, he said, the statutes are calculated by counting only business days.

Professor Morris also noted that the proposed template rule speaks of inaccessibility in such a way that it could be interpreted to include inaccessibility on a lawyers' end, as well as the inaccessibility of the clerk's office to accept filings. He suggested that the rule might be broad enough to cover the situation where a law firm's server is not working.

Judge Rosenthal explained that the civil advisory committee had considered that situation and had decided tentatively that it was not possible to write a rule to cover all situations. She suggested that it should be left up to the lawyers to decide whether they need to ask a court for an extension of time in appropriate situations. She cautioned, however, that there are a handful of time limits in the rules that a court has no authority to extend.

One participant urged that the time had come to move forward with the time-computation project, despite the complications posed by statutory deadlines. He suggested, moreover, that Congress might well be amenable to making appropriate statutory adjustments in this area to accommodate the time-computation project, especially if the bar associations agree with the committee's proposal.

Judge Levi asked whether the subcommittee was contemplating further changes or additions to the template. Judge Kravitz responded that at least three changes should be made. First, he said the subcommittee would eliminate the word "paper." Second, he said that he had been persuaded to eliminate the word "weather," so the rule would state simply that the last day is not counted if the clerk's office is "inaccessible." Third, he agreed to add to the rule a definition of "last day" along the lines of Professor Cooper's proposal. That definition, he noted, is workable and already exists in most of the local court rules dealing with electronic filing.

In addition to those three changes, Judge Kravitz said that he had no objection to eliminating state holidays from the rule if there were support for the change. As for closure of the federal court on a "virtual holiday," he said that the problem would be taken care of by revising the rule to specify that the last day is not counted if the clerk's office is inaccessible. Several members of the committee suggested that both state holidays and virtual holidays be eliminated from the rule. Thus, the only exclusions in the rule would be for federal holidays and days when the clerk's office is "inaccessible." Another member added that it should be made clear in the rule that "inaccessibility" applies only to problems arising at the courthouse, and not in a lawyer's office.

Judge Kravitz noted that the instructions from the Standing Committee were for the advisory committees to review individually each of the individual time limits in their respective rules and to recommend appropriate adjustments to them in light of the template's mandate to count all days, including weekends and holidays.

One participant suggested that the only significant issue relating to statutes was the problem that the proposed rule would shorten statutory deadlines of 10 days or fewer. Another participant pointed out, though, that the supersession provision of the Rules Enabling Act might also be implicated.

One advisory committee chair suggested that it would be very helpful for the advisory committees to have a list of all the various statutory deadlines and an indication of how often they actually arise in daily situations. Some of the statutes, she said, might make a big difference in federal practice, such as the 10 days given a party by statute to object to a magistrate judge's report.

One member said that the problem of shortening statutory deadlines had the potentiality of undermining the whole time-computation project and wasting a great deal of time and work by the advisory committees.

Another added that it was questionable whether judges have authority to extend statutory deadlines. He suggested that it might be appropriate to speak with members of Congress about the issue. Another participant said that Congress might give its blessing to fine tuning the calculation of statutory deadlines, as long as the particular deadlines affected are not politically charged.

Professor Struve added that she had just scratched the surface with her initial research into statutory deadlines. She said that it would be a truly major project to gather all the statutes, and the committee was bound to make a mistake or two. Professor Cooper pointed out that, unless the new rule also sweeps up all future statutes, some time periods could end up being counted one way and others another way – the worst possible outcome.

One member asked whether lawyers in fact even look to the federal rules to calculate a deadline in a statute. Or do they merely look to the statute itself? In other words, if a statutory deadline is 10 days, do lawyers assume that it means 10 days, as set forth in the plain language of statute itself, or 14 days, as calculated under the federal rules?

Judge Kravitz suggested that the choice for the advisory committees was either: (1) to continue their examination of each time limit in their respective rules, or (2) to try to solve the statutory deadline problems first, present a solution to those problems at the January 2007 Standing Committee meeting, and then resume work on the specific time limits. One advisory committee chair said that it was important to have a firm road map in place before the advisory committees commit themselves to a great deal of work.

One participant concluded that the committees may not be able to resolve all the open questions regarding statutory interpretation and the interplay between statutes and rules. Professor Cooper pointed out that supersession questions already make it unclear in several instances whether a statute or a related rule should control the computation of a given time limit. Many of those questions have never been faced and answered. In the interest of simplicity, though, he suggested that it may make sense simply to abolish the 11-day rule explicitly for both rules and statutes, even if that results in certain statutory time limits being shortened.

Two members suggested that another possible resolution of the statutory problems would be to eliminate all reference in the rule to calculating time limits set forth in statutes. Therefore, the rules, as revised, would apply only in calculating time limits set forth in rules and court orders. Another member pointed out that this solution would bring the civil and bankruptcy rules into line with the current criminal rules, which do not extend to calculation of statutory time limits.

One advisory committee chair suggested that there was great value in continuing the momentum that the Technology Subcommittee had created. She said that the civil advisory committee had made a good deal of progress, and it would be best to continue its work over the summer, despite the uncertainties over statutes.

Another advisory committee chair pointed out that there is a difference between counting hours and counting days. Under the rules, he explained, days are considered as units, not 24-hour periods. Therefore, a party has until the end of the last day in which to act. On the other hand, in counting hours, an hour counts as exactly 60 minutes, not as a unit. Therefore, a party has exactly 60 minutes in which to act. The time period is not rounded up to the end of the last hour. He suggested that the committee consider specifying in the template that 60 minutes is 60 minutes precisely.

One participant recommended that the committee consider whether Congress contemplates that its statutes will be interpreted according to the time-computation provisions in the federal rules. He suggested that the committee, by changing the method of calculating shorter statutory deadlines, might be contradicting the intentions of Congress in enacting the statutes.

Judge Kravitz added that the rule should provide clear advice to judges and lawyers on how to count time limits set forth in statutes. The proposed revision of the federal rules would effectively shorten the time for people to act. Therefore, he said, the committee should study such matters as how judges and lawyers actually count time in statutes, how many statutory deadlines there are, how often they arise in the courts, and whether they have caused practical problems. Once the committees understand these issues better, they should be able to propose the appropriate solution to the problem of counting time as set forth in statutes.

One member emphasized that the bar wants a clear, revised rule, and the time has come to promulgate it. Among other things, he said, lawyers are deeply concerned about achieving clarity because missing a deadline is a serious mistake that can lead to a malpractice claim. He suggested, among other things, that the committee expressly solicit the views of the bar regarding statutory deadlines or hold a conference with members of the bar on the subject.

Judge Levi suggested that each advisory committee decide how it should proceed on the matter in light of the discussion. Judge Stewart added that the template, with the various adjustments suggested at the meeting, provides the appropriate vehicle for the advisory committees.

LONG RANGE PLANNING

Mr. Ishida reported that the Judicial Conference's Long Range Planning Group, comprised of the chairs of the Conference's committees, had met in March 2006, and its report was included in the agenda book (Agenda Item 10). The group, he said, was preparing the agenda for its next meeting and had asked the chairs of each committee to submit suggested topics.

The planning group first asked the Standing Committee to identify key strategic issues affecting the rulemaking process and to report on what initiatives or actions it was taking to address those issues. Second, the planning group asked the committee to identify trends in the courts that merit further study and could lead to new rules. Mr. Ishida asked the members to consider these requests and send him any ideas that could be included in the committee's report to the planning group.

Mr. McCabe suggested that it would be very helpful for the committee to take advantage of the new statistical system being built by the Administrative Office. He said that the committee should consider the kinds of data that might be extracted from court docket events to develop a sound empirical basis for future rules amendments. Judge Levi endorsed the Administrative Office's efforts to improve and expand collection of statistical information from the courts.

One member suggested that the committee might also consider pro se cases as an area that needed to be addressed in future rulemaking.

Judge Levi agreed to work with Mr. Ishida on a response from the committee to the long range planning group.

NEXT COMMITTEE MEETING

The next committee meeting of the committee will be held in Phoenix in January 2007. The exact date of the meeting was deferred to give the chair and members an opportunity to check their calendars and for the staff to explore the availability of accommodations.

Respectfully submitted,

Peter G. McCabe,
Secretary

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

MAY 22-23, 2006

The Civil Rules Advisory Committee met on May 22 and 23, 2006, at the Administrative Office of the United States Courts in Washington, D.C.. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell; and Chilton Davis Varner, Esq., who attended by telephone. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Professors Thomas D. Rowe, Jr., and R. Joseph Kimble, and Joseph F. Spaniol, Jr., Esq., attended as consultants. Judge Sidney A. Fitzwater, Judge Thomas W. Thrash, Jr., and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office; Robert Deyling also attended, as did Kate Simon who staffs the Committee on Court Administration and Case Management. Thomas Willging, Emery G. Lee, and Rebecca Norwick represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Alfred W. Cortese, Jr., Esq., and Jeffrey Greenbaum (ABA Litigation Section liaison) attended as observers. Professor Daniel J. Capra attended by telephone for the discussion of Civil Rule 5.2 and a report on proposed Evidence Rule 502.

Judge Rosenthal opened the meeting by noting the expectation that the Committee's work on the Style Project will be brought to a conclusion. That result will bring enormous satisfaction. She also noted that the September meeting will be the final meeting for members Judge Russell, Justice Hecht, and Frank Cicero, and anticipated the expressions of gratitude that will be offered in September for their constant engagement in all aspects of the Committee's work during their years as members.

Judge Rosenthal also noted that after the Judicial Conference approved a package including the e-discovery amendments, Supplemental Rule G on civil forfeiture, new Rule 5.1., and amendments of Rule 50(b), the Supreme Court transmitted them to Congress. That package standing alone represents a remarkable feat of productivity.

Turning to a sad note, Judge Rosenthal observed that the passing of Judge Edward Becker had lost the Committee a true friend of the rules process. Judge Becker was known to all of us. He regarded himself as a "Philadelphia Lawyer." Two Philadelphia lawyers on the Committee, Judge Baylson and Robert Heim, offered their own tributes. Judge Baylson recounted meeting with Judge Becker not long before his death. They discussed the Committee's consideration of Rule 15, a subject long pursued by Judge Becker. Judge Becker remained actively engaged with the topic and was pleased that the Committee had appointed a subcommittee and would be taking up its recommendations this spring. Robert Heim noted that the Philadelphia news stories had described Judge Becker as one of the most influential appellate judges, known both for his learning and his modesty. Those words captured him well. He was a prodigious intellect. He would put questions at oral argument that the best lawyers had not anticipated — but would help the lawyer work toward an answer. He also had a great sense of humor — not only did he write a district-court opinion in verse, but it was good verse! He was a good, kind, man. We will be less without him.

John Rabiej reported that the agenda for the Judicial Conference meeting in March was relatively light. Judge Rosenthal added that Chief Justice Roberts presided to admirable effect.

October 2005 Minutes

The minutes of the October 2005 meeting were approved, subject to correction of technical errors identified by the Reporter.

Rule 5.2

Judge Rosenthal introduced discussion of Rule 5.2, the Civil Rules version of the "E-Government Act" rule. She noted that it is important that the Bankruptcy, Civil, and Criminal Rules be identical as far as possible. That means that no one Advisory Committee is as free as it might wish to shape its rule entirely to its own liking. Rule 5.2(c), however, is unique to the Civil Rules and can be developed outside this constraint. Apart from Rule 5.2(c), coordination must be accomplished through the Standing Committee subcommittee constituted for this purpose, as assisted by Professor Capra. The Reporters for the several Advisory Committees have exchanged a flurry of e-mail messages; changes have been recommended even since the version of Rule 5.2 that appears in the agenda book.

Judge Fitzwater, Chair of the Standing Committee E-Government Act Subcommittee, began discussion by noting that the Subcommittee developed a template rule drafted by Professor Capra. The Bankruptcy and Criminal Rules Committees have adopted revisions at their spring meetings. The Civil Rules Committee now has its turn. The Reporters have worked hard to achieve uniformity.

Professor Capra noted that achieving uniformity is a nettlesome task, but it is one required by the E-Government Act as well as the ambition to avoid discrepancies between different sets of Enabling Act rules that address the same subject. A lot of time has been devoted to discussing choices between "the" or "a," between "and" or "or," and so on.

Looking to Civil Rule 5.2, Professor Capra noted that subdivisions (a) and (b) are common among Bankruptcy, Civil, and Criminal Rules. Rule 5.2(c) is unique to the Civil Rules. It began with the Committee on Court Administration and Case Management, which was persuaded that the burden of redacting files in Social Security cases justified a different approach. The Department of Justice has made the case that immigration cases deserve similar treatment for similar reasons. Subdivision (d) is required by the E-Government Act. Subdivision (e) reflects the value of protective orders. Subdivision (f) ties to an amendment of the E-Government Act adopted by Congress on advice of the Department of Justice. Subdivision (g) also is drawn from the E-Government Act. Subdivision (h), finally, is a provision on waiver adopted uniformly across the rules sets.

A list of changes from the agenda book version of Rule 5.2 recommended by the Reporters' group were described. The Reporters agreed that each set of rules should adhere to its own internal style conventions. The internal cross-reference in Rule 5.2(h), for example, will be to "Rule 5.2(a)," not to "(a)," nor to "subdivision (a)."

A change in subdivision (b)(4) temporarily adopted in other rules but not shown in the agenda book was abandoned by all, leaving the agenda book version current again: "the record of a court or tribunal ~~whose decision becomes part of the record~~ * * *" is exempt from redaction. All Reporters came to agree that the exemption should extend to any record filed in the present proceeding without regard to whether the other court's "decision" in some sense "becomes part of the record."

A style change in Rule 5.2(e)(2) described a court order limiting or prohibiting "a nonparty's remote electronic access ~~by a nonparty~~ to a document filed with the court." This change conforms to the style convention favoring use of the possessive whenever possible. Together with the convention favoring drafting in the singular, the effect remains the same. The order can apply to all nonparties. This revision is a good illustration of the need to accept uniformity among the rules, and to defer to the Style Subcommittee.

The Committee Note observes that a party who has waived redaction by filing its own information without redaction can seek relief from the waiver. The question whether the opportunity for relief should be reflected in rule text was answered by noting that the rule is designed to support a deliberate choice to avoid the cost of redaction, and to make clear that one party's waiver does not defeat the right of others to insist on redaction.

Several public comments addressed subdivision (c), which allows a nonparty full electronic access to social-security and immigration files at the courthouse, but severely limits remote electronic access by a nonparty. The comments suggested diverging concerns. One concern was that it is important to allow convenient and full electronic access by public media and scholarly researchers, particularly to court files bearing on the troubled practices in immigration matters. But an opposing concern was that "data miners" will take advantage of electronic access at the courthouse to gather vast amounts of personal information including identifiers, financial information, and health information. Because subdivision (c) is unique to Civil Rule 5.2, it can be revised without need for coordination with the other Advisory Committees. It would be possible to meet these comments by revising the provisions for social-security and immigration cases. Nonparties could be barred from electronic access to the administrative record, whether remotely or at the courthouse. That would make it possible to avoid the great burden of redacting the administrative record. At the same time, the legitimate needs of public media and academic researchers could be satisfied by a court order permitting access.

The Department of Justice initially requested that immigration cases be added to subdivision (c) because of the great burden of redacting the administrative file and because of the risk that mistakes still would be made. The burden of redacting papers prepared for purposes of court review would not be as great. On the other hand, it is late in the day to consider revisions. As to social-security cases, the published proposal reflected recommendations of the Committee on Court Administration and Case Management that have been adopted as Judicial Conference policy. Some knowledgeable comments suggest that the risk presented by "data miners" is real, but clear information is hard to come by. On the other hand, the bankruptcy courts have had experience with data miners for many years. Traditionally mining has been accomplished by sending people to the courthouse to physically comb through records. But surely it will become a matter of electronic searching as courts complete the transition to electronic filing. For the moment the cost of access is ten cents a page, a formidable barrier. But that may change. Just what the consequences will be, however, is not so clear. And it is important to remember the fundamental starting point established by Judicial Conference policy: absent good reason, public access to electronic court records should be as complete as access to paper court records. This is the "practical obscurity" issue — so long as access required physical presence at the courthouse and individual reading of paper files, most sensitive information was protected by the barriers to access. "Only the most determined or the most academic" will undertake the effort. Electronic access may change the balance, but it is difficult to predict when or how.

It was observed that the case-management software now being adopted will enable court clerks to manage the three levels of access provided by Rule 5.2 — full remote electronic access by a party or a party's attorney; full electronic access for anyone at the courthouse; and limited remote electronic access by nonparties.

And it was agreed that the limits on remote electronic access by a nonparty will not limit a judge's authority to use electronic court files from home or an office away from the courthouse housing the relevant computer file.

The Committee approved a motion to recommend adoption of Rule 5.2 to the Standing Committee, noting again the remarkable level of work required to achieve consistency across the sets of rules.

Evidence Rule 502

Judge Rosenthal noted that several Advisory Committee members attended the Evidence Rules Committee's conference and meeting to consider proposed Evidence Rule 502 and expressed appreciation to Judge Smith and Professor Capra, Chair and Reporter of the Evidence Rules Committee, for the opportunity. This Committee has been frustrated in its attempts to deal with waiver of attorney-client privilege and work-product protection by inadvertent production in discovery. The perils of inadvertent production have increased with the rapid growth of discovering electronically stored information. Efforts to avoid inadvertent production — and to avoid the risk of waiving privilege as to all communications touching the subject-matter of an inadvertently produced communication — add to cost and delay in discovery. The discovery problems, however, intersect with larger problems that lie in the Evidence Rules Committee's province. A rule that modifies an evidentiary privilege, moreover, can take effect only if approved by an Act of Congress. The Evidence Committee's work is welcome, and the invitation to participate in its work is also welcome.

Judge Baylson observed that the current draft Rule 502 reflects substantial revisions from the draft that initiated the Evidence Rules Committee's work. It addresses topics beyond the discovery problems, including adoption of a "selective waiver" approach to disclosure to government agencies while cooperating in an investigation.

Professor Capra began his description of Rule 502 by observing that it does not establish rules on waiver. Instead, it addresses a few acts that do not waive attorney-client privilege or work-product protection. Although the goal is to perfect a draft that can be submitted to Congress for enactment by Act of Congress, the present proposal is to recommend publication of the rule for public comment in the regular Enabling Act process. The rule is in "a very initial stage."

Subdivision (a) addresses the scope of a waiver by limiting "subject-matter" waiver to communications or information that "ought in fairness to be considered with the disclosed communication or information." This "fairness" test is adapted from Evidence Rule 106.

Subdivision (b) is the central provision governing inadvertent disclosure in federal litigation or federal administrative proceedings. It provides that the disclosure does not effect a waiver if the holder of the privilege or work product took reasonable precautions to prevent disclosure and took reasonably prompt measures to rectify the error after the holder knew or should have known of the disclosure. The procedures of proposed Civil Rule 26(b)(5)(B) are incorporated.

Subdivisions (d) and (e) expand the provisions for discovery. Subdivision (e) recognizes the binding effect of an agreement on the effect of disclosure, but limits the effect to the parties to the agreement. Subdivision (d) makes an agreement binding on all persons or entities if it is incorporated in a federal court order governing disclosure in connection with litigation pending before the court.

Subdivision (c) governs selective waiver, permitting disclosure to a federal agency exercising regulatory, investigative, or enforcement authority without waiving privilege or work-product protection. This provision will be controversial. The proposal is to publish it in brackets to indicate recognition of its controversial character.

Judge Rosenthal noted that an American Bar Association task force has considered earlier drafts. Individual members of the task force have raised the question whether the selective waiver provisions will prove counterproductive. Their concern is that government agencies have become too insistent on extracting waivers as a condition of favorable treatment for cooperating in an investigation. Adopting selective waiver might increase the frequency of waiver demands and increase the pressure to succumb.

Judge Rosenthal noted another interaction with the pending e-discovery amendments. There was concern that the provisions addressing privileged and work-product material might be read to promise greater protection than in fact can be delivered through the Civil Rules. Evidence Rule 502 would bolster the protection.

It was noted that Gregory Joseph continues to press the question whether a single waiver rule should differentiate between waiver of work-product and waiver of privilege.

Finally, it was observed that there is a relation between this topic and Rule 26(a)(2)(B). The American Bar Association Litigation Section is considering the questions that arise from sharing privileged and work-product materials with expert trial witnesses. Disclosure and discovery rules can be adapted to answer this question in part, although the waiver question will arise at trial as well.

Style Project

Judge Rosenthal introduced the Style Project materials by noting the amount of work that has been done. Something like 750 documents have been generated. Many of them are long. The work has been done so well that in five years no one will remember that there was a Style Project — the restyled rules will come to seem original and inevitable. But some work remains to be done at this meeting. Many of the footnotes in the agenda draft identify choices that probably do not need further discussion. But all of the footnotes, and indeed all of the Style Rules, remain open for discussion. Any issues that require further drafting that cannot be accomplished "on the floor" will be resolved by circulating final texts for approval after the meeting.

Rule 1: Present Rule 1 says that these rules govern "all suits of a civil nature." Style Rule 1 changed this to "all civil actions and proceedings." Comments expressed concern that "and proceedings" may expand the domain governed by the rules, a substantive change. The Standing Committee Style Subcommittee [SCSSC] recommended deletion of "and proceedings," and Subcommittee A agreed. But further consideration suggests that "and proceedings" should be retained. Rule 3 says that a "civil action" is commenced by filing a complaint. There is a risk that Rule 3 might be read as a definition, foreclosing application of the rules to events that are not initiated by filing a complaint. One illustration is a Rule 27 petition to perpetuate testimony — it is clear that the Civil Rules must govern this proceeding, but the problem also is clear. The Second Circuit has ruled that confirmation of an arbitration award under legislation implementing the New York Convention need not be by formal complaint, even though Rule 81(a)(6) provides that the rules govern "proceedings under" 9 U.S.C. Apart from that, "proceedings" is a word used both in the Civil Rules and in other sets of rules. Civil Rule 26(a)(1)(E) refers to some of the things excluded from initial disclosure obligations as "proceedings." Rule 60(b) refers to a motion to relief from a "proceeding." Evidence Rule 1101(b) applies the Evidence Rules to "civil actions and proceedings."

Discussion began by noting that this is a question of substance, not mere style. Some support was expressed for returning to the present rule's "suits of a civil nature" as the only way to avoid unintended changes. One member who did not like "suits of a civil nature" suggested that the rule might be limited to "civil actions," leaving the complications to be addressed in the Committee Note. That suggestion was met by renewal of the observation that Committee Note statements must be

supported by rule text. Further discussion expressed uncertainty whether any example could be found of circumstances in which "proceedings" would bring into the Civil Rules something they do not govern now.

The conclusion was that Rule 1 should go forward as published, retaining "and proceedings" and "and proceeding." The paragraph of the Committee Note referring to summary statutory proceedings was revised by expanding it to say: "This change does not affect ~~the~~ such questions as whether the Civil Rules apply to summary proceedings created by statute. * * *"

Rule 4: Two changes were made in Rule 4(d)(1)(D): "using text prescribed in ~~Official~~ Form 5 ~~1A~~ * * *." Former Form 1A is restyled as Form 5. The forms are not described as "official" in Rule 84. Although Rule 4(d) directs that Form 5 be used to inform the defendant of the consequences of waiving and not waiving service, there is no need to describe it as "official" for this purpose.

Rule 5.1(a)(1)(A): Rule 5.1, which is before Congress on track to take effect on December 1, 2006, was not published in the Style Rules package. In the course of revising it to conform to style conventions, a word was inadvertently intruded. The Committee agreed that it must be deleted: "the parties do not include the United States, one of its agencies, or one of its officers or employees ~~sued~~ in an official capacity." During the development of Rule 5.1 it was early recognized that there is no reason to require notice to the United States when the United States or one of its agents is a plaintiff.

Styling Rule 5.1 changed references to certification of "a constitutional challenge" to certification that a statute "has been questioned." This change was approved. It draws from the language of 28 U.S.C. § 2403 and reflects the use of "question" elsewhere in Rule 5.1.

Rule 9(a)(2): Present Rule 9(a) directs that a party who raises an issue about another party's capacity or authority to sue or legal existence "do so by specific negative averment." The Style Rule says "do so by specific denial." "Specific denial" was approved. It may seem awkward since Rule 9(a)(1) carries forward the rule that a party need not allege its capacity, authority, or legal existence — there is no allegation to deny. But the Style Rule continues to provide that the denial must state any supporting facts peculiarly within the pleader's knowledge. If the pleader knows none, it cannot plead with any greater "particularity" than a denial (which may rest on a lack of information or belief).

Rule 10: Two changes were made in the caption of Rule 10(c): "Adoption by Reference; ~~Attached~~ Exhibits."

Rule 12: The Bankruptcy Rules Committee suggested that the Committee Note should be expanded to describe the rearrangement of material among the subdivisions: "Some subdivisions have been redesignated. Former subdivision 12(c) has been divided into new 12(c) and (d), while former subdivision (d) has become new 12(i)." The purpose is to assist future researchers, particularly those who rely on electronic searches. An electronic search for cases discussing Rule 12(i), for example, would stop short at December 1, 2007. To be sure, the chart of changes published as Appendix B to the Style Rules, pages 220-221 of the publication book, will be carried forward with the Style Rules, but researchers may not routinely consult that chart, particularly after the Style Rules have been in effect for a time.

This suggestion was framed as a general issue, to be implemented by adding each item in the Appendix B chart to the relevant Committee Note. Judge Thrash stated that the SCSSC would rather not add to the length of the Committee Notes in this way. Further discussion agreed that expanded Committee Notes might be useful during the period of transition to the Style Rules, but expressed hope that all of the major rules publications would include the Appendix B chart as a research aid.

Some publications likely will also provide this information in annotations to each specific rule. The Committee agreed that Committee Note language should not be added.

Rule 16: Rule 16(c)(1) carries forward a phrase from the present rule: "*If appropriate*, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement." (Style-Substance Rule 16(c) changes this to being reasonably available by "other means.") "If appropriate" is an "intensifier." Retaining it violates the drafting guidelines — a court should not be admonished to avoid doing something inappropriate. The phrase was carried forward because of the sensitivities that attend court directions to discuss settlement — a party may legitimately take the position that it will not settle on terms that compromise its position in any way. It also reflects a pragmatic concern. The Department of Justice, for example, has clear rules on who has authority to settle; large settlements require approval by a person in a high position facing many competing demands. "If appropriate" has been useful in persuading reluctant judges that it is not appropriate to require that a high official be committed to immediate availability, and that it suffices to have participation by a person who can contribute usefully to the discussion. The Committee agreed that it would not be desirable to remove the words from the rule text only to restore them by an admonition in the Committee Note. Concern was expressed that if the words actually do have an effect, deletion would change meaning. But it was noted that "if appropriate" does not directly provide much restraint, and that these words are relatively new in the rule. A motion to delete the words failed, 3 yes and 6 no.

Rule 16(e) as published read: "The court may modify an order *issued after a final pretrial conference* only to prevent manifest injustice." Comments observed that this formula seems to apply to any order issued after that time. One example would be a Rule 51 order to submit proposed jury instructions ten days before trial. A revision was suggested: "an order reciting the action taken at the conference * * *." But Subcommittee A concluded that this revision is vulnerable to the risk that actions may be taken at a final pretrial conference that are not expressly recited in the order. One illustration of particular concern has been approval of a Rule 36 admission — the "manifest injustice" standard should apply to later withdrawal or amendment if the admission was adopted at the final pretrial conference, but the order might not recite this action. The Committee approved this final revision: "The court may modify ~~an~~ the order issued after a final pretrial conference only to prevent manifest injustice."

Rule 23: Professor Kimble proposed a revision of Rule 23(e) to avoid repeated references to "settlement, voluntary dismissal, or compromise." As compared to other parts of Rule 23, the language of this subdivision is new and has not acquired a large body of interpretive decisions. The revision clearly says the same things in fewer words. The Committee approved a revised Rule 23(e):

(e) Settlement, Voluntary Dismissal, or compromise. * * * The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal~~ed settlement, voluntary dismissal, or compromise~~.

(2) If the proposal would bind class members, ~~T~~the court may approve it ~~a settlement, voluntary dismissal, or compromise that would bind class members~~ only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposaled ~~settlement, voluntary dismissal, or compromise~~.

(4) [unchanged]

(5) Any class member may object to the proposal if it ~~a proposed settlement, voluntary dismissal, or compromise that~~ requires court approval under this subdivision (e) * * *."

It was noted that although paragraph (4) refers only to refusal to approve a settlement, this provision for a second opt-out opportunity stands within itself and need not be revised to reflect editing of "voluntary dismissal or compromise."

Rule 25: Present Rule 25(a)(1) says that unless a motion to substitute is made within 90 days after death is suggested on the record, "the action *shall* be dismissed as to the deceased party." The published Style Rule — shaped after lengthy discussion — said the action "may" be dismissed." This decision drew from the provisions of Rule 6(b), which allow the court to extend the time to move for substitution even after the 90-day period has expired. To say that the court "must" dismiss obscures the alternative power to allow substitution and refuse to dismiss. Rule 6(b), on the other hand, remains. It clearly qualifies "must," so long as anyone thinks to read it. And there are situations in which the court must dismiss — there is no one carrying on the litigation with respect to the dead party, and no one seeking an extension of time to substitute a successor or representative. Some Committee members suggested that in any event, "shall" in the present rule means "must." Of course there are situations in which the court should not dismiss — one would involve a contest for appointment as representative that cannot be resolved within 90 days after service of the statement noting death. At a minimum, the final sentence in the proposed Committee Note explaining the change to "may" should be deleted — in such a situation there is no negligence, not excusable negligence.

Turning to the Committee Note, it was agreed that there is no need for Committee Note explanation when a Style Rule substitutes "must" for "shall" in a present rule. That is the routine act. Explanation may be appropriate when "shall" is changed to "may" or "should."

A motion to substitute "must" for "may," and to delete the proposed Committee Note paragraph that would explain the use of "may," was approved over two dissents.

Rule 26: Rule 26(a)(1)(C) presented the occasion to discuss a global issue. "Agree," "consent," and "stipulate" appear throughout the rules. They may be characterized as "written" or "in writing," or they may be used without a reference to writing. The global resolution has been to prefer "stipulate" and "stipulation" as a general matter, but to use other words if the context makes that appropriate. "Agreement" is used, for example, in Rule 23(e)(3) to refer to the side agreements that at times may accompany a class-action settlement; Rule 35(b)(6) refers to an agreement for a physical or mental examination without court order. In these places "stipulate" would not be appropriate. The Committee agreed that there is no need to reconsider the many places in which references to writing have been omitted. Almost all agreements are reduced to writing, at least in electronic form. Careful practitioners invariably dispatch a confirming memorandum.

Rule 26(e) was discussed extensively in drafting the Style version. The present rule creates a duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired" if a party "learns" that the disclosure or response is incomplete or incorrect. All reference to "thereafter acquired" was deleted from the Style Rule because this limit was thought to have

disappeared from actual practice. All lawyers understand that there is an obligation to supplement or correct a disclosure or response no matter whether the omitted information was known at the time of the initial disclosure or response or whether in some sense the party "learned" of information "later acquired." Subcommittee B recommended that this issue be considered further, noting that the Rule could read: "must supplement or correct its disclosure or response to include later-acquired information. The party must do so: * * *." The first question was whether the reference to later-acquired information is needed to avoid an implication that it is proper to dole out disclosures and discovery responses in bits and pieces — a party can argue that it has not violated Rule 26(g) by deliberately revealing its information later rather than in timely fashion. The history of Rule 26(e) was explored. The 1970 version presented many puzzles. For example, it contemplated that a response could be both complete and incorrect when made. If a response was both complete and correct when made, on the other hand, supplementation was required only if failure to supplement amounted to knowing concealment. Later amendments were designed to clarify and strengthen the duty to supplement. Throughout the period from the inception of Rule 26(e) in 1970, however, it has been understood that it does not justify a deliberate tactic of making and later supplementing incomplete responses. On the other hand, it was noted that there is confusion in practice. Lawyers expect that adversary counsel will respond forthrightly with the information available at the time of responding. But there is uncertainty as to what will happen with information later acquired. It is standard practice to serve a request to supplement. That practice is likely to continue, although perhaps somewhat limited by the Rule 33 limit on the number of interrogatories, no matter what Rule 26(e) says. A motion to add the "later-acquired information" language failed for want of a second. Because this issue is explicitly discussed in the Committee Note, and because the Committee's decision is so clear, the matter may be allowed to rest as it is.

Rule 34: Professor Kimble suggested that the drafting of later rules could be improved by adopting a definition of "inspection" in Rule 34(a): "In these Rules, an inspection of documents, tangible things, or land includes the right to copy, test, sample, measure, survey, or photograph." This definition could be incorporated in other rules — particularly Rule 45 — to reduce the ambiguities that arise from the various ways in which "inspect" and "produce" are (or are not) amplified. Rule 26(a)(1)(A)(iii), for example, refers to "inspection and copying as under Rule 34." Although the rules do not have a general definitions rule, definitions are scattered throughout. Rule 54(a), for example, defines "judgment." Rule 81(d)(1) and (2) define "state law" and "state." It might be possible as an alternative to define "inspect" in Rule 45 alone, but that might create some implied confusion in Rule 34. One reason for considering the question now is that "test and sample" were added for documents only as part of the e-discovery amendments process. But the new emphasis might be obscured if it were rolled back into a single common definition only one year after it takes effect. The SCSSC thought it too late to adopt a definition without adequate time to ensure against unintended consequences. And Subcommittee A worried about the possible consequences in discovery of electronically stored information. The definition was put aside.

Rule 37: Style Rule 37(c)(1) carried forward a confusion in the present rule. "Disclose" is used initially in the technical sense of Rule 26(a) disclosure, while it is used later in a more general sense to refer to revealing information through disclosure or discovery. An interim proposal was to write the rule to forbid use of "unrevealed information." Subcommittee A recommended a further revision. Discussion led to these changes:

(c) Failure to Disclose, to ~~Amend~~ Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or ~~Amend~~ Supplement. If a party fails to ~~disclose the~~ provide information or identify a witness as required by Rule 26(a) or (e), ~~— or to provide~~

~~the additional or corrective information required by Rule 26(e)~~ — the party is not allowed to use ~~as~~ that information or witness to supply evidence on a motion, at a hearing, or at a trial ~~any witness or information not so disclosed~~, unless the failure was substantially justified or is harmless. * * *.

Rule 39: Present Rule 39(a) provides that after a demand for jury trial the parties can consent to nonjury trial by filing a written stipulation "or by an oral stipulation made *in open court* and entered in the record." Style Rule 39(a) omits the reference to "in open court." The SCSSC prefers the Rule as published, but was uncertain whether it changes the Rule's meaning. A Committee member suggested that the open-court requirement may be intended to protect a client who wants a jury trial against hidden surrender of the jury-trial demand by the lawyer. But the Rule generates confusion. A pretrial conference would be a likely occasion to agree to withdraw a jury demand, and the agreement could be put on the record. But is the conference "in open court"? Professor Rowe, who researched this issue for the Subcommittee, observed that the cases recognize consent in at least two sets of circumstances that are not "in open court." One is an agreement to withdraw made at a pretrial conference. The other is waiver by conduct, notably proceeding to a bench trial without objection. These decisions seem to be sensible. If "in open court" is added back to Style Rule 39(a), it will continue to be ignored as it has been when there is good reason to ignore it. The Committee concluded that Rule 39(a) should remain as published, without "in open court."

Rule 44.1: Present Rule 44.1 is a good example of the "intensifier" problem. It requires a party who intends to raise an issue of foreign law to "give notice by pleadings or other *reasonable* written notice." Style Rule 44.1 deletes "reasonable," in keeping with the convention that a rule need not negate the implication that "unreasonable" notice suffices. If Rule 44.1 requires "reasonable" notice, other rules that require only "notice" might seem to authorize notice without regard to reasonableness. Comments and continuing discussion, however, focused on the 1966 Committee Note written on adopting Rule 44.1 and on the practical needs it reflected. The Note reflects concern that notice must be reasonable. The time of notice is important. The need for ample notice of an intent to raise an issue of foreign law may be less now than in 1966, although some foreign-law sources are not readily available for on-line research. On-line access varies greatly from one country to another. And the need for time to find an expert witness remains. There is some question as well whether a foreign-law expert witness need be disclosed under Rule 26(a)(2); reasonable advance notice is important. Taking "reasonable" out of the rule, moreover, may send a message — some people reading in earlier opinions will compare the former text without searching out the disappearance of "reasonable" in the style process.

Further concern was expressed that simply removing "reasonable" without explanation would be confusing. Work with the restyled Criminal Rules has caused difficulty to one member who has found it difficult to heed the purpose to make no change in meaning when the words seem to change meaning. It was suggested that this difficulty might be ameliorated by adding a specific explanation to the Committee Note. But it was responded that each Committee Note reminds that the general restyling does not change meaning, and that any attempt to explain all of the decisions to delete intensifiers would be both incomplete and cumbersome. At the same time, thought should be given to finding a general way to carry advice on this drafting convention, and a few others, with the new rules. A general memorandum might be attached. Or it might be more effective to condense the general memorandum into an expanded Committee Note to Rule 1.

A motion was made to revise Rule 44.1 to read: "must ~~give notice by a pleading or other~~ plead it or give other reasonable notice in writing." The motion failed, 4 yes to 5 no. But it was

agreed that an attempt should be made to summarize some of the style conventions, including the deletion of intensifiers, in the Committee Note to Rule 1.

Rule 45: This change was approved for Rule 45(c)(2)(B)(ii): "inspection and copying may be ~~done~~ required only as directed in the order * * *." A comment suggested that "done" implies that the parties cannot agree to resolve an objection without a confirming court order. Although this implication seems strained, the change avoids any risk.

A long-festering question was renewed in comparing Style Rule 45(c)(2)(B)(ii) with 45(c)(3)(B)(iii). As published, each carried forward the words of the present rule. (2)(B)(ii) directs the court to protect a nonparty from "significant" expense resulting from compliance with a discovery subpoena to produce documents or tangible things or to permit inspection. (3)(B)(iii) directs the court to protect a nonparty against "substantial" expense to travel more than 100 miles to attend trial. Some participants expressed confusion as to which is greater — "significant" expense or "substantial" expense. A small sum may be significant to a person in straitened circumstances; a large sum may be insignificant to a wealthy person. Another view was that "substantial" refers to a larger sum than "significant," and thus affords less protection. On this view, it was argued that greater protection is required at the discovery stage because of long experience demonstrating the huge burdens that discovery can impose and because a nonparty is not fairly subjected to the costs of participating in discovery in litigation among others. The trial itself, however, is more important, and it is fair to require greater sacrifices of nonparties who are called for the central duty of appearing as witnesses. Although the SCSSC adhered to the view expressed by many that there is no apparent reason to use different words in these two provisions, the Committee concluded that in the midst of such confusion it is better to carry forward the language of the present rule. The Style Rule will remain as published.

Rule 48: As published, Style Rule 48 said: "A jury must have no fewer than 6 and no more than 12 members." A comment suggested that this formulation might be read with the second sentence to authorize a stipulation to begin with fewer than 6 jurors. The Committee agreed to revise Rule 48 to read: "A jury must initially have at least ~~no fewer than~~ 6 and no more than 12 members * * *."

Rule 50: Amendments to Rule 50(b) now pending in Congress and to take effect December 1, 2006, were not reflected in the published Style Rules. The amended rule is designed to discard the former practice that allowed a renewed motion for judgment as a matter of law — formerly called judgment notwithstanding the verdict — only if a motion for judgment as a matter of law — formerly called a directed verdict — was made at the close of all the evidence. In place of this requirement the new rule allows renewal of any motion for judgment as a matter of law made "under Rule 50(a)." Despite the style convention that prefers to avoid cross-references within a single rule by formal designation — as "under Rule 50(a)" — this approach was adopted after careful consideration of alternatives. The suggestion that Rule 50(b) could allow renewal of "a motion for judgment as a matter of law" was rejected in drafting the revised rule. One problem is that this formulation might obscure the rule that a renewed motion may rely only on the law and facts specified in the pre-submission motion. Another problem is that Rule 56, both in its present form and in its style form, bases summary judgment on showing that the moving party is entitled to judgment as a matter of law. It was deliberately decided not to allow a post-submission motion to be supported by a pretrial motion for summary judgment. The Committee agreed that Rule 50(b) should continue to refer to a motion "made under Rule 50(a)."

At Professor Kimble's suggestion, a revision of punctuation was made: "No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may file a renewed motion * * *."

Rule 63: Present Rule 63 begins: "If a trial or hearing has been commenced and the judge is unable to proceed," another judge may proceed. Style Rule 63 began: "If the judge who commenced a hearing or trial is unable to proceed * * *." A comment pointed out that this version narrowed the present rule. There may be a succession of successors — the judge who commenced a hearing may be succeeded by another judge, who later becomes unable to proceed and must be succeeded by yet another judge. A tentative response revised the rule to read: "If the judge who ~~commenced~~ conducted a hearing or trial * * *." But this too was defective because it seemed to apply only if the hearing or trial was concluded, losing sight of the present rule's application to mid-hearing disability. Recognizing that it is important to be open-ended about the point at which a judge becomes unable to proceed, it was agreed that the rule should begin: "If ~~the~~ a judge ~~who commenced~~ conducting a hearing or trial is unable to proceed, any other judge may proceed ~~with it~~ upon certifying familiarity with the record * * *."

Rule 64: Style Rule 64 provided for use of state pretrial security measures "to satisfy the potential judgment." The Bankruptcy Rules Committee pointed out that this rule is forward-looking. Provisional remedies are used not to satisfy a judgment, but to protect the ability to enforce a judgment if an enforceable judgment is entered. The Committee approved their suggested revision: "provides for seizing a person or property to ~~satisfy~~ secure satisfaction of the potential judgment."

Rule 65: Present Rule 65 includes a "classic syntactic ambiguity." Rule 65(d) says that an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Absent a comma between "with them" and "who receive actual notice," the rule could be read to say that an injunction binds a party and its employees, etc., whether or not the party or its employees have actual notice. On this reading, actual notice is required only as to persons in active concert with a party or (depending on resolution of another ambiguity) in active concert with a party's employees. This ambiguity was resolved in the Style Rule by clearly limiting the notice requirement to "other persons * * * who are in active concert with" a party or its employees, etc. Further research by Professor Rowe, however, disclosed that Rule 65(d) was intended to carry forward the provisions in former 28 U.S.C. § 363. Section 363 included the comma missing from Rule 65(d); it clearly applied the "actual notice" requirement to parties and their employees. In most circumstances, moreover, it is appropriate to bind a party only after actual notice of the injunction.

This revision was proposed:

> **(2) Persons Bound.** The order binds only the following who receive actual notice of it by personal service or otherwise:
>
> **(A)** the parties;
>
> **(B)** the parties' officers, agents, servants, employees, and attorneys; and
>
> **(C)** other persons ~~who receive actual notice of the order by personal service or otherwise and~~ who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Discussion took many paths. Draft Committee Note language to explain this provision raised the question whether the Note should say that "ordinarily" a party is bound only with actual notice. This question addresses the rarified possibility that in some situations it may be appropriate to invoke a doctrine of "anticipatory contempt," binding a party who anticipates entry of an injunction and acts deliberately to prevent effective relief. An example would be cutting down an ancient tree while the

court is considering whether to enjoin the cutting. It was agreed that the Note should not venture into this territory.

Further discussion explored the expectations of practicing lawyers. If you serve a party's attorney, that is thought to be notice to the party. And if a party is served, why should its employees not be bound? It was responded that the party is bound, and is subject to contempt if it does not comply. Disobedience by a party's employees is attributed to the party; the party has every interest in seeing to it that its employees are notified of the obligation to comply with the order. Temporary restraining orders are particularly likely to be submitted to the court with instructions that inform the party restrained about its obligations to get notice to its employees. But an employee who acts without actual notice should not be personally subject to contempt. So the party who wins an injunction may find it in its own interest to see to it that employees are notified — to tell the employee with the chain saw that the tree must not be cut down. Of course in many circumstances it will be necessary to rely on the employer because the party who won the order "does not know where to go" to notify employees.

The change was approved. The draft Committee Note language to explain the change was deleted. (Restoration of the Note, with slight modifications to remove any implications addressed to anticipatory contempt, was approved by post-meeting vote.)

Rule 69: Present Rule 69 directs that the procedure on execution "shall be in accordance with" state practice. Style Rule 69 said the procedure "must follow" state procedure. A comment expressed concern that "must follow" would bind federal courts too closely to state practice, creating a risk that inadequate state procedure might defeat effective enforcement of a federal judgment. The Committee approved Subcommittee A's recommendation to change to words closer to the present rule: "must ~~follow~~ accord with the procedure of the state * * *."

Rule 71.1: Present Rule 71A(b) allows joinder of separate pieces of property as defendants in a single condemnation proceeding "whether in the same or different ownership." Style Rule 71.1(b) said "no matter who owns them." A comment expressed concern that these words might be read to defeat immunities that depend on ownership, such as those that protect government property from condemnation by another government. The concern seems strained. The rule only addresses joinder procedure. Nonetheless the Committee determined to change the language to read: "no matter ~~who owns them~~ whether they are owned by the same persons or ~~whether they are~~ sought for the same use," subject to final SCSSC review for style.

Late comments renewed a question that was not again reviewed by a subcommittee. Present Rule 71A(e) states that "the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting *it*." "it" is patently ambiguous. If properly used in the original drafting, it could refer only to the defendant as the only antecedent within the sentence. But "it" could easily be read to refer to the property. This reading might be bolstered by the in rem nature of a condemnation proceeding. And as a practical matter, the government finds it easier to make an objective judgment whether a proceeding affects the property than to make an at-times subjective judgment whether a proceeding affects a particular owner. It also could be urged that after a defendant gives notice that it has no objection or defense to the taking, the defendant is interested only in compensation. In a proceeding to condemn more than one piece of property, further, "it" could be read to distinguish among the separate properties.

The suggestion that "it" should be carried forward as an ambiguity that cannot be resolved was met with the protest that the ambiguity is so offensive that the Committee must give an answer one way or the other.

Further discussion noted that it is possible to imagine real circumstances where the choice makes a difference. Co-owners, for example, may disagree about objecting to the condemnation. If one answers with an objection or defense and the other gives notice that is has no objection or defense, should the one who has no objection or defense be given notice of proceedings to determine whether to condemn the property because the proceedings affect the property? Or should it not be given notice because the proceedings do not affect that defendant? Or both co-owners may agree that taking is proper, and even agree on the appropriate just compensation, but disagree about allocation of the compensation between them. Surely notice must be given of allocation proceedings initiated by one co-owner, even though the proceeding does not seem to affect the property.

Several alternatives were suggested. The rule could require notice of "all later proceedings." The difficulty with that alternative lies in condemnation of multiple parcels — many of the owners may have no interest at all in most of the proceedings. Another alternative is to require notice of all later proceedings "relating to that property." "Relating to" would include such proceedings as those to allocate compensation, whether or not they "affect" the property in any meaningful way. Yet another possibility would require notice of later proceedings "affecting the defendant or the property."

Professor Rowe pointed to conflicting indicators about the present rule. One treatise states that notice must be given of later proceedings affecting the property, but says nothing further to explain or support this reading. The original Committee Note requires notice of proceedings "affecting him," seeming to refer to the owner.

Finding no "canonical answer," it was suggested that the published rule — "affecting the defendant" — should be retained.

A motion to substitute "relating to that property" failed, 3 yes and 7 no.

A motion to carry forward with the rule as published — "affecting the defendant" — passed with one dissent.

Present Rule 71A(h) says that a party "may" have a jury by demanding it. Style Rule 71.1(h)(1) says that the court tries all issues except when compensation must be determined "by a jury when a party demands one." A late comment suggested that the Style Rule expands the right to jury trial. It is settled that the Seventh Amendment does not apply to condemnation proceedings, and it was urged that the Style Project should not expand the right. An illustration of a possible problem was given. After a demand for jury trial a court may appoint commissioners, but then conclude that the commissioners are not diligently discharging their duties and take the case back from them. Can the judge then try the case without a jury? The present rule does not clearly address this. It was concluded that there is no reason attempt an answer in the Style Rule. There is no need to change the Style Rule.

Rule 73: After renewed discussion of the relationship between the language of Rule 73 and the underlying statute, 28 U.S.C. § 636(c), the Committee adopted these changes in Style Rule 73:

> **(a) Trial by Consent.** When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct ~~the proceedings in~~ a civil action or

proceeding, including a jury or nonjury trial. A record ~~of the proceedings~~ must be made in accordance with 28 U.S.C. § 636(c)(5).

(b) Consent Procedure.

(1) In General. When a magistrate judge has been designated to conduct civil actions or proceedings, * * *

Rule 86(b): A new Rule 86(b) was presented for discussion. Comments on the Style Project expressed concern that the supersession effects of the Civil Rules would be expanded by promulgating the entire body of the Civil Rules to take effect on December 1, 2007. One running example has been used to illustrate the argument. Rule 11 was amended in 1993. In 1995 the Private Securities Litigation Reform Act enacted provisions that conflict with and that supersede Rule 11. Even though Style Rule 11 does not change the meaning of any provision in Rule 11, by taking effect on December 1, 2007, it might be thought to supersede the inconsistent provisions of the PSLRA.

The Committee agreed that this supersession argument is not persuasive. The Style Project involves only improved expression of unchanged meaning. It is not intended to affect the relationships between any rule and any conflicting statute. To the contrary, any conflict should be resolved by comparing the first effective dates of the rule provision and of the statute that conflicts with it.

The first question is whether it is necessary to say anything, anywhere, about this supersession argument. The argument is so thin that it might not deserve any form of response. There is no indication that the argument was even made with respect to the style revisions taking effect in 1987 to make rules language gender-neutral. Most of the cases that deal with comparable problems look to the first effective date of the rule, disregarding subsequent amendments that change expression but not meaning. The Appellate Rules were restyled without any evident supersession-related concern. In restyling the Criminal Rules, a conflict appeared between Criminal Rule 48(b) and the later-enacted Speedy Trial Act. The Committee Note explains that "[i]n re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act."

The argument has been made, however, and may be made again. In addition, there is a pair of cases in the Sixth Circuit that suggest that the argument may prevail by sheer inadvertence. In *Floyd v. U.S. Postal Service*, 6th Cir.1997, 105 F.3d 274, the court found 28 U.S.C. § 1915(a)(3) inconsistent with Appellate Rule 24(a), and concluded that § 1915(a)(3) was later in time and superseded Rule 24(a). Two years later, in *Callihan v. Schneider*, 6th Cir.1999, 178 F.3d 800, 802-804, the court concluded that the Style Project amendment of Rule 24(a) established Rule 24(a) as later in time, so it now superseded § 1915(a)(3). There is no explanation, no recognition of the effect of the fact that the Rule 24 revisions carried forward the rule's meaning without change, and no explanation of the reason for concluding that the supersession relationship should be reversed by a style amendment that was recognized to carry forward the once-superseded meaning.

In addition to these Sixth Circuit cases, mixed signals can be found in a few cases that responded to complex relationships between rules and statutes without apparently recognizing or responding to the complexities.

Several methods of responding to the supersession question have been considered. One would address the question in a Committee Note, perhaps attached to Rule 1 as part of a general explanation of the Style Project. Another would suggest that the Supreme Court address and negate

the supersession argument in the message transmitting the rules to Congress. Still another would be to address the question directly in a rule.

Draft Rule 86(b) represents the recommendation to address supersession directly in a rule. This approach is not vulnerable to the charge that it seeks to exercise the supersession authority of 28 U.S.C. § 2072(b) to supersede § 2072(b). No circularity is involved because there is no attempt to supersede any statute. To the contrary, the rule expresses a guide to interpreting the Style Amendments — they are not intended to affect the meaning of any rule nor to affect the supersession effect of any rule. The authority to adopt rules of practice and procedure includes authority to define what they mean.

The draft presented for discussion read:

> **(b) December 1, 2007 Amendments.** The amendments adopted on December 1, 2007, do not change the date on which any provision that conflicts with another law took effect for purposes of 28 U.S.C. § 2072(b).

The Committee Note expanded on this theme, stating in part that if there is a conflict between a rule and another law, "the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted."

Discussion focused in part on the wisdom of including any provision in the rules at all. The supersession argument is weak. One member observed that the rule "looks twisted around the axle responding to a crazy theory." More generally, it was asked whether future rules amendments would require similar provisions stating that incidental style changes do not affect supersession. On the other hand, the decisions are not as uniform or as uniformly clear as might be wished. And highly respected scholars may find the supersession argument an intriguing — and therefore troubling — concern.

The Committee agreed unanimously to develop a Rule 86(b) provision. The draft, however, should be refined. Any rule should refer to the date amendments "take effect," responding not only to the language of § 2072(b) but also to the process by which the Supreme Court adopts the rules but the effective date is delayed until Congress either lets a rule take effect by inaction or acts to establish an effective date.

Finding rule text expressions to clearly address the Style Project also came on for discussion. Other amendments are slated to take effect on December 1, 2007, in addition to the Style Project. The Style-Substance Track includes changes that were thought unsuited to the Style Project because they do change meaning, albeit in technical and very limited ways. And new Rule 5.2, reflecting uniform E-Government Act Rules, should take effect then as well. One way to address this question may be to identify the rules by numbers, in groups: Rules 1-5.1, 6-73, and 77-86. [The gaps reflect new Rule 5.2 and the decision to leave idle the numbers for abrogated Rules 74-76.]

Other questions addressed the Committee Note. The statement that the amendments do not change the meaning of any rule seems inconsistent with the Style-Substance Track amendments. The suggestion that any conflict between a rule and another law should be decided on December 1, 2007 in the same way as it would have been decided on November 30, 2007, although a correct statement of the proposition, was troubling because it seemed to overlook decisions to be made after December 1, 2007. Adding "or thereafter," however, might cause confusion by seeming to freeze a moment of comparison without recognizing future rules amendments.

Further discussion suggested that the Committee Note should focus, although briefly, on the central proposition. The Style Project and the Style-Substance amendments are not intended to change the date on which any rule provision took effect for the supersession purpose of determining priority in time. This is a matter of interpreting the rules, not an exercise of the supersession authority.

Revised rule text and Committee Note will be circulated to the Committee for review after the meeting.

Style-Substance Track

Two of the published Style-Substance amendments were abandoned. Comments on Style Rule 8(a)(3) established good reasons to maintain the seemingly archaic reference to "relief in the alternative." These words capture the many situations in which the pleader is uncertain as to the available forms of relief, or prefers a form of relief that may not be available. The proposal to amend Rule 36(b) was superseded by the clarification of Style Rule 16(e) noted above. Taken together, Style Rule 16(e) and Style Rule 36(b) apply the "manifest injustice" standard to withdrawal or amendment of an admission adopted at a final pretrial conference.

Small style changes were made in two other Style-Substance rules.

Rule 30(b)(6) was amended by deleting a comma: "a governmental agency, or other entity; * * *.

Rule 31 was amended by changing the paragraph captions in subdivision (c):

(c) Notice of Completion or filing.

(1) ~~Notice of~~ Completion. * * *

(2) ~~Notice of~~ Filing * * *."

The second sentence of the Rule 31 Committee Note also was revised: "A deposition is completed when * * * the deponent has either waived or exercised the ~~Rule 30(e)(1)~~ right of review under Rule 30(e)(1)."

Style Forms

Form 2: The Committee agreed to correct Form 2 by adding a missing opening parenthesis and by transposing the signature lines. The corrected sequence will be signature, printed name, address, e-mail address, and telephone number.

Form 10: A comment suggested that the reference to interest in the demand for judgment should read "plus interest as available under applicable law." This suggestion was rejected. The need to ascertain applicable law is plain.

Form 19: The form copyright complaint has caused difficulty throughout the Style Project. Present Form 17 was adopted under the Copyright Act of 1909 and was last amended in 1948. It has not been adjusted since enactment of the Copyright Act of 1976. The conversion to Style Project style has not been the subject of comments from people specialized in copyright practice. Department of Justice lawyers reviewed the Style Form and found a substantive error that has been corrected — paragraph 8 no longer implies that there is a common-law remedy for simply continuing to publish and sell an infringing book. It remains to be decided whether there should be a form copyright complaint at all. Discussion asked whether anyone uses the forms — at least one member has never

seen a complaint that resembles any form. The role of the forms, however, is illustrative. Judge Clark long ago observed that it is not possible to clearly define the intent of Rule 8 in rule language, but that the forms serve as pictures illustrating the nature of federal pleading requirements. Although the concern remains that the revised Style Form 19 "goes half-way, fixing half the mistakes," the Committee decided to carry Style Form 19 forward.

E-Discovery Amendments

The electronic discovery amendments scheduled to take effect on December 1, 2006, were published and adopted without thorough Style Project review, although many of the Style Project conventions were followed. Early drafts of the electronic discovery amendments followed two tracks, one fitting into the Style Project and one using the present rule language, but the two-track approach was abandoned. Publication of both versions, one recast to fit within the slightly changed structure of the Style Project discovery rules, would have created difficulty if not outright consternation. Drafting to conform the e-discovery amendments to the Style Project has proceeded separately from the main Style Project. Professor Marcus presented the fruits of his labors. He began by noting that he and Professor Kimble had worked through some of the questions presented in the agenda materials, simplifying the task facing the Committee.

Rule 26(b)(2)(B): The question raised by Rule 26(b)(2)(B) is whether the subparagraphs in subdivision (b)(2) should be rearranged. The Committee agreed to the first step, merging subparagraph (D) into subparagraph (C):

> **(C) When Required.** On motion or on its own, ~~T~~the court must limit the frequency or extent * * *.
>
> ~~**(D) On Motion or the Court's Own Initiative.** The court may act on motion or on its own after reasonable notice.~~

Professor Kimble suggested that subparagraphs (B) and (C) be transposed, so the sequence would be "(A) When Permitted," "(B) When Required," and "(C) Electronically Stored Information." This suggestion was resisted. Although the captions may seem to flow more neatly from "permitted" to "required" to e-information as an afterthought, the sequence in which issues arise in practice is better reflected in the current arrangement. (A) deals with general limits likely to be set — if at all — early in the course of managing an action. (B), focusing on discovery of electronically stored information, addresses issues that will arise as a party asserts that some information is not reasonably accessible and the parties then attempt to work out the problem. The court will be asked to act under (C) only if the parties' efforts fail. Beyond this concern, Rule 26(b)(2)(B) has become familiar to practitioners engaged in e-discovery disputes even before it has become effective. It is used to guide practice now. By the time the Style Project takes effect the (b)(2)(B) label will be well known and will be reflected in several — and perhaps many — reported decisions. It should not be changed now. The Committee agreed to retain the present sequence of subparagraphs, but also agreed to change the caption for subparagraph (B): "Specific Limitations for Electronically Stored Information."

Rule 26(f)(3): The provision for discussing electronically stored information at the Rule 26(f) conference provided the occasion to revisit an oft-discussed style question. The e-discovery amendments were deliberately written to describe the "form or forms" of production. It has been recognized throughout that "the form" of production can encompass multiple forms, corresponding to the fact that it may be inconvenient or impossible to produce different kinds of electronically stored information in a single form. But the form of production issue has proved contentious in

practice. It was decided to emphasize the frequent need to produce in different forms by referring to "form or forms." The question has been renewed in conforming the e-discovery amendments to style conventions. This issue arises repeatedly throughout the e-discovery amendments. Professor Marcus and Professor Kimble worked together to determine how best to reconcile the functional need for emphasis with the style convention to draft in the singular. In some places "form or forms" will remain — Rules 26(f)(3)(C), 34(b)(1)(C), and 45(a)(1)(B) are examples. In other places it may work to retreat to "form" — Rule 34(b)(2)(D) is an example. The SCSSC agreed to the compromise, maintaining the virtues of adhering to style conventions but recognizing the special substantive concerns that have moved the Advisory Committee in addressing this topic.

Rule 45(a)(1)(A)(iii) introduces a similar question. The 2006 amendments introduced a new concept to the text of Rule 34 — "documents" may be requested not only for inspection and copying but also for testing and sampling. Rule 45 addresses discovery from nonparties as the analogue to Rule 34 discovery among parties. It seems necessary to add "testing, or sampling" in Rule 45(a)(1)(A)(iii) as it defines the "command" of a subpoena. Need "testing and sampling" reappear whenever Rule 45 refers to production or inspection and copying? Rule 45 must be made easy to read because it is addressed to nonparties, many of whom have not been involved in the underlying action in any way that would inform them about the issues. But it has not been consistent in approaching the ways of referring to production. Although there is a risk of negative implications, it does not seem worthwhile to constantly repeat "inspecting, copying, testing, or sampling." The Committee decided to leave to Professor Marcus the task of one final review to determine how best to achieve parallel expression without unnecessary repetition.

Rule 45(d): This rule presented some questions readily answered and another that proved difficult.

As a matter of style, the phrases appearing in paragraphs (1)(B), (C), and (D) as variations on "person responding ~~to a subpoena~~" were shortened as marked by deleting "to a[the] subpoena." Paragraph (1)(B) was further amended by adding two words: "or in a reasonably usable form or forms ~~that are reasonably usable;~~" And two words were deleted from (2)(B): If information ~~is~~ produced in response to a subpoena ~~that~~ is subject to a claim of privilege * * *."

The introduction to (d)(1) proved much more difficult. The e-discovery amendments changed Rule 34(b)(2)(D) but failed to make a corresponding change in Rule 45(d)(1). The agenda materials showed the addition of a parallel change in Rule 45(d)(1): "Unless the parties and the person responding to a subpoena otherwise agree, or the court otherwise orders, these procedures apply to producing documents or electronically stored information for production: * * *." Discussion showed that the problem is more difficult in Rule 45 than in Rule 34. Even in a two-party action three persons are interested in Rule 45 nonparty subpoena. The draft rule language seems to require agreement among all parties, not only the party serving the subpoena, and the person responding to the subpoena. But in practice the party serving the subpoena commonly works out the objections with the person responding and notifies the other parties. The other parties are not put in a position to block the agreement. They can object, or can serve their own subpoenas, if the agreement threatens to deprive them of desired information. Problems remain even on this practice — different parties may have different levels of interest in the form of production, particularly with electronically stored information. A nonparty who produces in one form in response to an initial subpoena may argue that it should not be required to produce the same information in a different form in response to a second subpoena served by a different party.

In the end it was agreed that it is too late to attempt to establish in Rule 45(d)(1) a provision that draws from Rule 34(b)(2)(D) with suitable modifications to fit the nonparty subpoena situation. The draft will be simplified. Subject to further style work, (d)(1) may begin:

(1) Producing Documents or Electronically Stored Information. ~~Unless the parties and the person responding to a subpoena otherwise agree, or the court otherwise orders, t~~These procedures apply to producing documents or electronically stored information for inspection: * * *

Time Counting Project

Judge Rosenthal noted that work on the Civil Rules time provisions will have to proceed on a tight schedule over the summer. The next meeting is set for early September. Two subcommittees are designated, each to consider half of the rules. It will be important to coordinate the two subcommittees as common questions arise. But the allocation of rules between them attempts to bring together rules that obviously present common questions. Rules 50, 52, 59, and 60, for example, establish time limits for post-judgment motions. Rule 6(b) prohibits extension of any of these periods. They should be assigned to the same subcommittee, and to the same members of that subcommittee. Final recommendations must be ready in time for submission to the Standing Committee in the spring of 2007. The first step, however, is to consider the "template" prepared by the Standing Committee's Time-Computation Subcommittee. The template has conveniently been framed as Civil Rule 6(a).

The template's central feature is abolition of the "eleven-day" rule that omits intervening Saturdays, Sundays, and legal holidays in computing periods of less than eleven days. Abolition is not left to chance — the template not only says "count every day," it also says "including intermediate Saturdays, Sundays, and legal holidays." The redundant inclusion was added for fear that practitioners accustomed to the present system might otherwise hesitate to believe and rely on a simplye direction to count every day. This feature will require reconsideration of every period now set at 10 days or less. As the rule now stands, a 10-day period in fact means a minimum of 14 days. When three-day holiday weekends intervene, it can run still longer. Shorter periods, however, are more variable. The two-day period set by Rule 65(b) for notice of a motion to dissolve a temporary restraining order, for example, can readily mean two days because it expires before reaching a weekend.

Abolition of the eleven-day rule presents a question that needs to be thought through. Rule 6(a) establishes rules that "apply in computing any time period specified in these rules or in any local rule, court order, or statute." Each district may need to survey its own local rules to determine whether adjustments are appropriate. That can be managed. Greater difficulty arises with respect to statutory time periods. Two illustrations that apply to civil practice are provided by 28 U.S.C.A. § 1292(b) (ten days to seek permission for an interlocutory appeal) and § 1453(c)(1) (7 days to ask a court of appeals to accept appeal from a remand order). As to statutory periods, each of the obvious alternatives presents a problem. If nothing is done, the real duration of these statutory periods is shortened. If the eleven-day rule is preserved for statutory periods alone, practitioners may encounter even greater confusion than they encounter with the present rule. And an attempt to adopt specific periods, statute-by-statute, must inevitably overlook some statutes and seem an arrogant assertion of supersession authority as to the statutory periods that are revised. It may be argued that extension of specific statutory periods by rule simply carries forward the effects long since established by Rule 6(a), but the appearance will be different.

The Committee Note advises that the method used to measure periods expressed in days also applies to periods expressed in weeks, months, and years. The Civil Rules do not appear to define any periods in weeks or months. Civil Rule 60(b) sets an outer limit of one year for some motions. There is no definition of what is a year — whether always 365 days, or 366 days if a leap year is involved.

The template also introduces a new feature, describing a method for counting periods expressed in hours. This paragraph is a response to at least one statute, and several pending bills, that set such periods. It is a useful answer to questions that otherwise must cause great perplexity.

The template also addresses calculation of periods that must be counted backward from an end-point. Rule 56(c), for example, requires that a motion for summary judgment be served at least 10 days before the day set for the hearing. The template — as clearly expressed in the Committee Note — contemplates that this period be determined by continuing to count in the same direction. If the 10th day before the hearing day is a Saturday, the motion must be served on Friday. This approach reduces the time available to the moving party, but increases the time available to the responding party.

The Time-Computation Subcommittee recommends that the advisory committees consider two sets of provisions left unchanged by the template rule. Rule 6(a) excludes the last day of a period when weather "or other conditions" make the clerk's office inaccessible. Adapting this provision to failures of electronic filing may prove difficult. And Rule 6(e) allows an additional three days to act in response to a paper that is served by any means other than personal service, perhaps skewing strategic incentives in choosing among the modes of service. Beyond these provisions, this Committee may wish to consider the part of Rule 6(b) that prohibits extensions of some time periods. This provision causes grief to lawyers who rely on the general authority to extend without bothering to look for the specific prohibition.

A first question in approaching reconsideration of time periods is to decide whether there is any view that the collective set of time periods is too generous or too stingy. Is an overly generous approach to time responsible for undue expense and delay? Or is an unreasonably stingy approach responsible for unduly compressed work, tacit but risky disregard of deadlines, or widespread modification by agreement? Are time periods that have endured for many years simply out of touch with increasingly complex forms of litigation that cannot be managed in periods that were reasonable for simpler forms? Or is judicial management, particularly through Rule 16, sufficient to account for the cases that do not fit comfortably within the general rules? It was agreed that the overall approach in the rules is not unduly generous. In the end, the Committee agreed that there is no reason to adopt a general preference, either to generally shorten or generally extend present periods. Instead, each time period should be evaluated in its own terms.

The Rule 6(a) problem of electronic inaccessibility begins with present rule language that seems to focus on physical barriers. "[W]eather or other conditions" does not obviously address interruptions in the court's capacity to receive electronic communications, nor difficulties that may arise in a filer's computer system. This impression is reinforced by the preface: "when the act to be done is the filing of a paper in court." Although Rule 5(e) defines an electronic filing as a paper, there is no direct clarification of Rule 6(a). Rule 6(a) could be written to address "a filing in court," and "a day on which the clerk's office is inaccessible." But those steps still would not speak directly to electronic impediments to electronic filing.

The problem of filing impediments is exacerbated by the phenomenon that although lawyers know they should not wait to file on the last permissible moment, many frequently do delay.

One peculiar aspect of electronic filing impediments is that they may be more likely than physical impediments to arise for brief periods. The court's system can fail briefly, return to service, fail again, and so on. If an express provision is to be written, what should it say about the duration of the failure and about the time of day when the failure occurs? Should a one-hour failure at the end of the day be treated differently than a two-hour failure in the morning? Should this and like

problems be treated by leaving matters to the discretion of the judge? A discretionary approach does not give the comfort of clear rules, but it may be as much relief as can be tolerated. Still, it might work to allow filing the day after any day on which the court's system was unable to receive e-filings for any measurable period.

A different question was raised by asking whether we should expect lawyers to be prepared to file in paper if the e-filing system is down, and to file electronically if the court is not physically accessible? One answer was that the whole purpose of converting to e-filing would be defeated by requiring constant readiness to file in paper. "Inaccessible" should mean that the court is physically inaccessible or that e-filing is not possible. A suggestion that the Committee Note might say that there is no requirement of substitute paper filing when the e-filing system is down was met, however, with the response that such matters should be addressed in rule text or not at all.

A similar question was raised by observing that a lawyer in San Francisco can work until 9:00 Pacific Time and still file electronically just before midnight in the Southern District of New York. That opportunity becomes something that lawyers rely on. If we want them to be able to rely on it safely, we should be clear about it. It would be possible to define when a day ends. The most likely choices would be the period when the clerk's office is open or midnight. Some courts accept e-filings up to midnight. Some accept paper filings up to midnight as well, relying on a "drop box." But other courts do not have drop boxes, and the likelihood is that security considerations and electronic filing will reduce or eliminate them altogether. It is possible that variations in local circumstances make it difficult to adopt a uniform national rule. But consideration should be given — perhaps with help from the Time-Computation Subcommittee — to defining the end of the day. It may be that different definitions are suitable for paper filing and for e-filing. Midnight would do for e-filing as a national rule; for paper filings, when they are permitted, extension beyond regular business hours might be left to local rules.

Further discussion suggested that it would be better to begin afresh, departing from the "inaccessible office" concept. Three different concerns should be considered: physical inaccessibility, inability of the court's e-filing system to receive a filing, and inability of a filer's system to make a filing. Allowance also must be made for parties, such as pro se litigants, who are exempted from otherwise mandatory e-filing systems.

The question of failures in the filer's computer system raises issues that are difficult to police. Most lawyers will be honest. And allowing an extra day for filing "won't hurt anyone." "If you never excuse a sending-end crash, lawyers will have to invest huge amounts in technology." But there is room for some maneuvering or even abuse. Perhaps more importantly, express allowance for filers' problems is likely to invite disputes. It may be better to rely on the general authority to excuse a failure and to extend the time to act. That approach encounters difficulty with the time periods that cannot be extended — the 10-day periods set in Rules 50, 52, and 59 are the most sensitive. If the problem seems severe enough, it might be possible to amend Rule 6(b) to allow extension of those periods for e-filing failures. Tactical abuse of the opportunity might not be a problem, at least so long as those periods are treated as mandatory and jurisdictional. Few lawyers would risk loss of the opportunity to make those motions by relying on the court's willingness to grant an extension of a day or two to offset an e-filing mishap.

The e-filing problem should be considered by the Standing Committee Technology Subcommittee. Meanwhile, the approach to Rule 6(a) will be to adopt open terms that are not limited to physical inaccessibility but that do not directly address e-filing mishaps. The reference to filing a "paper" will be changed to a neutral "filing." Nothing will be said about problems on the filer's end.

The question of legal holidays was addressed by asking whether the definition of "legal holiday" should include a day declared a holiday by the state where the court is held. Deference to local holidays is strongly supported by the desire for uniformity among local courts. Many lawyers in Massachusetts, for example, might not pause to inquire whether Patriots Day is an occasion for closing federal courts. The Time-Computation Subcommittee should consider this question. The question is further complicated by local district practices. At least some districts are likely to close on Friday after Thanksgiving, or after a Thursday Christmas Day, even though those days do not meet any of the Rule 6(a) definitions of "legal holiday." Perhaps the definition should be revised to exclude the last day of the period whenever the clerk's office is closed on that day, no matter what the reason. At the end, a question went unanswered — is there any state that has half-day holidays? Or court that closes for half a day?

Rule 6(b) presents a different question. It forbids extension of the periods set by several rules. It continues to be the source of grief. The court cannot extend the time to file post-judgment motions under Rules 50, 52, or 59, nor can it extend the time to file a motion to vacate under Rule 60. The Rule 50, 52, and 59 periods tie to the time to appeal. Lawyers continue to lose the opportunity to win post-judgment relief because they fail to meet the 10-day deadline. At times they lose the right to appeal by relying on an untimely motion to suspend appeal time in the way that a timely motion would do. And on rare occasions they are caught in a trap when the district court mistakenly attempts to grant a forbidden extension. Reliance on an unauthorized extension as an excuse to extend appeal time under the "exceptional circumstances" doctrine almost always fails. Nonetheless, the rules are clear. And they serve important purposes, seeking to achieve prompt consideration and disposition of post-trial motions, and to expedite appeals. Any attempt to permit even limited flexibility could defeat these purposes. This question will be considered, but the case for change remains to be made.

The Time-Computation Subcommittee decided to retain the extra three days provided by Rule 6(e) for acting in response to service by means other than personal service. But it was concerned that any distinction among methods of service — or the absence of any distinction — might affect strategic choices among the methods. It seems sad that lawyers would attempt to select the method of service best calculated to reduce the effective time available to respond. But such tactical calculations seem common. This question too remains open for consideration.

Turning to one final question, it was agreed that time computations will be facilitated if individual periods are expressed in multiples of seven days. That approach will minimize the occasions when a period ends on a Saturday or Sunday. Periods now set at 10 days are likely to become 14 days, although some — such as the 10-day period set for a temporary restraining order — may require separate deliberation.

Rules 13(f), 15

Judge Baylson presented the report of the Rule 15 Subcommittee. The first proposal would amend Rule 15(a) by changing the periods in which a party may amend a pleading "once as a matter of course." Present Rule 15(a) allows amendment within 20 days if a responsive pleading is not allowed and the action is not yet on the trial calendar. The proposal would change the period to 21 days, anticipating a preference for multiples of seven in the Time-Computation Project. It also would delete the reference to the trial calendar. Many courts do not have a trial calendar, and Style Rule 40 will eliminate the former reference to the trial calendar.

More important changes are recommended for a pleading to which a responsive pleading is required. Present Rule 15(a) terminates the right to amend once as a matter of course after a

responsive pleading is served. The proposal would extend the right to 21 days after service of a responsive pleading. This expansion matches a contraction for cases in which the pleading is challenged by a motion before the responsive pleading is served. Because a motion is not a "pleading" as defined in Rule 7, a motion does not now cut off the right to amend once as a matter of course. The right persists indefinitely. Some judges regularly encounter the frustration of investing time in a motion only to find an amendment of the challenged pleading. The proposed amendment would terminate the right to amend once as a matter of course 21 days after service of a motion under Rule 12(b), (e), or (f) addressed to the pleading. The amendment will support better judicial management and expedite disposition.

The draft was improved: "A party may amend ~~a party's~~ its pleading once * * *."

Discussion began with support of the 21-day limit to amend after service of a responsive motion. This was seen as the most important part of the amendment. Doubts were expressed about extending the right to amend to 21 days after service of a responsive pleading. The opportunity may be used not for curative purposes "but to throw in bad changes." These doubts were met by the observation that a pleader recognizes the importance of the first amendment. After one amendment, it becomes more difficult to win permission to make another amendment. "Taking the first shot will be a matter for care."

Another question asked what happens to the motion if the challenged pleading is amended before the motion is decided. The answer was that practice would carry on as at present — the only difference is that the amendment must be made earlier than may happen now. The amendment may moot the motion. It may require that the motion be amended or be superseded by a new motion. The parties and court will respond as the circumstances dictate.

The proposed amendment of Rule 15(a) was approved as a recommendation for publication. The Committee Note should include a statement that the abrogation of Rule 13(f), as discussed next, establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Turning to Rule 13(f), Judge Baylson described the recommendation to abrogate. Under Rule 13(f) the court may permit a party to amend a pleading to add a counterclaim. On its face, the rule invokes the amendment process. Both Rule 15(a)(2) and Rule 13(f) speak of allowing amendment if "justice so requires." Rule 13(f) adds a set of other words not in Rule 15(a): "if [the counterclaim] was omitted through oversight, inadvertence, or excusable neglect." Despite these additional words, courts apparently administer Rule 13(f) as if it repeated Rule 15(a) verbatim. Nor is there any reason to suppose that the standards for permitting amendment should be different. Abrogation of Rule 13(f), finally, will end any lingering uncertainty whether the relation-back tests of Rule 15(c) apply to an amendment that adds a counterclaim.

Abrogation of Rule 13(f) was approved without dissent. Publication will be recommended to the Standing Committee.

Judge Baylson then turned to Rule 15(c), a topic that divided the Subcommittee. The Committee first put Rule 15(c) on the agenda in response to the suggestion of a first-year law student. The suggestion addressed a very specific point. A few courts had then taken a view of Rule 15(c)(3) that now has been adopted by several circuits. Relation back of an amendment changing the party against whom a claim is asserted requires that the new party have received notice that but for some "mistake" concerning the identity of the proper party, the new party would have been sued. "[M]istake" is read to cover only a claimant who erroneously believes that the right defendant has been identified. If the claimant knows that it cannot identify the proper defendant, there is no "mistake," but only ignorance. This interpretation could easily be changed by adding four words:

"mistake or lack of information." Consideration of this simple change, later strongly urged by Judge Becker in *Singletary v. Pennsylvania Department of Corrections*, 3d Cir.2001, 266 F.3d 186, gradually grew into an elaborate study of Rule 15(c). The study found many conceptual shortcomings in the rule, but at the same time found little indication that the shortcomings have any significant effect on practice.

One of the glaring conceptual difficulties with Rule 15(c)(3) is its reliance on notice to the new defendant "within the period provided by Rule 4(m) for service of the summons and complaint." Apart from other problems, Rule 4(m) does not set a firm 120-day period. It allows extensions. The 1991 Committee Note observes that Rule 15(c)(3) "allows not only the 120 days specified in [Rule 4(m)], but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons." Since the Note refers to an extension "pursuant to" Rule 4(m), and since the only example refers to reasons that relate only to serving process, it is easy to conclude that the incorporation of Rule 4(m) does not create an open-ended authorization to defeat the statute of limitations by granting an extension whenever the court would prefer to proceed to the merits. But it also can be argued that incorporation of Rule 4(m) creates such open-ended authority as to defeat limitations defenses in the court's discretion.

Two Subcommittee members, drawing from the view that Rule 15(c)(3) now effectively establishes discretion to suspend a limitations defense for a defendant not initially named, proposed two broad amendments. One would respond to concerns that Rule 15(c) subverts state limitations periods by limiting what now are paragraphs (2) and (3) — to become Style Rule 15(c)(1)(B) and (C) — to a claim or defense governed by federal law. The second would create discretion to allow joinder of a new defendant, to be guided by the claimant's diligence in identifying the new defendant and in seeking amendment, and by finding that the new defendant would not be prejudiced in defending on the merits. In the Style version, the proposal would be:

(c) Relation Back of Amendments.

(1) ***When an Amendment May Relate Back.*** An amendment to a pleading relates back to the date of the original pleading when: * * *

(B) the amendment asserts a claim or defense that is governed by federal law and that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or

(C) the amendment changes the name or the identity of — or adds — a party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied, and the court finds:

(i) the pleader has exercised diligence in ascertaining the name of the party;

(ii) the amendment is sought within a reasonable time after serving the pleading on the other parties against whom the claim is asserted; and

(iii) the party to be added, identified, or named will not be prejudiced in defending on the merits.

Subcommittee members who support this approach believe that it carries forward the increasingly broad set of doctrines used to suspend the running of limitations periods. Definition of the time a claim arose, concepts of estoppel and fraudulent concealment, and other approaches have undermined the seeming precision of limitations periods.

Those who oppose the proposal begin by doubting the view that the incorporation of Rule 4(m) authorizes a court to defeat a valid limitations defense by the simple act of pretending to extend the time to serve process for reasons that have nothing to do with difficulties in effecting service. Rule 15(c) applies only when the court cannot find that notice to a defendant was timely within established limitations doctrine. The court can legitimately employ all of the devices used to interpret the limitations statute first. But if it cannot find a way to escape the limitations bar, there is no reason to use Rule 15(c) to establish a new discretion. This discretion would be especially peculiar because it could not be established for a claim against a defendant properly named in the original pleading. If limitations doctrine bars the claim then, no one would contend that the Enabling Act should be used to create new limitations doctrine that allows an untimely claim if the court finds the plaintiff was diligent and the defendant would not be prejudiced.

The Enabling Act question was pressed further. One member suggested doubts about the legitimacy of present Rule 15(c)(2) and (3), and urged that an attempt to broaden relation-back rules might end up by forcing repeal of present rules that do have a legitimate function in correcting what are truly procedural errors. The decision in *Schiavone v. Fortune*, 1986, 477 U.S. 21, that present Rule 15(c) aims to correct is an example of circumstances that properly allow relation back.

Further doubts were expressed about the wisdom of tangling with the many problems identified in the supporting Rule 15 materials. At least until conceptual confusion is matched by practical difficulties, it is better to let Rule 15(c) rest as it is.

Attention turned to the narrower question whether to expand the concept of "mistake" by adding "or lack of information." The question commonly arises in actions against police officers. The plaintiff cannot identify the officer claimed to have violated the Fourth Amendment without filing suit and using discovery. The alternative of filing the action well before the limitations period has run is not always practicable. The desire to help such plaintiffs has not generated any strong support for expanding Rule 27 to authorize discovery to aid in bringing an action. An expanded relation-back doctrine seems attractive in this setting. But "the context is broader than police officers." The Department of Justice often encounters "Bivens" complaints that include numbers of "unknown-named" federal agents in circumstances that threaten broad intrusions on limitations periods.

The issues are difficult. The Committee is not shy about tackling difficult issues. But it seems wise to take on difficult issues only when there is a clear problem in practice. The balance between difficulty and need seems close.

A motion to remove further work on Rule 15(c) from the agenda was adopted, 7 yes and 5 no.

Rule 48 — Jury Polling

The Committee decided in October 2005 to give final consideration this month to a proposal to recommend publication of a jury polling provision as part of Rule 48. The draft proposal is taken nearly verbatim from Criminal Rule 31(d), honoring the preference to avoid discrepancies between parallel provisions that may generate unwarranted implications. But one departure from Rule 31(d) is necessary and another seems desirable. Rule 48 allows the parties to stipulate to a nonunanimous verdict; the Criminal Rules have no parallel provision. Criminal Rule 31(d) provides that if the poll reveals a lack of unanimity, the court may "declare a mistrial and discharge the jury." Although those words are not inaccurate in a civil trial, they are tailored to the double-jeopardy concerns that surround mistrial in a criminal prosecution. The Civil Rules refer simply to a "new trial" in the parallel provisions of Rule 49(b) that address inconsistencies when a general verdict is accompanied by interrogatories. The Committee agreed that the new part of Rule 48, to become subdivision (c), would read:

> **(c) Polling.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or assent by the number of jurors required by the parties' stipulation, the court may direct the jury to deliberate further or may order a new trial.

The question whether the court must carry through with the new trial in every case was answered with a clear "no." A properly preserved motion for judgment as a matter of law can be renewed under Rule 50(b), corresponding to what once was called judgment notwithstanding the jury's failure to agree. If that fails, a new trial order simply returns the case to pretrial mode. The parties can settle. Summary judgment is available — and the record of the first trial provides an excellent starting point for showing what evidence is available. The direction to "order a new trial" does not change the usual incidents of a new trial order.

The October meeting noted a question presented by the argument in a pending Tenth Circuit case that by requiring that the jurors be polled "individually" Criminal Rule 31(d) requires one-by-one polling apart from all other jurors. That is not the traditional method of polling. There are good reasons to conduct the poll in front of the entire jury. The argument was rejected by the Tenth Circuit. It seems safe to adhere to the language of Criminal Rule 31(d).

Rule 48 became the occasion for discussing the timing of publication. The Standing Committee has already approved publication at a future date of a modest Rule 8(c) amendment. The recommendations to publish amendments of Rules 13, 15, and 48, along with a new Rule 62.1, raise the question whether the time has come to provide some respite for the bench and bar. The e-discovery amendments and other important new rules and amendments are on track to take effect on December 1, 2006. The Style amendments still are aimed to take effect on December 1, 2007. Becoming familiar with all of these changes will take time. Proposals published for comment in 2006 would be on track to take effect on December 1, 2008. Although none of the current proposals would effect a dramatic change, it may be better to defer publication. Other advisory committees have deferred publication of proposals otherwise ready in order to assemble a larger bundle for publication. On the other hand, account must also be taken of the size of the eventual publication bundle. Work is proceeding on the Time-Computation Project. If the time rules are published in 2007, other proposals may be lost in the shadows of time. This effect would be enhanced if work

on summary judgment or pleading proceed on a pace for publication in 2007. The Committee concluded that the time for publication should be decided by the Standing Committee after consultation with Judge Levi and Reporter Coquillette.

Rules 54(d), 58(c)(2), Appellate 4

Professor Gensler reported his conclusions on the Appellate Rules Committee's recommendation that the Civil Rules be amended to impose a deadline for exercising the Rule 58(c)(2) (Style Rule 58(e)) authority to suspend appeal time when a timely motion for attorney fees is made.

The origin of Rule 58(c)(2) lies in the Supreme Court ruling that a timely motion for attorney fees does not affect the finality of a judgment on the merits. The fee demand is not a "claim" for purposes of Rule 54(b), so disposition of all "claims" in the case establishes a final judgment. Nor is the fee motion one to alter or amend the judgment, so it does not count as a Rule 59(e) motion that suspends appeal time under Appellate Rule 4. If it were not for Rule 58(c)(2), the result would be that a party wishing to appeal judgment on the merits must file a notice of appeal within the allotted time or lose the right to appeal. That result is sound when it is better to have the appeal on the merits decided before the attorney-fee questions are decided by the district court. But it can be a source of difficulty when it would be better to present both merits and the fee issues in a single appeal.

The response of Rule 58(c)(2) is to establish the district court's authority to decide whether a fee motion should suspend appeal time. It is not easy for a tyro to unravel the rule. As stated in Style Rule 58(e):

> But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

The Sixth Circuit had to wrestle with this provision in *Wikol ex rel. Wikol v. Birmingham Public Schools*, 6th Cir. 2004, 360 F.3d 604, lamenting the difficulty of working through four rules to find an answer. Its opinion also reflects the absence of any explicit provision in Rule 58 that cuts off the time for seeking an order when there is no notice of appeal. It would be possible to read the rule literally to support an argument that so long as there is a timely fee motion the court can suspend the time to appeal on the merits long after the time to appeal has run. Judgment is entered in Day 1. A timely fee motion is made on Day 12. Days march by and the time to appeal on the merits expires. On Day 150 the court rules on the fee motion. On Day 160 a party moves for an order that the timely fee motion has the effect of suspending time to appeal on the merits. Because no notice of appeal has yet been filed, Rule 58 might seem to allow the order. Few courts are likely to grant such an order. The more plausible reading, moreover, is that the court must act while it is still possible to file an appeal notice that will become effective.

The complexity of these rules is not welcome. But the experience of Appellate Rule 4 is instructive. Provisions that ought to be clear on careful reading have been continually amended to meet the challenge of careless reading. Lawyers continue to lose the opportunity to appeal nonetheless. Surrender to careless practice, however, would carry a high price. There are good reasons for complexity. Post-judgment motions should be timely made. Rule 6(b), indeed, specifically prohibits extensions of time. Appeal time is taken very seriously — only recently has there been any room even to question the "mandatory and jurisdictional" characterization. Integrating these provisions is complicated by the concern that one party should not be able to defeat another's opportunity to make a timely post-judgment motion by immediately filing a preemptive

notice of appeal. The desire to protect appellants who file premature notices of appeal, or who file a timely notice that then is suspended by a post-judgment motion, leads to further complexity. Great care must be taken in considering still further complications.

The potential gap in Rule 58 could be addressed by adding one word — the court must act before a "timely" notice of appeal has been filed and has become effective. This amendment, however, would not reduce the complexity of the rules' interplay. Other attempts to fix the rule by requiring that a motion to suspend appeal be made — that the district court act — within the original appeal time encounter the difficulty that a case order or statute may set the time to move for attorney fees beyond the appeal period.

Confronting these perplexities last October, the Committee asked the Federal Judicial Center to study actual use of Rule 58 in practice. The first phase of the study initially examined a sample of more than 8,500 cases terminated over the last eleven years in eight districts. Then it went on to examine at least 200,000 docket sheets that combine references to attorney fees, appeal, and extend. This phase found almost no evidence that Rule 58 is used to suspend appeal time. The second phase responded to the observation that reported opinions do reflect simultaneous consideration on appeal of the merits and attorney-fee awards. Nineteen of these cases were identified. The circumstances that led to combined consideration varied, but almost invariably seemed "legitimate" in the sense that the district court had not deliberately delayed entry of judgment on the merits for the purpose of resolving attorney-fee issues.

Docket-sheet research of this sort may overlook some cases. But it provides a reliable indication that courts are not encountering widespread difficulty with the tightly drawn maze established by the combination of Civil Rules 54 and 58 with Appellate Rule 4.

The Federal Judicial Center was thanked for its work and help.

The Committee concluded that there is not sufficient need to justify the risks of further rulemaking in this area. This conclusion will be reported to the Appellate Rules Committee so that further work can be undertaken if it reaches a different conclusion.

Rule "62.1" — Indicative Rulings

The "indicative rulings" question has remained on the agenda for a few years. It began with a recommendation by the Solicitor General to the Appellate Rules Committee. The Appellate Rules Committee concluded that any rule change should be made in the Civil Rules because the question arises most frequently in civil practice and also because the case-law answers are better developed in civil actions.

The clear starting point is provided by cases that deal with a Civil Rule 60(b) motion to vacate a judgment that is pending on appeal. Almost all circuits agree on a common approach. They begin with the theory that a pending appeal transfers jurisdiction of a case to the court of appeals. The district court lacks jurisdiction to affect the judgment. At the same time, there are important reasons to allow the district court to consider the motion. The appeal does not suspend the time limits of Rule 60(b) — the motion still must be made within a reasonable time, and there is a one-year outer limit if the motion relies on the grounds expressed in paragraphs (1), (2), and (3). The district court, moreover, is commonly in a better position to determine whether the motion should be granted. These competing concerns are reconciled by holding that the district court can entertain the motion and can either deny the motion or indicate that it would grant the motion if the court of appeals remands for that purpose. Some courts introduce modest variations, but the core remains

— the district court can, if it wishes, consider the motion pending appeal, but cannot grant it absent a remand for that purpose.

Although the practice is well settled under Rule 60(b), several reasons are advanced for expressing it in a rule. A national rule would eliminate the minor disuniformities among the circuits. It would give clear notice of a practice that remains unfamiliar to many lawyers and to at least a few judges. It could establish useful procedural incidents, such as a requirement that the movant inform the court of appeals both when the motion is filed and again when the district court acts on the motion. It might — although this is a sensitive issue — prove useful when the parties wish to settle pending appeal but are able to reach agreement only if there is a firm assurance that the district court is willing to vacate its judgment upon settlement.

A more general purpose would be served by adopting a new rule that is not confined to Rule 60(b) motions. A new rule — tentatively numbered Rule 62.1 — could address all situations in which a pending appeal ousts district court authority to act.

Discussion began with the impact on settlement pending appeal. The Supreme Court has suggested that a court of appeals should vacate a judgment to reflect a settlement on appeal only in "exceptional circumstances." But it suggested at the same time that without considering whether there are exceptional circumstances, the court of appeals may remand to the district court to consider the parties's request to vacate, "which it may do pursuant to Federal Rule of Procedure 60(b)." *U.S. Bancorp Mort. Co. v. Bonner Mall Partnership*, 1994, 513 U.S. 18. District-court consideration is an accepted practice. Recognizing the practice in the rule "does not put any weight on the scales; it does not make it more likely that a request to vacate will be granted." Further support was offered with the observation that "in the settlement context you want assurance the settlement will go through and the judgment will be vacated." Each of the alternative drafts supports remand for this purpose.

The Department of Justice prefers adoption of a broader rule that reaches beyond Rule 60(b). The established Rule 60(b) procedure has proved useful. It introduces a structured dialogue between the trial court and the appellate court that can be useful in other settings as well. An express rule will not create a new procedure. It will only make an established procedure more accessible. Adopting a rule confined to Rule 60(b) motions, on the other hand, might be read to imply that the same useful procedure should not be followed in other circumstances. The Rule 62.1 draft does not attempt to define district court authority. Rather, it is framed in terms that apply only when independent doctrine establishes that a pending appeal defeats the district court's authority to act on a motion. A party can file a motion in the alternative, arguing that the district court has authority and should grant the motion, and arguing alternatively that the district court should indicate that it would grant the motion if it concludes that it needs a remand to establish its authority. One complex illustration is provided by a case in which a qui tam relator appealed from dismissal for want of jurisdiction of a False Claims Act action. While the appeal was pending the Department of Justice concluded that it should intervene in the action. It would be useful to be able to win a district-court ruling that intervention would be granted if the court of appeals were to remand.

Support for the Rule 62.1 alternative was offered with a different example. One party to a class action might take an appeal. Then settlement becomes possible. It can be important to win a remand so the trial court can proceed to settlement.

It was noted that neither the Rule 60 version nor the Rule 62.1 version would affect the time limits for making motions.

A narrower question is presented by a drafting alternative. The rule can call for an indication that the district court "would" grant the motion on remand, or instead it can call for an indication that the district court "might" grant the motion. There are competing concerns. The court of appeals may be reluctant to remand without an assurance that delay of the appeal will lead to accelerated disposition of the new issues put to the district court. But the district court may be reluctant to invest heavily in full proceedings and decision when the court of appeals may proceed to resolve the appeal — and on grounds that may moot the district court's indicative grant of relief.

The question whether the district court should be able to seek remand by stating only that it "would" grant relief was approached by asking whether "would likely" is a useful compromise. This proposal was attractive, but "might" was further supported. The court of appeals, after all, is left in control. It can decide whether "might grant" provides a sufficient reason to remand in light of the progress of the appeal and the weight of the reasons for investing further district-court effort only if a remand provides assurance that an appellate decision will not defeat the effort. A district judge will have to invest more effort to determine that it "would" grant the motion than to determine that it "might" grant the motion. But perhaps that is a good thing — the court has to think harder. On the other hand, the district court has the alternative option — which must be written into the rule — to defer any consideration at all. The ability to consider the motion to the point of determining that a real investment of effort will be required to reach a final conclusion may be important. A remand in this circumstance will allow the court to go either way, to grant the motion or to deny it.

It was pointed out that if the rule published for comment is the broader version, Rule 62.1, the indicative ruling practice will be extended into territory where it is not firmly established. For this reason, it seems better to publish it with bracketed alternatives — the district court can indicate that it "[might][would]" grant relief if the case is remanded.

A motion was made to adopt the broader Rule 62.1 version. Discussion began with the observation that the most common application of this version will involve interlocutory injunction appeals under § 1292(a)(1). Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish a firm rule not only that the district court can act on a motion to "suspend, modify, restore, or grant an injunction," but also that it is the preferred forum. Several courts of appeals, however, defeat these rules by relying on the theory that an appeal ousts district-court jurisdiction of the order being appealed. One approach to this problem might be to rewrite these rules to establish that they mean what they rightly say — it is better that the first consideration be in the court of appeals. This invitation was not taken up.

It was agreed that the broad Rule 62.1 approach should not attempt to define the situations in which a pending appeal ousts district-court jurisdiction. Instead it should be drafted in terms that assume that independent sources of authority establish that the district-court lacks authority.

The motion to adopt the general Rule 62.1 approach was approved, 9 yes and none opposed.

The draft rule in the agenda materials was refined to read:

Rule 62.1 Indicative Rulings

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer consideration of the motion,

(2) deny the motion, or

(3) indicate that it [might][would] grant the motion if the appellate court should remand for that purpose.

(b) Notice to Appellate Court. The movant must notify the clerk of the appellate court when the motion is filed and when the district court rules on the motion.

(c) Indicative Statement. If the [district] court indicates that it [might][would] grant the motion, the appellate court may remand the action to the district court.

Subcommittee Report: Rule 30(b)(6)

Judge Campbell introduced the report on Rule 30(b)(6) by observing that the Subcommittee also is addressing at least two questions about Rule 26(a)(2)(B) disclosure of trial expert-witness reports.

Rule 30(b)(6) came to the agenda with a memorandum from the New York State Bar Association Committee on Federal Procedure. The Subcommittee sought further information by sending a letter to bar groups that had commented on the e-discovery amendments. Fourteen letters were received in response. Professor Marcus also researched the origins of Rule 30(b)(6) and the case law. Working with these responses, the Subcommittee identified six issues to consider. Professor Marcus drafted illustrative rule language to focus the discussion.

Some of the issues that arise in practice are case-specific and are not suitable for treatment in a national rule. For example, there is no way to say that 30(b)(6) depositions should be used at the beginning or at the end of discovery. Use early in discovery is often important to identify the sources of information to support further discovery, or to develop information needed for efficient discovery of electronically stored information. But use later in the discovery period also may be important.

Another set of issues not likely to yield to rule amendments concern the scope of the deposition. How broad or particular is the notice of the matters on which examination is requested? How clear is the deponent's designation of the matters on which a named person will testify? How closely must examination of the witness adhere to the notice of matters for examination? Responses indicate that lawyers who represent plaintiffs complain that named witnesses often are unprepared. Lawyers who represent defendants complain that notices are unclear and that questioning regularly extends beyond matters identified in the notice. "That's how adversaries are." We cannot hope to accomplish much by rules changes.

Other questions may be susceptible to rules provisions, but remain difficult. Illustrations are provided by disputes about the "binding" effect of a witness's answers and by the related questions whether supplementation after the deposition should be seen as a duty or as an opportunity.

Professor Marcus began his presentation by noting that rule 30(b)(6) is a valuable and important device. Although there are legitimate concerns about its implementation, the concerns do not of themselves mean that ameliorative reform is possible. The topics that became the focus of Subcommittee deliberation seem the best way to introduce the topic.

One suggestion, advanced by David Bernick at the October meeting, was that Rule 30(b)(6) should to limited to questions that locate the sources of proof. There was no Subcommittee support for this approach. The original purpose revealed by the 1960s deliberations that led to adoption of Rule 30(b)(6) in 1970 is to go further. These depositions were analogized to Rule 33 interrogatories, which clearly go further.

A second set of suggestions arise from disputes about treatment of a witness's deposition statement as a binding "judicial admission." Many bar groups find this an important problem. Some groups say there is not enough binding effect, and that the rule should be changed to expand binding effects. Other groups think there is too much binding effect now. The cases do not establish a clear picture of present practice. The case most often cited for a strict "judicial admission" approach is *Rainey v. American Forest & Paper Assn.*, D.D.C.1998, 26 F.Supp.2d 83. But the *Rainey* decision is tied to failure to prepare the witness, emphasizing that a corporation named as deponent has a duty to prepare its witness "to be able to give binding answers on its behalf." Other decisions find that the "sounder view" permits a party to contradict the deposition testimony of its designated witness, subject to impeachment use of the deposition testimony. This approach at times seems to treat the designated witness in the same way as a deponent directly named in the notice, and may include the "sham affidavit" approach that authorizes a court to disregard a self-serving and affidavit that attempts to defeat summary judgment by contradicting the affiant's deposition testimony. Moore's Treatise, on the other hand, says that the designated witness's testimony binds the entity. This is a subject that could be addressed by amendment.

A Subcommittee member observed that the bar group comments provided "excellent input" on the question of binding effect. The Subcommittee seemed to agree that the better rule permits an entity named as deponent to present evidence that contradicts the deposition testimony of its designated witness. Impeachment by use of the deposition is available. The question may arise more frequently — perhaps much more frequently — than published opinions reflect. And the statement in the Moore's Treatise will be cited every day by lawyers seeking to take advantage of a purported admission.

Another comment addressed the "sham affidavit" rule, observing that this "is not a Rule 30(b)(6) problem." It is a form of judicial estoppel. There is no need to amend Rule 30(b)(6) to address this doctrine.

A Committee member thought it appropriate to leave these questions to the courts. But it seemed surprising that the letters did not speak to "the problem I encounter most." Rule 30(b)(6) depositions are used to penetrate work-product protection and privilege. To educate a witness for the deposition you have to educate the witness in counsel's work product. There are difficult questions about the extent of the duty to teach the witness about things counsel has found in preparing for trial.

Discussion of work-product problems began with a reminder that work-product does not protect fact information uncovered by counsel in preparing for trial. The information is subject to discovery by deposing individual witnesses, by interrogatory, by production of documents, and by requests to admit. It is equally subject to discovery through Rule 30(b)(6). The question instead goes to matters of theory, contention, and strategy.

The bar groups were asked to comment on work-product issues, and provided some comments. The American College of Trial Lawyers asked whether Evidence Rule 612 applies at all — are documents used to prepare a witness used to refresh memory, or instead to educate? The New York State Bar Association memorandum that began this project focused on work-product questions

and attempts to commit the entity to defined contentions through the designated witness. These questions are difficult. The memorandum by Gregory Joseph in the Evidence Rule 502 agenda materials remarks that a lawyer should assume that the book of materials used to prepare the designated witness will be subject to discovery. This question relates to one of the questions presented by Rule 26(a)(2)(B): is a party obliged to disclose the briefing book used in helping a trial-expert witness to develop expert opinions?

Professor Marcus returned to the "judicial admissions" problem by pointing to a draft in the agenda materials. This draft would add two new sentences to Rule 30(b)(6): "The responding organization must adequately prepare the person or persons designated to testify so that they can testify as to the information known or reasonably available to the organization. If such preparation is adequately done, the court may not treat answers given during the deposition as judicial admissions." This draft "mediates between those who want a clearer duty to prepare and those who want to address admission effects in the Rule." The rule text could be supplemented by Committee Note discussion of the nature of the duty to prepare the witness.

The question of binding effect also can be approached through Rule 26(e) by addressing the duty to supplement testimony provided under Rule 30(b)(6). Rule 26(e) could establish a duty to supplement or correct testimony by a Rule 30(b)(6) designated witness, and perhaps establish a right to "retake" the deposition free of the Rule 30(a)(2)(B) need for permission to examine the same witness twice. The duty to supplement would tie directly to Rule 37(c)(1), which prohibits use of testimony that a party failed to provide under the duty to supplement. The American Bar Association Litigation Section was circumspect in addressing this possibility. One concern is that an explicit duty to supplement might come to be used as an opportunity to delay responses — in effect the answers at deposition would be "I don't know; we'll get back to you later on that."

The question of scope could be addressed by adding a sentence to Rule 30(b)(6): "Questioning during the deposition must be limited to the matters for which the person was designated to testify." The bar groups provided varying reports. Some said that questioning beyond the designation occurs frequently; others said that judges never allow it; some said that such questioning occurs, often with the acquiescence of all parties, because it is more sensible than requiring that the same witness be named in a second notice and deposed as an individual. Still others raised the question whether questioning that extends beyond the designation automatically converts the deposition into a second deposition for purposes of the presumptive limit to ten depositions.

Another suggestion, responding to concern about contention questions, is that Rule 30(b)(6) should be amended to state that the persons designated by the entity named as deponent "must testify to factual information known or reasonably available to the organization." Administration of this provision might prove difficult. What should be done, for example, with a question that asks for "all facts that support paragraph 4 of the complaint"?

Perhaps predictably, a number of comments addressed application of the rules that govern the number and duration of depositions. Some of the answers are clearly established now, and seem right. The Committee Note to Rule 30(a) states that a 30(b)(6) deposition counts as one deposition "even though more than one person may be designated to testify." The Committee Note to Rule 30(d) says that the seven-hour limit applies separately to each person designated. But there is no clear answer to the question whether a second 30(b)(6) deposition of the same organization is subject to the Rule 30(a)(2)(B) requirement for permission or stipulation if "the person to be examined already has been deposed in the case."

Complaints about the difficulty of preparing one or more witnesses to testify about information "known or reasonably available to the organization" might be addressed by amendment. In preparing Rule 30(b)(6), the Committee rejected a version that called for testimony on information "readily obtainable" by the organization. It would be possible to soften the rule now by referring to information "readily" available. But — particularly by relieving the organization of the duty to prepare the witness on all information "known" to the organization — this might reduce the value of 30(b)(6) too far.

Discussion began with an observation that one judge encounters contention questions on Rule 30(b)(6) depositions "all the time." People would rather bind the corporation by asking deposition questions of a witness than by using interrogatories. Interrogatory answers will be carefully framed by a lawyer. A witness, no matter how well prepared, cannot be expected to be as careful or as precise. Questioners "use it to beat people over the head."

There may be some relation between contention questions and complaints that deposition notices are too broad, or that notices are too specific but on too many topics, or that questions are asked on topics unrelated to the notices. But it is difficult to improve on the drafting of the present rule in these respects. Self-control by attorneys, and when necessary control by the court, are the most effective devices.

It was suggested that part of the response to concern about admissions and contention questions may lie in clearly recognizing a right to supplement deposition testimony. Any other witness has a right to supplement deposition testimony at trial.

A different slant was taken on contention discovery by suggesting that if a contention question is asked during early discovery the proper answer should be that the information is not yet reasonably available. If need be, a protective order could be sought on this ground.

The evolution in Rule 30(b)(6) practice was noted. For many years these depositions were used to identify sources of information to be sought by other discovery methods. That use responded to the purpose that launched the rule. But today these depositions are used for gamesmanship. "Tell me everything you've learned about the case." Rule 33 interrogatories are not extensively used in "big" cases. A lawyer will draft an answer that cannot be usefully read to a jury. The deposition "is just a shortcut to get inside what other lawyers have done." It is used to trip up the witness.

A defense of 30(b)(6) depositions was offered. They can be a useful short cut, compared to the "long cut" by interrogatories and individual depositions. Not only are more costly modes of discovery avoided. A Rule 30(b)(6) deposition may be the only way to get straight answers.

The Subcommittee agreed that it should work further on the use of Rule 30(b)(6) deposition testimony as a judicial admission. Judge Campbell asked whether it also should work further on supplementing the testimony, noting that under present Rule 26(e) the only occasion for supplementing deposition testimony arises from deposition of a trial-expert witness. If supplementation is required, Rule 30(b)(6) depositions would be treated differently from other depositions. That may not be a good thing. And it would not be good to allow supplementation only on showing good cause. The deposition remains a process of questioning a human witness. A person answering questions may not answer perfectly the first time around. A right to supplement of course affects potential use of an original deposition answer as a judicial admission. In any event, if rule language is adopted to address the admission question, supplementation will be implicated whether or not an explicit rule provision addresses supplementation.

Judge Campbell summed up the discussion. The Subcommittee will not address questions such as the number of depositions or second depositions of the same organization. It is widely recognized that the organization has a duty to prepare the witness; there is no need to elaborate in the rule. One proposal from a bar group recommended adoption of the California approach, which requires designation of the "most knowledgeable" person. To the extent that approach is different from Rule 30(b)(6), there is little apparent reason to change direction now. Rule 30(b)(6) is functioning well enough. A Committee member observed that in practice the California rule is not much different from Rule 30(b)(6) anyway.

The Subcommittee will consider the admission issue, noting that the cases seem to be moving toward the conclusion that the deposition testimony is not binding. It also will consider the "work-product" issues.

Rule 26(a)(2)(B)

Jeffrey Greenbaum reported on the American Bar Association Litigation Section report on discovery of work-product and privileged information revealed to a trial-expert witness. The report is not yet official ABA policy; it will be submitted to the House of Delegates with a recommendation for adoption.

The cases divide on protecting by privilege communications between an expert trial witness and counsel.

Discovery of draft expert reports also is treated in different ways. Some judges order at the beginning of a case that drafts be preserved. Some experts flatly refuse to keep drafts, or even to make a draft. A cautious attorney simply talks with the expert, or views a draft report only on a computer screen. Experts often scrub drafts from their hard drives. The difficulties created by these practices are reflected by part of the 1993 Committee Note that recognizes that an expert witness may need an attorney's help in preparing a disclosure report, offering an automobile mechanic as an example.

The ABA recommends adoption of a national rule to establish uniform practice. The rule should bar discovery of draft reports. And it should protect work-product involved in exchanges between the attorney and the expert trial witness. Disclosure and discovery should still be available as to the expert's analysis and the data on which it is based. The expert can be cross-examined. This system will protect against the disadvantages that arise when a well financed party is able to hire two sets of experts, one set acting as trial consultants protected by work-product, while another party is able only to hire trial experts who will be subject to full discovery. New Jersey has had such a rule for a few years, and it works well.

It was noted that Massachusetts has a rule similar to the New Jersey rule, and reported that it works well.

Professor Marcus noted that the 1993 Committee Note operated on the premise that "the collaborative process of preparing expert testimony" should be in the open. Disclosure and discovery are advanced as important counterbalances to the adversary character of expert testimony.

The question whether to permit discovery leads to the further question whether a different rule should apply at trial. Is it desirable to bar disclosure or discovery of something that can be sought at trial?

The Subcommittee will study the questions raised by the ABA report. It also will continue to study the distinctive treatment that Rule 26(a)(2)(B) extends to expert trial witnesses who are

employees of a party and whose duties as employees do not regularly involve giving expert testimony.

Ongoing Project: Rule 56

Judge Rosenthal reported that work on the Rule 56 project has proceeded. The primary work is reflected in a thorough report by James Ishida that distills a great amount of work in collecting and organizing local rules on summary judgment. The local rules take a wide range of approaches. There may be much to be learned from them in revising the national rule.

Rule 56 practice has developed away from the practices that might be inferred from the rule text. The Committee has been reluctant to reconsider the standard for deciding whether there is a genuine issue of material fact. But there is continuing interest in revising the procedures for considering a Rule 56 motion, for determining whether there is a genuine issue.

The Committee agreed that a proposal focusing on Rule 56 procedures should be prepared for consideration at the fall meeting.

Ongoing Project: Rule "8" — Notice Pleading

Judge Rosenthal recalled the decision that summary judgment should be considered in tandem with notice pleading. The common core involves identifying the optimal use of pleading, discovery, and summary judgment to identify and dispose of cases that do not merit trial. An adequate opportunity for discovery must be provided, but there may be room to improve present practice.

The primary work since the last meeting is reflected in a report by Jeffrey Barr on "heightened pleading" decisions. Supreme Court decisions rule that heightened pleading can be required only when demanded by rule or statute. Otherwise notice pleading governs. But the opinions recognize that there may be unmet needs for heightened pleading that could be addressed by amending the pleading rules. The Barr memorandum surveys many recent decisions, including not only those that reject heightened pleading but also some that gamely continue to require it. It is excellent work.

A survey of express statements in opinions may not tell the whole story. Even as courts continue to say that they do not require heightened pleading, some opinions seem to demand levels of detail far different from the pictures painted by the "Rule 84" Forms. Practice seems to reflect the views of at least some judges that some forms of litigation require more careful initial screening than bare notice pleading supports.

The initial work has addressed several options. "Fact" pleading might be restored, abandoning the 1938 experiment with what is commonly called "notice" pleading. Or Rule 8 might be amended to give teeth to the requirement that the plain and simple statement show that the pleader is entitled to relief. Or specific rules might be adopted for specific claims, in the mode of Rule 9(b). Or, failing any general approach, an attempt might be made to reinvigorate Rule 12(e), moving it back toward the former bill of particulars.

Initial discussion suggested that there is not much enthusiasm for reverting to fact pleading. Nor is there much enthusiasm for attempting a general redefinition of notice pleading. It does not seem likely that proposals to abandon notice pleading, or to redefine it, would survive the full course of Enabling Act scrutiny. Some observers believe that courts will de facto follow variable standards, generally requiring more exacting pleading standards in some types of cases. And at least some of

those who hold this view conclude that the practice is a good thing. But many of them also believe that it would be pointless to attempt either to enshrine this approach in rule text or to extirpate it.

The alternative of adopting specific pleading rules for specific types of claims was considered next. It is possible to expand Rule 9(b) to require particularized pleading of claims in addition to claims of fraud or mistake. Or Rule 9 could be expanded by adding additional subdivisions. Or a provision might be added to recognize authority to adopt local pleading requirements in the manner of the standing orders or local rules that require "case statements" in actions under the Racketeer Influenced and Corrupt Organizations Act.

Two difficulties were identified with the task of developing claim-specific pleading rules. One problem arises from the need for detailed knowledge about the underlying substantive law and the practicalities of litigating claims arising under that law. Another problem arises from the perception that the seemingly procedural pleading rules are surreptitiously motivated by distaste for the substantive rights or defenses subjected to higher standards.

Greater enthusiasm was expressed for exploring an expansion of Rule 12(e). The draft in the agenda materials would authorize an order for a more definite statement when more particular pleading will support informed decision of a motion under Rule 12(b), (c), (d), or (f). This case-specific approach might improve the position not only of defendants but also of plaintiffs who now must contend with unstated practices that in operation require heightened pleading without useful guidance.

Federal Judicial Center Report

Thomas Willging reported on the preliminary phases of the Federal Judicial Center study of the Class Action Fairness Act. He began by noting that class actions have been discussed at every meeting of the Advisory Committee that he has attended since 1994. The interim report was prepared by Willging with Emery lee and others.

The first phase will study filing practices. The interim report covers three districts; it is hoped that all districts can be covered by next September. They also hope to extend the study beyond the current time limit, June 30, 2005.

One surprise has been the level of activity. In the 1994 study of four districts, they found 407 cases terminated over a period of 2 years. For only three of those districts, this study shows 1,871 filings over a period of four years. That looks like a big increase. The figure will be broken down into smaller components as the study proceeds.

Changes in the rate of filings over the four-year period show that in two of the three districts, Northern California and Northern Illinois, filings increased in the short period between the effective date of CAFA, February 18, 2005, and June 30. They had expected there would be a lag before filings increased, in light of rumors that lawyers were accelerating the time of filing state-court actions before February 18 to defeat removal.

Separate attention is being paid to state-based contract and tort actions to see whether these actions will be shifted to federal courts after CAFA. Current filings are very low. This establishes a clear base for comparison.

Removals will be examined closely. The experience has been that there is a low level of diversity filings and a low level of removals. This pre-CAFA experience may make it easier to examine the causal effects of CAFA.

Next Meeting

The next meeting is scheduled for September 7 and 8 in Nashville, Tennessee, at the Vanderbilt Law School. The dates will be changed only if it is possible to reduce further the number of scheduling conflicts.

Vote After Meeting

The questions left open for final decisions by electronic voting after the meeting were submitted to the Committee on May 30 and resolved by balloting that concluded on June 1.

The Committee approved revised text for Rule 86(b), style changes to integrate into the Style Rules the electronic-discovery amendments scheduled to take effect next December 1, expanded Committee Note language for Style Rule 1 that provides a general description of the purposes and methods of the Style Project, and restoration to the Committee Note for Style Rule 65(d) of a paragraph explaining resolution of the ambiguity described above. The final texts of these new materials are attached.

Respectfully submitted,

Edward H. Cooper
Reporter

3-A

MEMORANDUM

DATE: August 21, 2006

TO: Time-Computation Subcommittee
Advisory Committee Chairs and Reporters

CC: Judge David F. Levi
John K. Rabiej

FROM: Judge Mark R. Kravitz
Catherine T. Struve

RE: Additional Revisions to Time-Computation Template

Attached is a draft of the time computation template, redlined to show changes from the version circulated on July 26. If you have already reviewed the version that we circulated to some on August 10, then you need only review the changes discussed in items 1 through 4 below; the other items mentioned here were discussed in the August 10 memo. If you have not seen the August 10 memo, items 1 through 7 below reflect changes made since the July 26 version:

1. As in the August 10 draft, subdivision (a)(4)'s definition of "last day" has been revised (as has the Note), to reflect the fact that courts currently permit after-hours filing if the filer seeks out a court official and hands the filing to that official in person. Cathie's memo, attached, provides more details concerning this issue.

   The current template draft is designed to preserve the current possibility of after-hours filing by hand delivery to a court official. The draft is problematic, however, in that it might encourage lawyers (or pro se litigants) to seek court officials out at their homes – a possibility that poses security concerns. The following are some potential options (not currently reflected in the draft template) for addressing those concerns. One approach might be to specify that (a)(4)(B)(ii) sets a default rule that can be altered by a local rule that designates a specific means of filing after hours. Another way of addressing the problem might be to delete the current text of (a)(4)(B)(ii) and instead insert text that refers to 28 U.S.C. § 452's provision that the courts shall be deemed always open; the Note could then explain that some courts have read Section 452 to permit filing by personal delivery to a court official, and could point out that courts can instead designate by local rule an alternative method of after-hours filing that comports with Section 452.

2. Subdivisions (a)(1)(A), (a)(2)(A), and (a)(3) now refer to deadlines triggered by an "event," rather than by an "act, event, or default." "Event" is broad enough to encompass

"acts" and "defaults." The Note to subdivision (a)(1) has been revised to make clear that this change, made for brevity's sake, is not intended to produce a change in meaning.

3. New subdivision (a)(3) defines "next day" in order to clarify how counting backward works. (N.B.: Subdivision (a)(3) has been altered since the August 10 version.) The proposed 'forward or backward' language in (a)(1)(C) and (a)(2)(C) has been deleted, and the Note's illustration of forward and backward counting now appears in the discussion of subdivision (a)(3).

4. The Note to subdivision (a)(1) previously referred to the counting of "every other day." To avoid the possibility of an argument that this means "alternating days," the Note has been changed to refer to the counting of "all other days."

5. Subdivision (a)(1) has been revised to reflect the fact that its time-computation approach applies to periods stated in units longer than days – e.g., weeks, months or years.

6. Subdivision (a)(2)(C) has been revised because Ed Cooper pointed out that under the prior formulation, a filing deadline of 11:17 a.m. on Day 1 would be extended until 11:17 a.m. on Day 2 if, for example, the court's system went down from 1:00 to 5:00 p.m. on Day 1 (after the deadline was to expire). The new language avoids that problem, but as Ed has noted it does raise another question: How would this provision treat the filer with a deadline of 11:17 a.m. who is unsuccessful in her attempts to file because the system is down from 9:00 to 11:15 a.m. on the relevant day? These problems may clear up, though, as we proceed to define "inaccessibility."

7. In subdivision (a)(5), the draft no longer deletes state holidays from the definition of "legal holiday."

We intend to make some further changes, which we will circulate as soon as possible. We will draft proposed language that would cover both physical and electronic inaccessibility of the clerk's office. We will also give further consideration to the possibilities for dealing with statutory deadlines. In the meantime, we welcome your comments on the attached.

Rule 6. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute.

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

(A) exclude the day of the ~~act,~~ event~~, or default~~ that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a day on which the clerk's office is inaccessible. When the last day is excluded, the period continues to run until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(2) ***Period Stated in Hours.*** When the period is stated in hours,

(A) begin counting immediately on the occurrence of the ~~act,~~ event~~, or default~~ that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end ~~at a time~~ on a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a time when ~~day on which~~ the clerk's office is inaccessible, then continue the period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(3) ***"Next Day" Defined.*** The "next day" for purposes of (a)(1)(C) and (a)(2)(C) is determined by continuing to count forward when the period is measured after an event and backward when the period is measured before an event.

(4) ***"Last Day" Defined.*** The last day concludes:

(A) (i) for electronic filing, at midnight in the court's time zone; and (ii) for filing by other means, at the closing of the clerk's office or the time designated by local rule, unless

(B) (i) the court by order in the case sets a different concluding time; or (ii) a paper filing made after the closing of the clerk's office is personally delivered prior to midnight to an appropriate court official.

(5) ***"Legal Holiday" Defined.*** "Legal holiday" means:

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

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

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. If, for example, a ~~rule or order requires that a~~ filing is required to be made "no later than November 1, 2007," then the filing is

due on November 1, 2007. But if a ~~rule or order requires that a~~ filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. ~~(~~It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).~~)~~

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days ~~10 days or less~~. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the ~~act, event, or default~~ that triggers the deadline is not counted. ~~Every~~ All other days — including intermediate Saturdays, Sundays, and legal holidays — ~~is~~ are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(3). Where present subdivision (a) refers to the "act, event, or default" that triggers the deadline, new subdivisions (a)(1), (a)(2) and (a)(3) refer simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days ~~10 days or less~~ will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

When the act to be done is a filing in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office, and the deletion from the text is not meant to suggest otherwise.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the ~~act, event, or default~~ that triggers the deadline. The deadline generally ends

when the time expires. If, however, the deadline ends at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. ~~[~~Periods stated in hours are not to be "rounded up" to the next whole hour.~~]~~ ~~(Again, w~~When the act to be done is a filing in court, and inaccessibility of the clerk's office occurs on the day the deadline ends and prior to the time the deadline ends, that day ~~a day on which the clerk's office is not accessible because of the weather or another reason~~ is treated like a Saturday, Sunday, or legal holiday.~~)~~

Subdivision (a)(3). New subdivision (a)(3) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an ~~act, event, or default~~. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an ~~act, event, or default~~. See, e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(4)~~(3)~~. New subdivision (a)(4)~~(3)~~ defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4)~~(3)~~ does not apply to the computation of periods stated in hours under subdivision (a)(2).

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Courts have held that these provisions permit after-hours filing so long as the filing is made by locating an appropriate official and handing the papers to that official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941) (after-hours filer "may seek out the clerk or deputy clerk, or perhaps the judge"). Subdivision (a)(4)(B)(ii) carries forward that view. Some courts have also held after-hours filing to be effective when, for example, the filing is time-stamped and placed in an depository maintained by the clerk's office. *See, e.g., Greenwood v. State of N.Y., Office of Mental Health*, 842 F.2d 636, 639 (2d Cir. 1988). Under subdivision (a)(4)(A)(ii), methods such as time-stamped placement in a depository will be effective if a local rule so provides. Such local rules should take into account the difficulties that can arise if a drop box lacks a device to record the date and time when a filing is deposited. *See, e.g.*, In re Bryan, 261 B.R. 240, 242 (9th Cir. BAP 2001).

Subdivision (a)(5)~~(4)~~. New subdivision (a)(5)~~(4)~~ defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

MEMORANDUM

DATE: August 10, 2006

TO: Time-Computation Subcommittee
Reporters to the Standing Committee and Advisory Committees

CC: Judge David F. Levi
John K. Rabiej

FROM: Judge Mark R. Kravitz
Catherine T. Struve

RE: Further Revisions to Time-Computation Template

Thank you for your input on the revised template. Attached is a draft that incorporates your suggestions. The draft is redlined to show changes from the version circulated on July 26:

- Subdivision (a)(1) has been revised to reflect the fact that its time-computation approach applies to periods stated in units longer than days – e.g., weeks, months or years.

- Subdivision (a)(2)(C) has been revised because Ed Cooper pointed out that under the prior formulation, a filing deadline of 11:17 a.m. on Day 1 would be extended until 11:17 a.m. on Day 2 if, for example, the court's system went down from 1:00 to 5:00 p.m. on Day 1 (after the deadline was to expire). The new language avoids that problem, but as Ed has noted it does raise another question: How would this provision treat the filer with a deadline of 11:17 a.m. who is unsuccessful in her attempts to file because the system is down from 9:00 to 11:15 a.m. on the relevant day? These problems may clear up, though, as we proceed to define "inaccessibility."

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- Subdivision (a)(4)'s definition of "last day" has been revised (as has the Note), to reflect the fact that courts currently permit after-hours filing if the filer seeks out a court official and hands the filing to that official in person. Cathie's memo, attached, provides more details concerning this issue.

- In subdivision (a)(5), the draft no longer deletes state holidays from the definition of "legal holiday."

We intend to make some further changes, which we will circulate as soon as possible. We will draft proposed language that would cover both physical and electronic inaccessibility of the clerk's office. We will also give further consideration to the possibilities for dealing with statutory deadlines. In the meantime, we welcome your comments on the attached.

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

(A) exclude the day of the act, event, or default that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a day on which the clerk's office is inaccessible. When the last day is excluded, the period continues to run until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(2) ***Period Stated in Hours.*** When the period is stated in hours,

(A) begin counting immediately on the occurrence of the act, event, or default that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end ~~at a time~~ on a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a time when ~~day on which~~ the clerk's office is inaccessible, then continue the period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(3) ***"Next Day" Defined.*** The "next day" for purposes of (a)(1)(C) and (a)(2)(C) is determined by continuing to count in the same direction — forward when computing a forward-looking period and backward when computing a backward-looking period.

(4) ***"Last Day" Defined.*** The last day concludes:

(A) (i) for electronic filing, at midnight in the court's time zone; and (ii) for filing by other means, at the closing of the clerk's office or the time designated by local rule, unless

(B) (i) the court by order in the case sets a different concluding time; or (ii) a paper filing made after the closing of the clerk's office is personally delivered prior to midnight to an appropriate court official.

(5) ***"Legal Holiday" Defined.*** "Legal holiday" means:

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

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

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. If, for example, a ~~rule or order~~

~~requires that a~~ filing is required to be made "no later than November 1, 2007," then the filing is due on November 1, 2007. But if a ~~rule or order requires that a~~ filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. (It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).)

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days ~~10 days or less~~. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the act, event, or default that triggers the deadline is not counted. Every other day — including intermediate Saturdays, Sundays, and legal holidays — is counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(3).

Periods previously expressed as less than 11 days ~~10 days or less~~ will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

When the act to be done is a filing in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office, and the deletion from the text is not meant to suggest otherwise.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the act, event, or default that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. [Periods stated in hours are not to

be "rounded up" to the next whole hour.] ~~(Again, w~~When the act to be done is a filing in court, and inaccessibility of the clerk's office occurs on the day the deadline ends and prior to the time the deadline ends, that day ~~a day on which the clerk's office is not accessible because of the weather or another reason~~ is treated like a Saturday, Sunday, or legal holiday.~~)~~

Subdivision (a)(3). New subdivision (a)(3) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an act, event, or default. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an act, event, or default. See, e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(4)~~(3)~~. New subdivision (a)(4)~~(3)~~ defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4)~~(3)~~ does not apply to the computation of periods stated in hours under subdivision (a)(2).

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Courts have held that these provisions permit after-hours filing so long as the filing is made by locating an appropriate official and handing the papers to that official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941) (after-hours filer "may seek out the clerk or deputy clerk, or perhaps the judge"). Subdivision (a)(4)(B)(ii) carries forward that view. Some courts have also held after-hours filing to be effective when, for example, the filing is time-stamped and placed in an depository maintained by the clerk's office. *See, e.g., Greenwood v. State of N.Y., Office of Mental Health*, 842 F.2d 636, 639 (2d Cir. 1988). Under subdivision (a)(4)(A)(ii), such methods will be effective if a local rule so provides. Such local rules should take into account the difficulties that can arise if a drop box lacks a device to record the date and time when a filing is deposited. *See, e.g.*, In re Bryan, 261 B.R. 240, 242 (9th Cir. BAP 2001).

Subdivision (a)(5)~~(4)~~. New subdivision (a)(5)~~(4)~~ defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

3-B

Adjusting Time Periods in Specific Rules

In 2005, the Standing Committee created a Time-Computation Subcommittee and charged it with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. Judge Mark R. Kravitz chairs the subcommittee. The Time-Computation Subcommittee has prepared a template that seeks to establish a uniform approach for counting time.

Each of the Advisory Rules Committees is now reviewing the deadlines and time periods within its own set of rules for consistency with the template and to ensure that they are reasonable and clear. The Civil Rules Committee created two subcommittees, A and B, and assigned them to review the time provisions in specific rules.

The subcommittees have reviewed their assigned rules, conferred on a number of occasions over the past several months, and arrived at recommendations. The work of the subcommittees is reflected in a chart that identifies time-related rule provisions, recommends changes, and provides comments on the reasons for recommended changes. Because the Civil Rules Committee has proposed restyled rules, the chart addresses the text of both the existing and restyled rules.

The subcommittees recommend that time periods of less than 30 days be converted to 7-day intervals for ease of time computation, but that time periods of 30 days or greater remain unchanged. The subcommittees concluded that it makes little sense to convert periods of 60, 90, or 120 days to 7-day intervals, and that the 30-day interval is sufficiently well established to remain unchanged.

In the course of reviewing various rules, the subcommittees identified time-related issues that may have implications beyond mere time counting. These issues have been identified in the "comment" section of the subcommittees' chart and will be discussed, along with the subcommittees' other proposed changes, at the Civil Rules Committee meeting in September, 2006.

TIME COUNTING PROJECT WORKSHEET
Subcommittee A

Rule	Current Rule with Proposed Change	Style Rule with Proposed Changes	Comment	Assigned
1	No time provision			Campbell
2	No time provision			Campbell
3	No time provision			Campbell
4.1	No time provision			Campbell
4(d)(2)(F) *4(d)(1)(F)*	Plaintiff must allow defendant a reasonable time to return waiver of service, "which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States"	No change.	No change to 30, 60, 90 etc.	Campbell
4(d)(3) *4(d)(3)*	"A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States"	No change.	No change to 30, 60, 90 etc.	Campbell
4(i)(3) *4(i)(4)*	"The Court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve"	No change.	No fixed time period or deadline.	Campbell
4(m) *4(m)*	"If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint . . . "	No change.	No change to 30, 60, 90 etc.	Campbell
5	No time provision			Campbell
5.1	Party raising constitutional question must promptly file a notice	No change.		Campbell
5.1	Attorney General must intervene within	No change.	Questions were raised as to	Campbell

	60 days after the notice is filed or after the Court certifies the challenge, whichever is earlier		whether this provision places too much time pressure on the AG. The subcommittee decided not to recommend a change to this recently-created rule, but the AG may raise it for discussion in the future.	
6(b) *6(b)(2)*	Court "may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them."	No change	Defer to other subcommittee on whether changes should be made to the time periods in Rules 50, 52, 59 and 60. On the question of whether courts should be granted greater flexibility in Rule 6(b) (restyled Rule 6(b)(2)), see separate memo by Ed Cooper.	Hagy
6(d) *6(c)(1)*	"A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than ~~5~~ **14** days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court."	"A written motion and notice of the hearing must be served at least ~~5~~ **14** days before the time specified for the hearing, with the following exceptions:".	Consistency and ease of computation. The subcommittee decided that the restyled rule sufficiently makes clear that this time limit will not apply to TROs through its reference to motions that "may be heard ex parte." Since the last subcommittee conference call, however, Judge Hagy has raised a relevant question: what about TROs not heard ex parte? Do we need a specific exception for Rule 65? The subcommittee also decided that an	Hagy

			exception should not be made for local rules, consistent with the general view that rulemaking by local rules should not be encouraged.	
6(d) *6(c)(2)*	"When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than ~~1~~ **7** days before the hearing, unless the court permits them to be served at some other time."	"An affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least ~~1~~ **7** days before the hearing, unless the court permits service at another time.	Consistency and ease of computation. Time extended to 7 days because one-day notice served on a Friday becomes no notice under the template. Same question as above: do we need a specific exception for Rule 65?	Hagy
7	No time provision			Hagy
7.1	"File a 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court."	No change	Not a counting issue	Hagy
8	No time provision			Hagy
9	No time provision			Cicero
10	No time provision			Russell
12(a)(1)(A) *12(a)(1)(A)(i)*	"Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer within ~~20~~ **21** days after being served with the summons and complaint"	"A defendant must serve an answer: within ~~20~~ **21** days after being served with the summons and complaint;"	Consistency and ease of computation.	Gensler
12(a)(1)(B) *12(a)(1)(A)(ii)*	"If service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent"	No change	No change to 30, 60, 90 etc.	Gensler

12(a)(1)(B) *12(a)(1)(A)(ii)*	or "within 90 days after that date if the defendant was addressed outside any judicial district of the United States."	No change	No change to 30, 60, 90 etc.	Gensler
12(a)(2) *12(a)(1)(B)*	"A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within ~~20~~ **21** days after being served."	"A party serving an answer to a counterclaim or crossclaim within ~~20~~ **21** days after being served with the pleading that states the counterclaim or crossclaim."	Consistency and ease of computation.	Gensler
12(a)(2) *12(a)(1)(B)*	"The plaintiff shall serve a reply to a counterclaim in the answer within ~~20~~ **21** days after service of the answer"	"A party serving an answer to a counterclaim or crossclaim within ~~20~~ **21** days after being served with the pleading that states the counterclaim or crossclaim."	Consistency and ease of computation.	Gensler
12(a)(2) *12(a)(1)(C)*	"or, if a reply is ordered by the court, within ~~20~~ **21** days after service of the order, unless the order otherwise directs."	"A party must serve a reply to an answer within ~~20~~ **21** days after being served with an order to reply, unless the order specifies a different time."	Consistency and ease of computation.	Gensler
12(a)(3)(A) *12(a)(2)*	"The United States … shall serve an answer to the complaint or cross-claim – or a reply to a counterclaim – within 60 days after the United States attorney is served with the pleading asserting the claim."	No change	No change to 30, 60, 90 etc.	Gensler
12(a)(3)(B) *12(a)(3)*	"An officer or employee of the United States sued in an individual capacity … shall serve an answer to the complaint or cross-claim – or a reply to a counterclaim – within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later."	No change	No change to 30, 60, 90 etc.	Gensler
12(a)(4)(A) *12(a)(4)(A)*	"If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ~~10~~ **14** days after notice	"If the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within ~~10~~ **14** days after notice of the	Consistency and ease of computation.	Gensler

	of the court's action; or"	court's action; or"		
12(a)(4)(B) *12(a)(4)(B)*	"If the court grants a motion for a more definite statement, the responsive pleading shall be served within ~~10~~ **14** days after the service of the more definite statement."	"if the court grants a motion for a more definite statement, the responsive pleading must be served within **14** days after the more definite statement is served."	See above	Gensler
12(b) *12(b)*	"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim cross-claim, or third party claim, shall be asserted in the responsive pleadings thereto if one is required . . .:"	No change.	Whatever deadline we pick for answering per 12(a) will remain the deadline for instead responding with a motion that tolls the time to answer	Gensler
12(c) *12(c)*	"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."	No change	Not affected by time counting project	Gensler
12(d) *12(i)*	"Any defense listed in Rule 12(b)(1)-(7) – whether made in a pleading or by motion – and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial."	No change	Not affected by time counting project	Gensler
12(e) *12(e)*	"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."	No change	Not affected by time counting project	Gensler
12(e) *12(e)*	"If the motion is granted and the order of the court is not obeyed within ~~10~~ **14** 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	"If the court orders a more definite statement and the order is not obeyed within ~~10~~ **14** days after notice of the order or within the time the court sets, the court may strike the pleading or	Consistency and ease of computation.	Gensler

	motion was directed or make such order as it deems just."	issue any other order that it considers appropriate."		
12(f) *12(f)(2)*	"Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion made by a party within ~~20~~ **21** days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant immaterial, impertinent, or scandalous matter."	"On motion made by a party either before responding to the pleading or, if a response is not allowed, within ~~20~~ **21** days after being served with the pleading …."	Consistency and ease of computation.	Gensler
13	No time provision			Russell
15(a) *15(a)(1)(A)*	"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or,"	No change	Not affected by time counting project	Gensler
15(a) *15(a)(1)(B)*	"If the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within ~~20~~ **21** days after it is served."	"within ~~20~~ **21** days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar."	Consistency and ease of computation.	Gensler
Current proposed change to Rule 15(a)	A party can amend its pleadings as of right within 21 days of serving it, or if a responsive pleading is due, within 21 days after service of a Rule 12 motion or the responsive pleading	No change	Already written to include 21-day period	Gensler
15(a) *15(a)(3)*	"A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ~~10~~ **14** days after service of the amended pleading,	"Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within ~~10~~ **14** days after	Consistency and ease of computation.	Gensler

	whichever period may be the longer, unless the court otherwise orders."	service of the amended pleading, whichever is later."		
15(c)(3) *15(c)(1)(C)*	"An amendment of a pleading relates back to the date of the original pleading when … the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint the party to be brought in by amendment …. "	No change	No change to 30, 60, 90 etc.	Girard
16(b) *16(b)(2)*	"The [scheduling order] shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on the defendant."	No change	No change to 30, 60, 90 etc. The Department of Justice raised concerns about time pressures placed on the Government by this rule, but agreed to do some additional internal analysis before raising it for committee discussion.	Gensler
16(d) *16(e)*	"Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances."	No change	Not a function of time counting; no need to alter	Gensler
17(a)	"No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification …."	No change	Not a function of time counting; no need to alter	Gensler
18	No time provision			Girard
19	No time provision			Girard
20	No time provision			Girard
21	No time provision			Girard

22	No time provision			Girard
23(c)(1)(A) *23(c)(1)(A)*	"When a person sues or is sued as a representative of a class, the court must – at an early practicable time – determine by order whether to certify the action as a class action."	No change	The "early practicable time" language was adopted as part of the 2003 amendments. Changing this language would appear to exceed the scope of the time-counting project.	Girard
23(d) *23(d)(2)*	"The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time."	No change	This language captures the pragmatic approach to Rule 23 recommended in the case law	Girard
23(f) *23(f)*	"A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ~~ten~~ **14** days after entry of the order."	A court of appeals may permit an appeal from an order granting or denying class action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within ~~10~~ **14** days after the order is entered.	Consistency and ease of computation. The change would not increase delay as it does not often come up.	Girard
23(h)(1) *23(h)(1)*	"A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court."	No change	The rule cross references 54(d)(2), which provides that a motion for attorneys' fees must be filed no later than 14 days after entry of the judgment. The Advisory Committee Note clarifies that the Rule 54(d)(2) time limit of 14 days does not apply to Rule 23 and the time for filing the fee application is determined by the court. Dan Girard has raised two issues: (1) Should the text of Rule 23(h)(1) make clear that	Girard

			the 14-day period specified in Rule 54(d)(2) does not apply? (2) Should there be a fixed time for the filing of a motion for attorneys' fees in a class action or should the time for filing remain dependent on action by the court? The subcommittee recommends that the issue of amendment of Rule 23(h)(1) not be tackled in the time counting project, but instead be added to the Suggestions Docket for future consideration.	
23.1	No time provision			Russell
23.2	No time provision			Russell
24(a), (b) *24(a), (b)*	"Upon timely application anyone shall be permitted to intervene in an action:"	No change		Cicero
25(a)(1) *25(a)(1)*	"Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party."	No change	No change to 30, 60, 90 etc.	Russell
26(a)(1) *26(a)(1)(C)*	"These disclosures must be made at or within 14 days after the R.26(f) conference."	No change	Already 14 days.	Cicero
26(a)(1) *26(a)(1)(D)*	"Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30	No change	No change to 30, 60, 90 etc.	Cicero

	days after being served or joined unless a different time is set by stipulation or court order."			
26(a)(3) *26(a)(3)(B)*	"Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing …."	No change	No change to 30, 60, 90 etc., and already 14 days.	Cicero
26(a)(3) *26(a)(3)(B)*	"a party must promptly file with the court" Rule 26(a)(3) disclosures.	No change		Cicero
26(c) *26(c)(1)*	Orders of protection sought subsequent to "certification" that movant has in good faith conferred with other affected parties	No change		Cicero
26(d) *26(d)(1)*	"A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)"	No change		Cicero
26(e)(1) *26(e)(1)(A)*	"A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a)"	No change		Cicero
26(e)(2) *26(e)(2)*	"A party is under a duty seasonably to amend a prior response to an interrogatory, …"	No change		Cicero
26(f) *26(f)(1)*	"Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held …"	No change	The subcommittee considered whether the 26(f) periods place too much time pressure on parties and therefore should be shortened from 21 and 14 days to 14 and 7 days. The subcommittee ultimately decided that there was not sufficient evidence of a problem to warrant a change	Cicero

			from existing time periods.	
26(f) *26(f)(2)*	"The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan."	No change	See above comment	Cicero
26(f) *26(f)(4)(A)*	"A court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 7 days after the conference …."	No change	See above comment	Cicero
27(a)(2) *27(a)(2)*	"At least ~~20~~ **21** days before the date of hearing the notice shall be served either within or without the district …"	"At least ~~20~~ **21** days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing."	Consistency and ease of computation.	Cicero
28	No time provision			Cicero
29	No time provision			Cicero
30(b)(1) *30(b)(1)*	"A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action."	No change	No fixed period or deadline	Campbell
30(b)(3) *30(b)(3)*	"With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the	No change	No fixed period or deadline	Campbell

	deposition."			
30(d)(2) *30(d)(2)*	"Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours."	No change	Not a time counting issue	Campbell
30(d)(4) *30(d)(3)(A)*	Upon demand of the objecting party or deponent, the taking of the deposition must be suspended "for the time necessary to make a motion for an order."	No change	No fixed period or deadline	Campbell
30(e) *30(3)(1)*	"If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available within which to review the transcript …."	No change	No change to 30, 60, 90 etc.	Campbell
30(f)(3) *30(f)(4)*	"The party taking the deposition shall give prompt notice of its filing to all other parties."	No change	No fixed period or deadline	Campbell
31(a)(4) *31(a)(5)*	"Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties."	No change	Already 14 days	Russell
31(a)(4) *31(a)(5)*	"Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties."	No change	Already 7 days	Russell
31(a)(4) *31(a)(5)*	"Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties."	No change	Already 7 days	Russell
32(a)(3) *32(a)(5)(A)*	"Nor shall a deposition be used against a party who, having received less than ~~11~~ **14** days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order …"	"A deposition must not be used against a party who, having received less than ~~11~~ **14** days' notice of the deposition,"	Consistency and ease of computation. The 11-day provision was a 1993 Rules Amendment -- the Committee Note observes: "[i]nclusion of this provision is not intended to signify that	Hirt

			11 days' notice is the minimum advanced notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations."	
32(d)(1) *32(d)(1)*	"All errors and irregularities in the notice for taking deposition are waived unless written objection is promptly served upon the party giving notice."	No change	I think it would be imprudent to set a specific deadline	Hirt
32(d)(2) *32(d)(2)(A)*	"Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence."	No change	I think it would be imprudent to set a specific deadline	Hirt
32(d)(3)(A) *32(d)(3)(A)*	"Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition,"	No change	I think it would be imprudent to set a fixed deadline. The advantage to the current rule is that it forces the party to make, or waive, its objection before the deposition is concluded	Hirt
32(d)(3)(B) *32(d)(3)(B)(ii)*	"Errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."	No change	I think it would be imprudent to set a fixed deadline. (See comment above.)	Hirt
32(d)(3)(C) *32(d)(3)(C)*	"Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross	"An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question	Consistency and ease of computation. In addition, current Rule 31(a)(4) uses multiples of 7 for service of cross, redirect, and cross	Hirt

	or other questions and within ~~5~~ 7 days after service of the last questions authorized."	is a recross question, within ~~5~~ 7 days after being served with it.	questions	
32(d)(4) *32(d)(4)*	Objections to errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, filed, etc., are waived unless a motion to suppress the deposition is made "with reasonable promptness after such defect is, or with due diligence might have been, ascertained."	No change	I think it would be imprudent to set a fixed deadline.	Hirt
33(b)(3) *33(b)(2)*	"The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories."	No change	No change to 30, 60, 90 etc.	Hirt
34(b) *34(b)(1)(B)*	"The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts."	No change	I think it would be imprudent to set a fixed deadline.	Hirt
34(b) *34(b)(2)(A)*	"The party upon whom the request is served shall serve a written response within 30 days after the service of the request."	No change	No change to 30, 60, 90 etc.	Hirt
35	No time provision			Russell
36(a) *36(a)(3)*	"The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing,"	No change	No change to 30, 60, 90 etc.	Hirt
37(a)	"A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery…."	No change	I think it would be imprudent to set a fixed deadline.	Hirt

38(b)	"Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than ~~10~~ **14** days after the service of the last pleading directed to such issue"	"serving the other parties with a written demand – which may be included in a pleading – no later than ~~10~~ **14** days after the last pleading directed to the issue is served"	Consistency and ease of computation.	Hirt
38(c)	"If the party has demanded trial by jury for only some of the issues, any other party within ~~10~~ **14** days after service of the demand or such lesser time as the court may order,"	If the party has demanded a jury trial on only some issues, any other party may – within ~~10~~ **14** days after being served with the demand or within a short time ordered by the court"	Consistency and ease of computation.	Hirt
39	No time provision			Russell
40	No time provision			Russell
45(c)(2)(B)	"A person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service"	No change	Already 14 days	Russell
45(c)(2)(B)	"If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production."	No change		Russell
45(c)(3)(A)	"On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it …"	No change		Russell

TIME COUNTING PROJECT - SUBCOMMITTEE B

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
11(c) *11(c)(1)* (no change)	**(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.	**(c) Sanctions.** **(1) *In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.	The rule is sensible. The applicable time period should be at the discretion of the court.	Cabranes
11(c)(1)(A) *11(c)(2)* (no change)	**(1) How Initiated.** **(A) By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected	**(2) Motion for Sanctions.** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or presented to the court if the challenged paper, claim, defense contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.	21 days, extendable by the court, is a reasonable time to respond in a manner that will avoid the filing of a Rule 11 motion. It is consistent with the preference for seven-day increments.	Cabranes

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
14(a) *14(a)*	**(a) When Defendant May Bring in Third Party.** At any time after the commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than ~~10~~ 14 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action.	**(a) Timing of the Summons and Complaint.** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than ~~10~~ 14 days after serving its original answer.	This change is for consistency and ease of computation.	Cabranes
14(a) *14(a)(2)(A)* (no change)	The person served with the summons and complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12	(A) must assert any defense against the third-party plaintiff's claim under Rule 12.	For consistency, the time periods set forth in Rule 12 should be applied to third-party practice.	Cabranes

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
14(c) *14(c)(2)* (no change)	[T]he third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12	[T]he third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim;	For consistency, the time periods set forth in Rule 12 should be applied to third-party practice.	Cabranes
41(a)(1)(i) *41(a)(1)(i)* (no change)	[A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . .	(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or	The rule is sensible. A plaintiff should be able to cause the dismissal of an action unilaterally before the filing of an answer or motion for summary judgment.	Cabranes
41(a)(2) *41(a)(2)* (no change)	If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.	If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication.	The rule is sensible. It prevents a unilateral voluntary dismissal by a plaintiff simply because he has been served with a counterclaim.	Cabranes

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
41(c) *41(c)* (no change)	A voluntary dismissal by the claimant alone . . . shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing	A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made: (1) before a responsive pleading is served; or (2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.	The rule encourages promptness in voluntary dismissals. Professor Cooper points out that although Rule 41(a)(2)(A)(i) cuts off a plaintiff's right to a voluntary dismissal on service of a motion for summary judgment, the Rule 41(c) cut-off applies only on service of a pleading. The difference appears to be mere oversight. If service of a motion for summary judgment should cut off a plaintiff's right, the same rule makes sense for any other claimant (counterclaimant, third-party plaintiff, and so on).	Cabranes
42	No time provision			Cabranes
43	No time provision			Cabranes
44(a)(2) *44(a)(2)(C)* (no change)	If reasonable opportunity has been given to all parties to investigate the authenticity of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.	**(C) Other Means of Proof.** If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either: (i) admit an attested copy without final certification; or (ii) permit the record to be evidenced by an attested summary with or without a final certification.	The rule is sensible. The applicable time period should be at the discretion of the court.	Cabranes

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
44.1 *44.1* (no change)	A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice.	A party who intends to raise an issue about a foreign country's law must give notice by pleading or other writing.	The rule is sensible. The applicable time period should be at the discretion of the court. Note deletion of "reasonable" as result of style project.	Cabranes
46	No time provision			Cabranes
47	No time provision			Cabranes
48	No time provision			Cabranes
49(a) *49(a)(3)* (no change)	If . . . the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury on the issue so omitted unless before the jury retires the party demands its submission to the jury.	**(3) Issues Not Submitted.** A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury.	The rule is sensible. It provides an incentive to identify problematic omissions in a timely manner.	Cabranes

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
50(b) *50(b)*	**(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court'[s later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by following a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. . . .	(b) **Renewing the Motion after Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made under Rule 50(a) the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment – or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged – the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. . . .	Pending further discussions concerning Rule 6(b), no change is being suggested for the 10-day periods in Rules 50,52 and 59.	Heim
50(c)(2) *50(d)*	**(2)** Any motion for a new trial under Rule 59 . . . shall be filed no later than 10 days after entry of the judgment.	**(d) Time for a Losing Party's New-Trial Motion.** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.	Pending further discussions concerning Rule 6(b), no change is being suggested for the 10-day periods in Rules 50,52 and 59.	Heim
51	N/A			Varner

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
52(b) *52(b)*	**(b) Amendment.** On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings. . . . The motion may accompany a motion for anew trial under Rule 59. . . .	**(b) Amended or Additional Findings.** On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings. . . . The motion may accompany a motion for a new trial under Rule 59.	Pending further discussions concerning Rule 6(b), no change is being suggested for the 10-day periods in Rules 50,52 and 59.	Varner
53(e) *53(d)*	**(e) Master's Orders.** A master who makes an order must file the order and promptly serve a copy on each party. . . .	**(d) Master's Orders.** A master who issues an order must file it and promptly serve a copy on each party. . . .	No change recommended. No specific time period is indicated and no need for one is perceived.	Varner
53(f) *53(e)*	**(f) Master's Reports.** A master must report to the court as required by the order of appointment. The master must promptly serve a copy of the report on each party unless the court directs otherwise.	**(e) Master's Reports.** A master must report to the court as required by the appointment order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.	No change recommended. No specific time period is indicated and no need for one is perceived.	Varner
53(g)(2) *53(f)(2)*	**(2) Time to Object or Move.** A party may file objections to – or a motion to adopt or modify– the master's order, report, or recommendations no later than ~~20~~ 21 days from the time the master's order, report or recommendations are served, unless the court sets a different time.	**(2) Time to Object or Move to Adopt or Modify.** A party may file objections to – or a motion to adopt or modify – the master's order, report or recommendations no later than ~~20~~ 21 days after a copy is served, unless the court sets a different time.	Consistency and ease of computation.	Varner

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
54(d)(1) *54(d)(1)*	**(1) Costs Other than Attorneys' Fees.** . . . Such costs may be taxed by the clerk on ~~one~~ 14 ~~day's~~ days' notice. On motion served within ~~5~~ 7 days thereafter, the action of the clerk may be reviewed by the court.	**(1) Costs Other Than Attorney's Fees.** . . . The clerk may tax costs on ~~one~~ 14 ~~day's~~ days' notice. On motion served within the next ~~5~~ 7 days, the court may review the clerk's action.	One day is insufficient notice Practice varies by district Consistency and ease of computation	Heim
54(d)(2)(B) *54(d)(2)(B)*	**(B)** Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment. . . .	**(B)** *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must **(i)** be filed no later than 14 days after the entry of judgment. . . .	No change	Heim
55(b)(2)	**(2) By the Court.** . . . If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least ~~3~~ 7 days prior to the hearing on such application. . . .	**(2) *By the Court.*** . . . If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least ~~3~~ 7 days before the hearing. . . .	Consistency and ease of computation.	Varner

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
56(a)(b) *56(a)(b)*	(a) ~~for Claimant.~~ ~~A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time 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, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.~~ ~~(b) For Defending Party.~~ ~~A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~ **(a) Time for Motion and Response.** Unless the court orders otherwise, a party may move for summary judgment on all or part of a claim at any time until [the earlier of] 30 days after the close of discovery [or 60 days before the date set for trial]. A party opposing the motion may file a response within 30 days after the motion is served.	~~(a) By a Claiming Party.~~ ~~A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:~~ ~~(1) 20 days from commencement of the action; or~~ ~~(2) the opposing party serves a motion for summary judgment.~~ ~~(b) By a Defending Party.~~ ~~A party against whom relief is sought may move at any time, with or without supporting affidavits for summary judgment on all or part of the claim.~~ **(a) Time for Motion and Response.** Unless the court orders otherwise, a party may move for summary judgment on all or part of a claim at any time until [the earlier of] 30 days after the close of discovery [or 60 days before the date set for trial]. A party opposing the motion may file a response within 30 days after the motion is served.	The time structure in Rule 56(c) is inconsistent with current federal practice. Most district judges set a deadline for a summary judgment motion in case management orders under Rule 16(c)(5) and decide whether to hold a hearing after briefs are filed. In many cases, judges make a ruling on a summary judgment motion without a hearing. This proposal simplifies the summary judgment procedure by first, specifically subjecting summary judgment motions to court scheduling orders, which is usually the case. In the absence of such an order, a summary judgment motion can be made at any time until the earlier of 30 days after the close of discovery or 60 days before the date set for trial, and the responses (including opposing affidavits) must be filed within 30 days after the motion is served. Query whether the only deadline should relate to the date of discovery without reference to a trial date?	Baylson

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
56~~(c)~~(b) *56~~(c)~~(b)*	**~~(c) Motion and Proceedings Thereon.~~** ~~The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits.~~ The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.	**~~(c) Serving the Motion; Proceedings.~~** ~~The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day.~~ The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.		Baylson
57	. . . . The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.	. . . . The court may order a speedy hearing of a declaratory-judgment action.	No change is recommended. No specific time is set and no need for one is perceived.	Varner

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
58(b)(2)(B) *58(c)*	**(b) Time of Entry.** Judgment is entered for purposes of these rules: **(1)** if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and **(2)** if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these occurs: **(A)** when it is set forth on a separate document, or **(B)** when 150 days have run from entry in the civil docket under Rule 79(a).	**(c) Time of Entry.** For purposes of these rules, judgment is entered at the following times: **(1)** if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or **(2)** if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs: **(A)** it is set out in a separate document; or **(B)** 150 days have run from the entry in the civil docket.	No change. The 150-day provision was designed to integrate the time for post-judgment motions with appeal time. See note to the 2002 Amendments.	Heim
59(b) *59(b)*	**(b) Time for Motion.** Any motions for a new trial shall be filed no later than 10 days after entry of the judgment.	**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of judgment.	Pending further discussions concerning Rule 6(b), no change is suggested for the 10-day period under Rule 59.	Heim

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
59(c) *59(c)*	**(c) Time for Serving Affidavits.** When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has ~~10~~ 14 days after service to file opposing affidavits, but that period may be extended for up to ~~20~~ 21 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.	**(c) Time to Serve Affidavits.** When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has ~~10~~ 14 days after being served to file opposing affidavits; but that period may be extended for up to ~~20~~ 21 days. . . .	Consistency and ease of computation. Query whether the total number of days is 21 or 35? Query whether we should recommend 30 days without providing for extensions?	Heim
59(d) *59(d)*	**(d) On Court's Initiative; Notice; Specifying Grounds.** No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion.	**(d) New Trial on the Court's Initiative or for Reasons Not in the Motion.** No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion.	Pending further discussions concerning Rule 6(b), no change is being suggested for the 10-day periods in Rules 50,52 and 59.	Heim
59(e) 59(e)	**(e) Motion to Alter or Amend a Judgment.** Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.	**(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.	Pending further discussions concerning Rule 6(b), no change is being suggested for the 10-day periods in Rules 50,52 and 59.	Heim

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
60(a) *60(a)*	**(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. . . .	**(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other party of the record. The court may do so on motion or on its own, with or without notice. . . .	None	Heim

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
60(b) *60(c)(1)*	**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. [Continued below]	**(c) Timing and Effect of the Motion.** **(1)** ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. **(2)** ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.	This is a close question. On the one hand, it is hard to fathom why fraud or evidence discovered 13 months after the entry of judgment should not warrant a motion before the same Court that heard the original matter. On the other, there is some force in having a definite time period for the trial court and in particularly compelling circumstances, the new evidence might be the basis for an independent action pursuant to the saving clause. See Rule 6(b)	Heim

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
60(b) *60(c)(1)* con'd	The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation			
61	N/A			Varner
62(a)	**(a) Automatic Stay; Exceptions - Injunctions, Receiverships and Patent Accountings.** Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ~~10~~ 14 days of its entry. . . .	**(a) Automatic Stay; Exceptions for Injunctions, Receiverships and Patent Accountings.** Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until ~~10~~ 14 days have passed after its entry."	Consistency and ease of computation	Varner

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
65(b) *65(b)(2)*	Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order granted without notice; and shall expire by its terms within such time after entry, not to exceed ~~10~~ 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.	**(2) Contents; Expiration.** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry – not to exceed ~~10~~ 14 days – that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.	Consistency and ease of computation	Baylson
65(b) *65(b)(4)*	On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.	**(4) *Motion to Dissolve.*** On 2 days' notice to the party who obtained the order without notice – or on shorter notice set by the court – the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.	No change is suggested because of the unique nature of TRO proceedings.	Baylson

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
68 *68(a)*	**Offer of Judgment** At ~~any time more than~~ least ~~10~~ 14 days before the date set for trial ~~begins~~, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within ~~10~~ 14 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment.	**Offer of Judgment** (a) **Making an offer; Judgment on an Accepted Offer**. At least ~~10~~ 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If within ~~10~~ 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment	Although current language works when a specific trial date has been set, some judges use a "trial pool" where the actual start of the trial may be on 1 or 2 days' notice. Consistent with other recommendations, the 10-day period should be extended to 14 days for consistency and ease of computation.	Baylson
70	N/A			Varner
71	N/A			Varner

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
71A(c)(2) *71.1(c)(3)*	**(2) Contents.** . . . . Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records. . . ."	**(3) Parties.** When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records. . . .	No change recommended. No specific time period is indicated and no need for one is perceived.	Varner
71A(d)(2) *71.1(d)(2)(A)(v)*	**(2) Form.** . . . that the defendant may serve upon the plaintiff's attorney an answer within ~~20~~ 21 days after service of the notice. . . ."	**(2) Contents of the Notice.** . . . that the defendant may serve an answer on the plaintiff's attorney within ~~20~~ 21 days after being served with the notice. . . .	Consistency and ease of computation	Varner
71A(e) *71.1(e)(2)*	**(e) Appearance or Answer.** . . . . If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within ~~20~~ 21 days after the service of notice upon the defendant."	**(2) Answer.** A defendant that has an objection or defense to the taking must serve an answer within ~~20~~ 21 days after being served with the notice. . . .	Consistency and ease of computation	Varner

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
71A(f) *71.1(f)*	**(f) Amendment of Pleadings.** . . . . Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the form and manner and with the same effect as there provided.	**(f) Amending Pleadings.** . . . A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).	No change is recommended, as this section merely incorporates subsection (e), which we have recommended be changed to 21 days.	Varner
71A(h) *71.1(h)*	**(h) Trial.** . . . [A]ny party may have a trial by jury of the issue of just compensation by filing a demand therefore within the time allowed for answer or within such further time as the court may fix. . . .	**(h) Trial of the Issues.** . . . [T]he court tries all issues, including compensation, except when compensation must be determined: (a) by any tribunal specially constituted by a federal statute to determine compensation; (b) or if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets. . . ."	No change is recommended as the time to answer is set by subsection 71A(e), which we have recommended be changed to 21 days; and the court should retain discretion to set such additional time as may be necessary.	Varner
72(a)	Within ~~10~~ 14 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made.	A party may serve and file objections to the order within ~~10~~ 14 days after being served wit ha copy. A party may not assign as error a defect in the order not timely objected to.	Consistency and ease of computation	Baylson

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
72(b)	A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within ~~10~~ 14 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within ~~10~~ 14 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.	**(2) Objections.** Within ~~10~~ 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within ~~10~~ 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.	Consistency and ease of computation	Baylson

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
81(c) *81(c)(2)*	**(c) Removed Actions.** Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within ~~20~~ 21 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within ~~20~~ 21 days after the service of summons upon such initial pleading, then filed, or within ~~5~~ 7 days after the filing of the petition for removal, whichever period is longest.	**(2)** ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods: **(A)** ~~20~~ 21 days after receiving – through service or otherwise – a copy of the initial pleading stating the claim for relief; **(B)** ~~20~~ 21 days after being served with the summons for an initial pleading on file at the time of service; or **(C)** ~~5~~ 7 days after the notice of removal is filed.	Consistency and ease of computation	Kelly
81(c) *81(c)(3)(B)*	If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within ~~10~~ [7 or 14] days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within ~~10~~ [7 or 14] days after service on the party of the notice of filing the petition.	**(B)** *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within ~~10~~ [7 or 14] days after: **(i)** it files a notice of removal; or **(ii)** it is served with a notice of removal filed by another party.	Consistency and ease of computation	Kelly

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
Supp. R. B(3)(a)	The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within ~~20~~ 21 days after service of process upon the garnishee.	N/A	Consistency and ease of computation	Hecht
Supp. R. B(3)(b)	The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.	N/A	Consistency	Hecht
Supp. R. C(4)	If the property is not released within ~~10~~ 14 days after execution, the plaintiff must promptly - or within the time that the court allows - give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed.	N/A	Consistency and east of computation	Hecht

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
Supp. R. C (6)(a)(i)-(A) [current]	In an in rem forfeiture action for violation of a federal statute: (i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right: (A) within 30 days after the earlier of (1) the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or (B) within the time that the court allows.	N/A	Consistency and conformity with 18 USC § 983(a)(4)(A)	Hecht
Supp. R. C (6)(a)(i)(A) [2006]	(Eliminated)			Hecht
Supp. R. C(6)(a)(iii) [current]	In an in rem forfeiture action for violation of a federal statute: . . . (iii) a person who files a statement of interest in or right against the property must serve and file an answer within ~~20~~ 21 days after filing the statement.	N/A	Consistency and ease of computation	Hecht
Supp. R. C(6)(a)(iii) [2006]	(Eliminated)			Hecht

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
Supp. R. C(6)(b)(i)(A) [current]	In an in rem action not governed by Rule C(6)(a): (i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest: (A) within ~~10~~ 14 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4), or (B) within the time that the court allows	N/A	Consistency and ease of computation	Hecht
Supp. R. C(6)(a)(i)(A) [2006]	(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest: (A) within ~~10~~ 14 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4), or (B) within the time that the court allows.	N/A	Consistency and ease of computation	Hecht

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
Supp. R. C(6)(b)(iv) [current]	A person who asserts a right of possession or any ownership interest must serve an answer within ~~20~~ 21 days after filing the statement of interest or right.	N/A	Consistency and ease of computation	Hecht
Supp. R. C(6)(a)(iv) [2006]	A person who asserts a right of possession or any ownership interest must serve an answer within ~~20~~ 21 days after filing the statement of interest or right.	N/A	Consistency and ease of computation	Hecht
Supp. R. E(4)(c)	If intangible property is to be attached or arrested the marshal or other person or organization having the warrant shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6)	N/A	The time periods in the referenced rules, whether or not changed, should continue to apply.	Hecht
Supp. R. F(1)	Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute.	N/A	The period is prescribed by 46 USC app § 185.	Hecht

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
Supp. R. F(4)	Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice.	N/A	Consistency	Hecht
Supp. R. G(4)(a)(iii) [2006]	Published notice must appear: **(A)** once a week for three consecutive weeks; or **(B)** only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an official internet government forfeiture site for at least 30 consecutive days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under Rule G(4)(a)(iv).	N/A	Consistency	Hecht

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
Supp. R. G(4)(b)(ii)(B) [2006]	The notice must state: **(A)** the date when the notice is sent; **(B)** a deadline for filing a claim, at least 35 days after the notice is sent	N/A	Deadline should not be shortened	Hecht
Supp. R. G(4)(b)(ii)(C) [2006]	The notice must state: . . . **(C)** that an answer or a motion under Rule 12 must be filed no later than ~~20~~ 21 days after filing the claim	N/A	Consistency and ease of computation **ISSUE:** Can or should time prescribed by 18 USC § 983(a)(4)(B) be altered?	Hecht
Supp. R. G(4)(b)(iv) [2006]	Notice by the following means is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail.	N/A	Consistent with FRCP 5(b)(2)(B) and FRAP 25(c).	Hecht

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
Supp. R. G(5)(a)(ii) [2006]	Unless the court for good cause sets a different time, the claim must be filed: **(A)** by the time stated in a direct notice sent under Rule G(4)(b); **(B)** if notice was published but direct notice was not sent to the claimant or the claimant's attorney, no later than 30 days after final publication of newspaper notice or legal notice under Rule G(4)(a) or no later than 60 days after the first day of publication on an official internet government forfeiture site; or **(C)** if notice was not published and direct notice was not sent to the claimant or the claimant's attorney: **(1)** if the property was in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the filing, not counting any time when the complaint was under seal or when the action was stayed before execution of a warrant issued under Rule G(3)(b); or **(2)** if the property was not in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the government complied with 18 U.S.C. § 985(c) as to real property, or 60 days after process was executed on the property under Rule G(3).	N/A	Consistency; but only the 30-day period, not the 60-day periods, conforms to 18 USC § 983(a)(4)(A). **ISSUE:** Can or should time prescribed by 18 USC § 983(a)(4)(A) be altered? [This issue has presumably been resolved by the adoption of proposed Supp. R. G.]	Hecht

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
Supp. R. G(5)(b) [2006]	A claimant must serve and file an answer to the complaint or a motion under Rule 12 within ~~20~~ 21 days after filing the claim	N/A	Consistency and ease of computation **ISSUE:** Can or should time prescribed by 18 USC § 983(a)(4)(B) be altered?	Hecht
Supp. R. G(6)(a) [2006]	The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed.	N/A	No change appropriate.	Hecht
Supp. R. G(6)(a) [2006]	But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within ~~20~~ 21 days after the motion is served.	N/A	Consistency and ease of computation	Hecht
Supp. R. G(6)(b) [2006]	Answers or objections to these interrogatories must be served within ~~20~~ 21 days after the interrogatories are served.	N/A	Consistency and ease of computation	Hecht
Supp. R. G(6)(c) [2006]	The government need not respond to a claimant's motion to dismiss the action under Rule G(8)(b) until ~~20~~ 21 days after the claimant has answered these interrogatories	N/A	Consistency and ease of computation	Hecht

Rule	Current Rule with Proposed Changes	Style Rule with Proposed Changes	Comment	Assigned
Supp. R. G(8)(c) [2006]	At any time before trial, the government may move to strike a claim or answer: **(A)** for failing to comply with Rule G(5) or (6); or **(B)** because the claimant lacks standing.	N/A	No change appropriate	Hecht

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3-C

Time Project: Rule 6(b)

Rule 6(b) cuts across the topics allocated to Time Computation Subcommittees A and B. In Style form, Rule 6(b) reads:

(b) Extending Time.

(1) ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

At least three distinct questions arise from Rule 6(b)(2). None of them involves a distinct period of days. None is affected by elimination of the Rule 6(a) provision for calculating periods less than 11 days. None of them should be the occasion for stalling progress on the Time Computation project if the subject seems worthy of action but to require more time than is available within the overall Standing Committee project.

The three questions are these: (1) Should we delete the final words — "except as those rules allow" — as meaningless? (2) Should courts be given some authority, perhaps quite narrow, to extend the times set in Rules 50, 52, 59, and 60? (3) If we carry forward the present prohibition on extending time to act under those rules, should there be a provision somewhere — most likely in Rule 6 or Rule 58 — expressly authorizing the common tactic of granting a de facto time extension by deferring entry of judgment?

Delete "except as those rules allow?"

None of the rules listed in Rule 6(b)(2) says anything about extending the time to act. Suggesting that exceptions are there to be found must waste countless hours of nervous reading and rereading by lawyers and judges. These words likely carry over from the time when the Civil Rules governed appeals, then-Rule 73(a) was included in Rule 6(b), and Rule 73(a) allowed an extension of appeal time for excusable neglect. (See *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 1962, 371 U.S. 215, the origin of the "unique circumstances" doctrine noted below.) They appear to serve no purpose now. It may be desirable to delete them.

Qualify the 6(b)(2) Prohibition?

At least two related reasons account for the strict approach that distinguishes the time periods for post-judgment motions from all other time periods in the rules. It is intrinsically important to move promptly after the district court has so far concluded its proceedings as to enter final judgment. And these post-judgment motions relate to appeal time — it is important both that the decision whether to appeal be made and noticed promptly and that the calculation of appeal time be as clear as it can be made.

These reasons are counterbalanced by lessons from practice. One important lesson is that the 10-day periods provided for motions under Rules 50, 52, and 59 are too short in complex cases. Judges frequently recognize this problem by deferring entry of judgment, although at least some feel

guilty about doing it and others may refuse because deferral seems inconsistent with the premises of Rule 6(b). Another lesson is that not all lawyers have learned that the relaxed attitude often taken toward pretrial deadlines is prohibited for post-judgment deadlines. The result may be loss of the opportunity for post-trial relief. And the result also may be loss of any opportunity to appeal because appeal time is suspended only by a timely motion under Rules 50, 52, or 59 (or a rule 60 motion filed no later than 10 days after judgment is entered). A third lesson is less distinct. When the trial judge conspires with a lawyer in misunderstanding — more likely overlooking — Rule 6(b), in some "unique circumstances" the courts have permitted untimely appeals or even, in at least one case, an untimely Rule 59 motion. [The "unique circumstances" doctrine has evolved to require at least an untimely motion that, if timely, would suspend appeal time, made while there is yet time to appeal, and an explicit reassurance by the trial court that the motion is timely. It is fashionable to express doubt whether the doctrine survives at all. Somewhat different views of the doctrine are reflected in 4B Federal Practice & Procedure: Civil 3d, § 1168; 16A FP&P: Jurisdiction 3d, § 3950.3, pp.149-152 & n. 20; Id., § 3950.4, pp. 181-184.]

Appellate Rule 4(a)(4) and (5) also may seem to cast doubt on the arguments for maintaining Rule 6(b)(2) in all its strictness. Rule 4(a)(4) allows an extension of appeal time so long as the motion is made no later than 30 days after the prescribed time expires, and adopts a single "excusable neglect or good cause" standard without regard to whether the motion was made before the time expired. Rule 4(a)(5) allows a reopening of appeal time if a would-be appellant did not receive notice of entry of the judgment or order within 21 days after entry; the motion must be filed within the earlier of 180 days after entry or 7 days after receiving notice under Civil Rule 77(d). (A party anxious to have a clear cut-off of appeal time can serve notice of the entry, reducing the potential for an unwelcome surprise.)

The history of continually revising Appellate Rule 4(a) suggests that any further consideration of the relationships between post-judgment motions and appeal time should be addressed in the Civil Rules. As the Committee's recent encounter with the intersection of Rules 54(d)(2), 58(c)(2), and Appellate Rule 4(a) shows, Rule 4(a) has been pushed about as far as it can go. If there is to be any change, it is better accomplished by directly addressing the Civil Rules time provisions.

Direct consideration of the Civil Rules time provisions has the additional advantage of focusing directly on the central question: is it wise to soften the strict 10-day time limit provided in Rules 50, 52, and 59, or the strict 1-year limit set for some Rule 60(b) motions?

Without offering any judgment on the wisdom of making any change, two approaches may be sketched.

The first approach would amend Rule 6(b)(2) (as it will be). The most sweeping revision would be to abrogate paragraph (2), bringing the post-judgment motion time periods within the general power to extend the time for good cause. A somewhat less sweeping revision would invoke the general good-cause test, but require that the motion to extend be made within the original period provided by Rule 50, 52, 59, or 60. Still less sweeping authority could be conferred by allowing only one extension, and by providing an express outer limit — for example, the court may grant only one extension for no more than 14 days. An additional restriction could be imposed by adopting a standard higher than "good cause." (Examples of standards in other rules include Rule 16(e) "manifest injustice"; Rule 26(b)(3) "substantial need" and "undue hardship"; Rule 26(b)(4) "exceptional circumstances" — also in new Rule 37(f).) Any of these approaches is easily drafted.

Rule 58 Provision To Delay Entry of Judgment?

An alternative approach would amend Rule 58 to recognize authority to defer entry of judgment in order to defer the start of the time periods for post-judgment motions. This approach

likely would be limited to Rules 50, 52, and 59. There is no apparent reason to worry about end-of-trial pleas to extend the "reasonable time" for a Rule 60(b) motion, not even the varieties subject to the limit of "no more than a year." The provision might look something like this, again using the Style Rule:

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But:

(A) the court may [for good cause] defer entry of judgment in order to delay commencement of the time to move under Rules 50(b) and (d), 52(b), and 59(b) and (e), or to act under Rule 59(d); and

(B) the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Committee Note

Rules 50, 52, and 59 require that postjudgment motions be filed no later than 10 [14] days after entry of judgment. Rule 6(b)(2) prohibits any extension of those periods. Strict adherence to these periods is important to assure prompt conclusion of all trial-court proceedings after completion of the trial and the factfinding process. Strict adherence also is important to assure clear integration with the specific time limits established by Rule 4, Federal Rules of Appellate Procedure.

Some cases arise, however, in which prompt entry of judgment means that the 10[14]-day period is too brief to prepare an effective motion under Rule 50, 52, or 59, or for the court to act without motion under Rule 59(d). Rule 58(e) is amended to allow a court to defer entry of judgment in order to delay commencement of the 10-day period. The need to defer is most likely to arise after a relatively long trial and in cases of factual complexity. But other circumstances also may justify deferred entry of judgment. For example, even modern recording techniques may not ensure that a trial transcript is immediately available[, perhaps because of the cost of expedited preparation]. [In all circumstances, the good-cause test should be administered in light of the need to proceed as promptly as possible to final completion of all trial-court proceedings.]

Relation to Appellate Rules

Revision of either Rule 6(b) or Rule 58 does not seem to entail any need to modify the Appellate Rules. Appellate Rule 4(a) suspends appeal time "[i]f a party timely files in the district court" a motion under Rule 50(b), 52(b), to alter or amend under Rule 59, or for a new trial under Rule 59. An amended Rule 6(b) would affect the timeliness of these motions, but would not mean that an untimely motion suspends appeal time. An amended Rule 58 would be even more indirect. (The integration of Rule 4(a)(4)(iv) and (v) with Rules 50 and 59 is slightly indirect but effective. There is no explicit reference to present Rule 50(c)(2), to become 50(d), but that rule refers to a new-trial motion as one under Rule 59. Nor is there any explicit reference to Rule 59(d), but Rule 59(d) requires that a trial judge acting without motion actually order a new trial within 10[14] days from entry of judgment; there is no need to provide for setting a new appeal period to run from disposition of a "motion.")

Appellate Rule 26(b)(1) prohibits an extension of the time to file "a notice of appeal (except as authorized in Rule 4)." Again, amendment of Rule 6 or Rule 58 would not affect this provision.

3-D

LIST OF STATUTORY PROVISIONS

SPECIFYING TIME PERIODS IN CIVIL CASES

Title	Section	Subsection	Nature of deadline	Type	Civil	Length - Unit	Length - Number	Issues	Comments
2	8	(b)(4)(B)(i)	(4) Extraordinary circumstances (A) In general In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100. (B) Judicial review If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply: (i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code. (ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives. (iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable. (iv) The executive authority of the State that contains the district of the Member	Time to seek judicial review	Y	Day	2	yellow flag on Westlaw	
2	8	(b)(4)(B)(iii)	(4) Extraordinary circumstances (A) In general In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100. (B) Judicial review If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply: (i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code. (ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives. (iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable. (iv) The executive authority of the State that contains the district of the Member	Time for court to act	Y	Day	3	yellow flag on Westlaw	

2	386	(c)	(c) Order and time of taking testimony The order in which the parties may take testimony shall be as follows: (1) Contestant may take testimony within thirty days after service of the answer, or, if no answer is served within the time provided in section 383 of this title, within thirty days after the time for answer has expired. (2) Contestee may take testimony within thirty days after contestant's time for taking testimony has expired. (3) If contestee has taken any testimony or has filed testimonial affidavits or stipulations under section 387(c) of this title, contestant may take rebuttal testimony within ten days after contestee's time for taking testimony has expired.	Time for litigant to act	Y	Day	10		even though this concerns election challenges in House of Representatives under Federal Contested Elections Act, this 10-day period concerns the time for obtaining a subpoena from a
2	388	(b)	(a) Issuance Upon application of any party, a subpena for attendance at a deposition shall be issued by: (1) a judge or clerk of the United States district court for the district in which the place of examination is located; ... (b) Time, method, and proof of service Service of the subpena shall be made upon the witness no later than three days before the day on which his attendance is directed. A subpena may be served by any person who is not a party to the contested election case and is not less than eighteen years of age. Service of a subpena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fee for one day's attendance and the mileage allowed by section 389 of this title. Written proof of service shall be made under oath by the person making same and shall be filed with the Clerk.	Notice to litigants or other entities	Y	Day	3		Currently, a time computation method is explicitly provided by 2 USC 394. I've omitted 2 USC 387, since that appears to concern procedure when no subpoena is used, and thus when no court is involved.
2	922	(e)	(b) Appeal to Supreme Court Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) of this section shall be issued by a single Justice of the Supreme Court. * * * (e) Timing of relief No order of any court granting declaratory or injunctive relief from the order of the President issued under section 904 of this title, including but not limited to relief permitting or requiring the expenditure of funds sequestered by such order, shall take effect during the pendency of the action before such court, during the	Timing of relief	Y	Day	10	Section 922(e) refers to Section 904, which is a part of the Gramm-Rudman-Hollings Act that may have been repealed -- need to check this.	922(b), re time limit for filing NOA, is presumably not governed directly by the Civil Rules?

7	18	(f)	(e) Review Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located * * * (f) Automatic bar from trading and suspension for noncompliance; effect of appeal Unless the party against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that either an appeal as herein authorized has been taken or payment of the full amount of the order (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all registered entities and, if the party is registered with the Commission, such registration shall be suspended automatically at the expiration of such fifteen-day period until such party shows to the satisfaction of	Effective date of consequences after judicial review of agency action	Y	Day	10		
7	2023	(a)(17)	(13) If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination. * * * (17) During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless on application to the court on not less than ten days' notice, and after hearing thereon and a consideration by the court of the applicant's likelihood of prevailing on the merits and of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal.	Notice to litigants or other entities	Y	Day	10		

7	136h	(d)(3)	(d) Limitations * * * (3) If the Administrator proposes to disclose information described in clause (A), (B), or (C) of paragraph (1) or in paragraph (2) of this subsection, the Administrator shall notify by certified mail the submitter of such information of the intent to release such information. The Administrator may not release such information, without the submitter's consent, until thirty days after the submitter has been furnished such notice. Where the Administrator finds that disclosure of information described in clause (A), (B), or (C) of paragraph (1) of this subsection is necessary to avoid or lessen an imminent and substantial risk of injury to the public health, the Administrator may set such shorter period of notice (but not less than ten days) and such method of notice as the Administrator finds appropriate. During such period the data submitter may institute an action in an appropriate district court to enjoin or limit the proposed disclosure. The court may enjoin disclosure, or limit the disclosure or the parties	Time to seek review of agency action	Y	Day	10		
7	499g	(d)	(c) Appeal from reparation order; proceedings Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: Provided, That in cases handled without a hearing in accordance with subsections (c) and (d) of section 499f of this title or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. * * * (d) Suspension of license for failure to obey reparation order or appeal Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day	Effective date of consequences after judicial review of agency action	Y	Day	10		
7	499j		Any order of the Secretary under this chapter other than an order for the payment of money shall take effect within such reasonable time, not less than ten days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, accordingly as it is prescribed in the order, unless such order is suspended, modified, or set aside by the Secretary or is suspended, modified, or set aside by a court of competent jurisdiction. Any such order of the Secretary, if regularly made, shall be final, unless before the date prescribed for its taking effect application is made to a court of competent jurisdiction by the commission merchant, dealer, or broker against whom such order is directed to have such order set aside or its enforcement, operation, or execution suspended or restrained.	Time to seek review of agency action	Y	Day	10		

9	4		A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement	Notice to litigants or other entities	Y	Day	5		
10	7666	(a)	(a) If a sale of prize property is ordered by the court, the marshal shall-- (1) prepare and circulate full catalogues and schedules of the property to be sold and return a copy of each to the court; (2) advertise the sale fully and conspicuously by posters and in newspapers ordered by the court; (3) give notice to the naval prize commissioner at least five days before the sale; and (4) keep the goods open for inspection for at least three days before the sale.	Notice to litigants or other entities	Y	Day	3	yellow flag on Westlaw -- apparently due to proposed legislation	see also 5-day notice provision

10	7726	(c)	(a) A claimant or party who considers himself adversely affected by a stay under this chapter may serve a written notice on the Secretary of the Navy at Washington, D.C., requesting him to reconsider the stay previously issued and to issue a new certificate. The notice shall identify the stay by means of an attached copy of the certificate of the Secretary or a sufficient description of the stay. The notice may not contain any recital of the facts or circumstances involved. (b) Within ten days after receiving notice under this section, the Secretary or his designee shall hold a secret meeting at which the claimant or party, or his representative, may present any facts and arguments he thinks material. (c) Within ten days after a hearing under this section, the Secretary shall file with the court that ordered the stay a new certificate stating whether the stay is then to be terminated or for what period the stay is to continue in effect. If the Secretary fails to file a new certificate, the court, upon application by the claimant or party, shall issue an order directing the Secretary to file a new certificate within	Time for governme nt to act	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	10 USC 7722(a) provides: "Whenever in time of war the Secretary of the Navy certifies to a court, or to a judge of a court, in which a suit described in section 7721 of this title is pending, that the prosecution of the suit would tend to endanger the security of naval operations in the war, or would tend to interfere with those operations, all further proceedings in the suit shall be stayed."
12	1708	(c)(6)	(6) Cease-and-desist orders (A) Whenever the Secretary, upon request of the Mortgagee Review Board, determines that there is reasonable cause to believe that a mortgagee is violating, has violated, or is about to violate, a law, rule or regulation or any condition imposed in writing by the Secretary or the Board, and that such violation could result in significant cost to the Federal Government or the public, the Secretary may issue a temporary order requiring the mortgagee to cease and desist from any such violation * * * (B) Within 10 days after the mortgagee has been served with a temporary cease-and-desist order, the mortgagee may apply to the United States district court for the judicial district in which the home office of the mortgagee is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting of suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the mortgagee, and such court shall have	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

12	1786	(f)(2)	(f) Temporary cease and desist order; injunctive procedure (1) Whenever the Board shall determine that the violation or threatened violation or the unsafe or unsound practice or practices * * * is likely to cause insolvency or significant dissipation of assets or earnings of the credit union, or is likely to weaken the condition of the credit union or otherwise prejudice the interests of its insured members prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (e) of this section, the Board may issue a temporary order requiring the credit union or such party to cease and desist * * * (2) Within ten days after the credit union concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the credit union or such party may apply to the United States district court for the judicial district in which the home office of the credit union is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1786	(g)(6)	(6) Within ten days after any director, officer, committee member, or other person has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured credit union under paragraph (3) of this subsection, such director, officer, committee member, or other person may apply to the United States district court for the judicial district in which the principal office of the credit union is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, committee member, or other person under paragraph (1) or (2) of this subsection, and such court shall have jurisdiction to stay such suspension and/or prohibition.	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1786	(h)(3)	(3) Not later than ten days after the date on which the Board takes possession and control of the business and assets of an insured credit union pursuant to paragraph (1), such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be enjoined from continuing such possession and control. Except as provided in this paragraph, no court may take any action, except at the request of the Board by regulation or order, to restrain or affect the exercise of powers or functions of the Board as conservator.	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

12	1787	(a)(1)(B)	(B) Not later than 10 days after the date on which the Board closes a credit union for liquidation pursuant to paragraph (1), or accepts appointment as liquidating agent pursuant to subsection (b) of this section, such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be prohibited from continuing such liquidation. Except as otherwise provided in this subparagraph, no court may take any action for or toward the removal of any liquidating agent or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a liquidating agent.	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1818	(a)(8)(D)	(8) Temporary suspension of insurance (A) In general If the Board of Directors initiates a termination proceeding under paragraph (2), and the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a savings association to which subparagraph (B) applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Corporation may issue a temporary order suspending deposit insurance on all deposits received by the institution. * * * (C) Effective period of temporary order Any order issued under subparagraph (A) shall become effective not earlier than 10 days from the date of service upon the institution and, unless set aside, limited, or suspended by a court in proceedings authorized hereunder, such temporary order shall remain effective and enforceable until an order of the Board under paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3).	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1818	(c)(2)	(2) Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

12	1818	(f)	(f) Stay of suspension and/or prohibition of institution-affiliated party Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section, such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	2262	(b)	(b) Within ten days after the institution concerned or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution has been served with a temporary cease and desist order, the institution or such director, officer, employee, agent, or other person may apply to the United States district court for the judicial district in which the home office of the institution is located, or the United States district court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the institution or such director, officer, employee, agent, or other person under section 2261 of this title, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action	Y	Day	10		
12	2264	(e)	(e) Stay of suspension or prohibition Within ten days after any director, officer, or other person has been suspended from office or prohibited from participation in the conduct of the affairs of a System institution under subsection (c) of this section, such director, officer, or other person may apply to the United States district court for the judicial district in which the home office of the institution is located, or the United States district court for the District of Columbia, for a stay of either such suspension or prohibition, or both, pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, or other person under subsection (a) or (b) of this section, and such court shall have jurisdiction to stay either such suspension or prohibition, or both.	Time to seek review of agency action	Y	Day	10		

12	3405	(2) & (3)	A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpena or summons otherwise authorized by law only if-- (1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; (2) a copy of the subpena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpena or summons was served on the financial institution together with the following notice * * * : "Records or information concerning your transactions held by the financial institution named in the attached subpena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must: "1. Fill out the accompanying motion paper and sworn statement or write one of your own * * * . "2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts:	Time to make a motion or other filing	Y	Day	10		
12	3407	(2) & (3)	A Government authority may obtain financial records under section 3402(4) of this title pursuant to judicial subpena only if-- (1) such subpena is authorized by law and there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; (2) a copy of the subpena has been served upon the customer or mailed to his last known address on or before the date on which the subpena was served on the financial institution together with the following notice * * * : "Records or information concerning your transactions which are held by the financial institution named in the attached subpena are being sought by this (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must: "1. Fill out the accompanying motion paper and sworn statement or write one of your own * * * . "2. File the motion and statement by mailing or delivering them to the clerk of the Court. "3. Serve the Government authority requesting the records by mailing or deliverin	Time to make a motion or other filing	Y	Day	10		

12	3408	(4)(A) & (B)	A Government authority may request financial records under section 3402(5) of this title pursuant to a formal written request only if-- (1) no administrative summons or subpena authority reasonably appears to be available to that Government authority to obtain financial records for the purpose for which such records are sought; (2) the request is authorized by regulations promulgated by the head of the agency or department; (3) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; and (4)(A) a copy of the request has been served upon the customer or mailed to his last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry: "Records or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose:	Time to make a motion or other filing	Y	Day	10		
12	3410	(a)	(a) Filing of motion to quash or application to enjoin; proper court; contents Within ten days of service or within fourteen days of mailing of a subpena, summons, or formal written request, a customer may file a motion to quash an administrative summons or judicial subpena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpena shall be filed in the court which issued the subpena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States district court. * * * Service shall be made under this section upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received pursuant to this chapter. For the purposes of this section, "delivery" has the meaning stated in rule 5(b) of the Federal Rules of Civil Procedure.	Time to make a motion or other filing	Y	Day	10	also note "seven calendar days" in (b)	
12	4632	(d)	(d) Judicial review An enterprise, executive officer, or director that has been served with a temporary order pursuant to this section may apply to the United States District Court for the District of Columbia within 10 days after such service for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of the order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the enterprise, executive officer, or director under section 4631(a) or (b) of this title. Such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

12	1833a	(g)(3)	(a) In general Whoever violates any provision of law to which this section is made applicable by subsection (c) of this section shall be subject to a civil penalty in an amount assessed by the court in a civil action under this section. * * * (g) Administrative subpoenas (1) In general For the purpose of conducting a civil investigation in contemplation of a civil proceeding under this section, the Attorney General may-- * * * (C) by subpoena, summon witnesses and require the production of any books, papers, correspondence, memoranda, or other records which the Attorney General deems relevant or material to the inquiry. * * * (2) Procedures applicable The same procedures and limitations as are provided with respect to civil investigative demands in subsections (g), (h), and (j) of section 1968 of Title 18 apply with respect to a subpoena issued under this subsection. * * *. Failure to comply with an order of the court to enforce such subpoena shall be punishable as contempt. (3) Limitation In the case of a subpoena for which the return date is less than 5 days after the date of service, no person shall be found in contempt for failure to comply by the	Time to make a motion or other filing	Y	Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
15	16	(g)	(g) Filing of written or oral communications with the district court Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the	Time to make a motion or other filing	Y	Day	10		

15	650	(g)(3)(C)	(C) Judicial review of suspension prior to hearing Not later than 10 days after a management official is suspended or prohibited from participation under subparagraph (A), the management official may apply to an appropriate district court for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under paragraph (2).	Time to seek review of agency action	Y	Day	10		
15	1116	(d)(10)(A)	(10)(A) The court shall hold a hearing, unless waived by all the parties, on the date set by the court in the order of seizure. That date shall be not sooner than ten days after the order is issued and not later than fifteen days after the order is issued, unless the applicant for the order shows good cause for another date or unless the party against whom such order is directed consents to another date for such hearing. At such hearing the party obtaining the order shall have the burden to prove that the facts supporting findings of fact and conclusions of law necessary to support such order are still in effect. If that party fails to meet that burden, the seizure order shall be dissolved or modified appropriately.	Presumptive time for court to act	Y	Day	10		
15	1116	(d)(5)(C)	(5) An order under this subsection shall set forth-- * * * (C) the time period, which shall end not later than seven days after the date on which such order is issued, during which the seizure is to be made;	Time for government to act	Y	Day	7		
15	1118		In any action arising under this chapter, in which a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) of this title, or a willful violation under section 1125(c) of this title, shall have been established, the court may order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the registered mark or, in the case of a violation of section 1125(a) of this title or a willful violation under section 1125(c) of this title, the word, term, name, symbol, device, combination thereof, designation, description, or representation that is the subject of the violation, or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same, shall be delivered up and destroyed. The party seeking an order under this section for destruction of articles seized under section 1116(d) of this title shall give ten days' notice to the United States attorney for the judicial district in which such order is sought (unles	Notice to litigants or other entities	Y	Day	10		

15	2310	(c)(1)	(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the co	TRO time limit	Y	Day	10		
15	2619	(b)(2)	(b) Limitation No civil action may be commenced-- * * * (2) under subsection (a)(2) of this section before the expiration of 60 days after the plaintiff has given notice to the Administrator of the alleged failure of the Administrator to perform an act or duty which is the basis for such action or, in the case of an action under such subsection for the failure of the Administrator to file an action under section 2606 of this title, before the expiration of ten days after such notification.	Prerequisite for suit	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

15	6606	(c)(4)	(a) In general Before commencing a Y2K action, except an action that seeks only injunctive relief, a prospective plaintiff in a Y2K action shall send a written notice by certified mail (with either return receipt requested or other means of verification that the notice was sent) to each prospective defendant in that action. The notice shall provide specific and detailed information about-- (1) the manifestations of any material defect alleged to have caused harm or loss; (2) the harm or loss allegedly suffered by the prospective plaintiff; (3) how the prospective plaintiff would like the prospective defendant to remedy the problem; (4) the basis upon which the prospective plaintiff seeks that remedy; and (5) the name, title, address, and telephone number of any individual who has authority to negotiate a resolution of the dispute on behalf of the prospective plaintiff. * * * (c) Response to notice (1) In general Within 30 days after receipt of the notice specified in subsection (a) of this section, each prospective defendant shall send by certified mail with return	Prerequisite for suit	Y	Day	7	presumably not many of these suits will be brought in the future	
15	687e	(c)(3)	(3) Judicial review Not later than 10 days after any management official has been suspended from office or prohibited from participation in the management or conduct of the affairs of a licensee, or both, under paragraph (1), that management official may apply to the United States district court for the judicial district in which the home office of the licensee is located, or the United States District Court for the District of Columbia, for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under subsection (b) of this section, and such court shall have jurisdiction to stay such action.	Time to seek review of agency action	Y	Day	10		

15	687e	(c)(3)	(3) Judicial review Not later than 10 days after any management official has been suspended from office or prohibited from participation in the management or conduct of the affairs of a licensee, or both, under paragraph (1), that management official may apply to the United States district court for the judicial district in which the home office of the licensee is located, or the United States District Court for the District of Columbia, for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under subsection (b) of this section, and such court shall have jurisdiction to stay such action.	Time to seek review of agency action	Y	Day	10		
15	77h-1	(d)(2)	(2) Judicial review Within-- (A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.	Time to seek review of agency action	Y	Day	10		
15	78u-3	(d)(2)	(2) Judicial review Within-- (A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.	Time to seek review of agency action	Y	Day	10		

15	80a-9	(f)(4)(B)	(B) Judicial review Within-- (i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
15	80b-3	(k)(4)	(B) Judicial review Within-- (i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

16	4307	(c)(2)	(c) Collection If any person fails to pay an assessment of a civil penalty-- (1) within 30 days after the order was issued under subsection (a) of this section, or (2) if the order is appealed within such 30-day period, within 10 days after court has entered a final judgment in favor of the Secretary under subsection (b) of this section, the Secretary shall notify the Attorney General and the Attorney General shall bring a civil action in an appropriate United States district court to recover the amount of penalty assessed (plus costs, attorney's fees, and interest at currently prevailing rates from the date the order was issued or the date of such final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.	Time for government to act	Y	Day	10		
16	539b	(b)(5)	(b) Approved plan for mining operations; requirements; review; modification; suspension of activities Because of the large scale of contemplated mining operations and the proximity of such operations to important fishery resources, with respect to mining operations in the Quartz Hill area of the Tongass National Forest, the regulations of the Secretary shall, pursuant to this subsection, include a requirement that all mining operations involving significant surface disturbance shall be in accordance with an approved plan of operations. * * * * * * (5) upon a finding by the Secretary that a mining activity conducted as a part of a mining operation exists which constitutes a threat of irreparable harm to anadromous fish, or other foodfish populations or their habitat, and that immediate correction is required to prevent such harm, he may require such activity to be suspended for not to exceed seven days, provided the activity may be resumed at the end of said seven-day period unless otherwise required by a United States district court.	Time for government to act	Y	Day	7		

16	539m-5	(c)(2)(B)	(c) Disputes involving forest service management and Pueblo traditional uses (1) In general In a case in which the management of the Area by the Secretary conflicts with a traditional or cultural use, if the conflict does not pertain to a new use subject to the process specified in subsection (a)(2) of this section, the process for dispute resolution specified in this subsection shall apply. (2) Dispute resolution process (A) In general * * * (B) Disputes requiring immediate resolution In the case of a conflict that requires immediate resolution to avoid imminent, substantial, and irreparable harm-- (i) the party identifying the conflict shall notify the other party and seek to resolve the dispute within 3 days of the date of notification; and (ii) if the parties are unable to resolve the dispute within 3 days-- (I) either party may bring a civil action for immediate relief in the United States District Court for the District of New Mexico; and (II) the procedural requirements specified in subparagraph (A) shall not apply.	Prerequisite for suit	Y	Day	3		
18	983	(j)(3)	(j) Restraining orders; protective orders.-- (3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.	TRO time limit	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

18	1514	(a)(2)	(a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title. (2) * * * (E) If on two days notice to the attorney for the Government or on such shorter notice as the court may prescribe, the adverse party appears and moves to dissolve or modify the temporary restraining order, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.	Notice to litigants or other entities	Y	Day	2		
18	1514	(a)(2)(C)	(a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title. (2) * * * (C) A temporary restraining order issued under this section shall expire at such time, not to exceed 10 days from issuance, as the court directs; the court, for good cause shown before expiration of such order, may extend the expiration date of the order for up to 10 days or for such longer period agreed to by the adverse party.	TRO time limit	Y	Day	10		

18	2518		(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. * * * * * * (5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for	Time for government to act	Y	Day	10		
18	2518		(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that-- (a) an emergency situation exists that involves-- (i) immediate danger of death or serious physical injury to any person, (ii) conspiratorial activities threatening the national security interest, or (iii) conspiratorial activities characteristic of organized crime, that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and (b) there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In	Time for government to act	Y	Hour	48		

18	2704	(a)	(a) Backup preservation.--(1) A governmental entity acting under section 2703(b)(2) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order. (2) Notice to the subscriber or customer shall be made by the governmental entity within three days after receipt of such confirmation, unless such notice is delayed pursuant to section 2705(a).	Time for governme nt to act	Y	Day	3	also note period of 'two business days'	
21	853	(e)(2)	(e) Protective orders (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section-- * * * (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concer	TRO time limit	Y	Day	10	yellow flag on WL - probably because of proposed legislation, though there are also possible negative decisions which I have not yet reviewed	

21	880	(d)(3)	(3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate judge allows additional time in the warrant. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate judge, upon request, shall deliver a copy of the inventory to the person from whom or	Time for government to act	Y	Day	10		
24	326	(a)	(a) Request; determination of right to retain; retention after request If a person who is a patient hospitalized under section 322 or 324 of this title, or his legal guardian, spouse, or adult next of kin, requests the release of such patient, the right of the Secretary, or the head of the hospital, to detain him for care and treatment shall be determined in accordance with such laws governing the detention, for care and treatment, of persons alleged to be mentally ill as may be in force and applicable generally in the State in which such hospital is located, but in no event shall the patient be detained more than forty-eight hours (excluding any period of time falling on a Sunday or legal holiday) after the receipt of such request unless within such time (1) judicial proceedings for such hospitalization are commenced or (2) a judicial extension of such time is obtained, for a period of not more than five days, for the commencement of such proceedings.	Time for government to act	Y	Hour	48	provision explicitly provides for exclusion of Sundays (but not Saturdays) & holidays	
26	5311		It shall be lawful for any internal revenue officer to detain any container containing, or supposed to contain, distilled spirits, wines, or beer, when he has reason to believe that the tax imposed by law on such distilled spirits, wines, or beer has not been paid or determined as required by law, or that such container is being removed in violation of law; and every such container may be held by him at a safe place until it shall be determined whether the property so detained is liable by law to be proceeded against for forfeiture; but such summary detention shall not continue in any case longer than 72 hours without process of law or intervention of the officer to whom such detention is to be reported.	Time for government to act	Y	Hour	72	not clear whether this period would be governed by either the Civil or Criminal Rules	

26	6861	(g)	(g) Abatement if jeopardy does not exist.--The Secretary may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.	Time for governme nt to act	Y			need to check how this provision works	
26	7429	(b)	(b) Judicial review.-- (1) Proceedings permitted.-- * * * the taxpayer may bring a civil action against the United States for a determination under this subsection in the court with jurisdiction determined under paragraph (2). (2) Jurisdiction for determination.-- (A) In general.--Except as provided in subparagraph (B), the district courts of the United States shall have exclusive jurisdiction over any civil action for a determination under this subsection. (B) Tax Court.-- * * * (3) Determination by court.-- * * * If the court determines that proper service was not made on the United States or on the Secretary, as may be appropriate, within 5 days after the date of the commencement of the proceeding, then the running of the 20-day period set forth in the preceding sentence shall not begin before the day on which proper service was made on the United States or on the Secretary, as may be appropriate.	Notice to litigants or other entities	Y	Day	5		

26	7609		(a) Notice.-- (1) In general.--If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons. (2) Sufficiency of notice.--Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by	Notice to litigants or other entities	Y	Day	3		
27	207		The District Courts of the United States, and the United States court for any Territory, of the District where the offense is committed or threatened or of which the offender is an inhabitant or has his principal place of business, are vested with jurisdiction of any suit brought by the Attorney General in the name of the United States, to prevent and restrain violations of any of the provisions of this chapter. Any person violating any of the provisions of section 203 or 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense. The Secretary of the Treasury is authorized, with respect to any violation of this chapter, to compromise the liability arising with respect to such violation (1) upon payment of a sum not in excess of $500 for each offense, to be collected by the Secretary and to be paid into the Treasury as miscellaneous receipts, and (2) in case of repetitious violations and in order to avoid multiplicity of criminal proceedings, upon agreement to a stipulation, that the United States may, on its own motion upon five days' notice t	Notice to litigants or other entities	Y	Day	5		
28	144		Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.	Time to make a motion or other filing	Y	Day	10		

28	636	(b)	(b)(1) Notwithstanding any provision of law to the contrary-- (A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except [lists exceptions]. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. (B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [FN1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement. (C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided b	Time to take appeal from court	Y	Day	10	yellow flag on WL - apparently due to proposed legislation, though there's also negative caselaw re (prior version of?) 636(c)	
28	754		A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof. He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title. Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.	Time to make a motion or other filing	Y	Day	10		

28	1605	(b)(2)	(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That-- (1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and (2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice	Notice to litigants or other entities	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
28	1715	(b)	(b) In general.--Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement * * *	Notice to litigants or other entities	Y	Day	10		
28	1867	(c)	(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.	Time to make a motion or other filing	Y	Day	7		
28	2001	(b)	(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the	Notice to litigants or other entities	Y	Day	10		

28	2107	(c)	(c) * * * In addition, if the district court finds-- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.	Time to take appeal from court	Y	Day	7		
28	2243		A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed. The person to whom the writ or order is directed shall make a return certifying the true cause of the detention. When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed. * * *	Presumptive time for court to act	Y	Day	5	what rules apply?	
28	2243		A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed. The person to whom the writ or order is directed shall make a return certifying the true cause of the detention. When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed. * * *	Time for government to act	Y	Day	3	what rules apply?	

28	2284	(b)(2)	(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows: (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding. (2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.	Notice to litigants or other entities	Y	Day	5		
28	3007	(b)	(a) Authority to sell.--If at any time during any action or proceeding under this chapter the court determines on its own initiative or upon motion of any party, that any seized or detained personal property is likely to perish, waste, or be destroyed, or otherwise substantially depreciate in value during the pendency of the proceeding, the court shall order a commercially reasonable sale of such property. (b) Deposit of sale proceeds.--Within 5 days after such sale, the proceeds shall be deposited with the clerk of the court, accompanied by a statement in writing and signed by the United States marshal, to be filed in the action or proceeding, stating the time and place of sale, the name of the purchaser, the amount received, and an itemized account of expenses. (c) Presumption.--For purposes of liability on the part of the United States, there shall be a presumption that the price paid at a sale under subsection (a) is the fair market value of the property or portion.	Time for government to act	Y	Day	5		re federal debt collection procedure
28	3101	(d)(2)	(a) Application.--(1) The United States may, in a proceeding in conjunction with the complaint or at any time after the filing of a civil action on a claim for a debt, make application under oath to a court to issue any prejudgment remedy. * * * [(d)](2) By requesting, at any time before judgment on the claim for a debt, the court to hold a hearing, the debtor may move to quash the order granting such remedy. The court shall hold a hearing on such motion as soon as practicable, or, if requested by the debtor, within 5 days after receiving the request for a hearing or as soon thereafter as possible.	Presumptive time for court to act	Y	Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	re federal debt collection procedure

28	3102	(e)(1)	(e) Return of writ; duties of marshal; further return.--(1) A United States marshal executing a writ of attachment shall return the writ with the marshal's action endorsed thereon or attached thereto and signed by the marshal, to the court from which it was issued, within 5 days after the date of the levy.	Time for government to act	Y	Day	5		re federal debt collection procedure
28	3105	(f)(1)	(f) Return of writ; duties of marshal; further return.--(1) A United States marshal executing a writ of sequestration shall return the writ with the marshal's action endorsed thereon or attached thereto and signed by the marshal, to the court from which it was issued, within 5 days after the date of the execution.	Time for government to act	Y	Day	5		re federal debt collection procedure
28	3202	(d)	(d) Hearing.--By requesting, within 20 days after receiving the notice described in section 3202(b), the court to hold a hearing, the judgment debtor may move to quash the order granting such remedy. The court that issued such order shall hold a hearing on such motion as soon as practicable, or, if so requested by the judgment debtor, within 5 days after receiving the request or as soon thereafter as possible. The issues at such hearing shall be limited-- (1) to the probable validity of any claim of exemption by the judgment debtor; (2) to compliance with any statutory requirement for the issuance of the postjudgment remedy granted; and (3) if the judgment is by default and only to the extent that the Constitution or another law of the United States provides a right to a hearing on the issue, to-- (A) the probable validity of the claim for the debt which is merged in the judgment; and (B) the existence of good cause for setting aside such judgment.	Presumptive time for court to act	Y	Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	re federal debt collection procedure.
28	3203	(d)	(d) Levy of execution.-- (1) In general.--Levy on property pursuant to a writ of execution issued under this section shall be made in the same manner as levy on property is made pursuant to a writ of attachment issued under section 3102(d). * * * (3) Records of United States marshal.-- * * * (C) The United States marshal shall make a written return to the court on each writ of execution stating concisely what is done pursuant to the writ and shall deliver a copy to counsel for the United States who requests the writ. The writ shall be returned not more than-- (i) 90 days after the date of issuance if levy is not made; or (ii) 10 days after the date of sale of property on which levy is made.	Time for government to act	Y	Day	10	also note 90 day period	re federal debt collection procedure

28	3203	(g)	(g) Execution sale.-- (1) General procedures.--An execution sale under this section shall be conducted in a commercially reasonable manner-- (A) Sale of real property.-- (i) In general.--(I) Except as provided in clause (ii), real property, or any interest therein, shall be sold, after the expiration of the 90-day period beginning on the date of levy under subsection (d), for cash at public auction at the courthouse of the county, parish, or city in which the greater part of the property is located or on the premises or some parcel thereof. (II) The court may order the sale of any real property after the expiration of the 30-day period beginning on the date of levy under subsection (d) if the court determines that such property is likely to perish, waste, be destroyed, or otherwise substantially depreciate in value during the 90-day period beginning on the date of levy. (III) The time and place of sale of real property, or any interest therein, under execution shall be advertised by the United States marshal, by publication of	Notice to litigants or other entities	Y	Day	10	also note other time periods	re federal debt collection procedure
28	3205	(c)(2)	(c) Procedures applicable to writ.-- (1) Court determination.--If the court determines that the requirements of this section are satisfied, the court shall issue an appropriate writ of garnishment. (2) Form of writ.--The writ shall state-- (A) The nature and amount of the debt, and any cost and interest owed with respect to the debt. (B) The name and address of the garnishee. (C) The name and address of counsel for the United States. (D) The last known address of the judgment debtor. (E) That the garnishee shall answer the writ within 10 days of service of the writ. (F) That the garnishee shall withhold and retain any property in which the debtor has a substantial nonexempt interest and for which the garnishee is or may become indebted to the judgment debtor pending further order of the court.	Time to make a motion or other filing	Y	Day	10		re federal debt collection procedure
28	3205	(c)(5)	(5) Objections to answer.--Within 20 days after receipt of the answer, the judgment debtor or the United States may file a written objection to the answer and request a hearing. The party objecting shall state the grounds for the objection and bear the burden of proving such grounds. A copy of the objection and request for a hearing shall be served on the garnishee and all other parties. The court shall hold a hearing within 10 days after the date the request is received by the court, or as soon thereafter as is practicable, and give notice of the hearing date to all the parties.	Presumptive time for court to act	Y	Day	10	see also 20 day period	re federal debt collection procedure

28	3205	(c)(7)	(7) Disposition order.--After the garnishee files an answer and if no hearing is requested within the required time period, the court shall promptly enter an order directing the garnishee as to the disposition of the judgment debtor's nonexempt interest in such property. If a hearing is timely requested, the order shall be entered within 5 days after the hearing, or as soon thereafter as is practicable.	Presumptive time for court to act	Y	Day	5		re federal debt collection procedure
28	3205	(c)(9)	(9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee. (B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable.	Presumptive time for court to act	Y	Day	10		re federal debt collection procedure
28	3205	(c)(9)	(9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee. (B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable.	Time for government to act	Y	Day	10		re federal debt collection procedure
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29	107		No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect-- * * * * * * Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting	TRO time limit	Y	Day	5		
29	160	(l)	Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding	TRO time limit	Y	Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	

29	662	(b)	(a) Petition by Secretary to restrain imminent dangers; scope of order The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.	TRO time limit	Y	Day	5		
30	40		All affidavits required to be made under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title, and section 661 of Title 43 may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.	Notice to litigants or other entities	Y	Day	10		

30	818	(b)	(b) Jurisdiction; relief; findings of Commission or Secretary In any action brought under subsection (a) of this section, the court shall have jurisdiction to provide such relief as may be appropriate. In the case of an action under subsection (a)(2) of this section, the court shall in its order require such assurance or affirmative steps as it deems necessary to assure itself that the protection afforded to miners under this chapter shall be provided by the operator. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce any order under paragraph (1) of subsection (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless prior thereto, the district court granting such relief sets it aside or modifies it. In any action instituted under	TRO time limit	Y	Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
30	1734	(c)(2)	(2) Any rent, royalty, or interest recovered by a State under subsection (a) of this section shall be deposited in the Treasury of the United States in the same manner, and subject to the same requirements, as are applicable in the case of any rent, royalty, or interest collected by an officer or employee of the United States, except that such amounts shall be deposited in the Treasury not later than 10 days after receipt by the State.	Time for governme nt to act	Y	Day	10		
31	3542	(a)	(a) A marshal carrying out a distress warrant issued under section 3541 of this title shall seize the personal property of the official and sell the property after giving 10 days notice of the sale. Notice shall be given by posting an advertisement of the property to be sold in at least 2 public places in the town and county in which the property was taken or the town and county in which the owner of the property resides. If the property does not satisfy the amount due under the warrant, the official may be sent to prison until discharged by law. (b)(1) The amount due under a warrant is a lien on the real property of the official from the date the distress warrant is issued. The lien shall be recorded in the office of the clerk of the appropriate district court until discharged under law. (2) If the personal property of the official is not enough to satisfy a distress warrant, the marshal shall sell real property of the official after advertising the property for at least 3 weeks in at least 3 public places in the county or district where the property is located. A buyer of the real property has valid title against a (c) The official shall receive that part of the proceeds of a sale remaining after the	Notice to litigants or other entities	Y	Day	10	not entirely clear whether such action by the marshal occurs in the course of a proceeding to which the FRCP would apply	

42	1971	(e)	(d) Jurisdiction; exhaustion of other remedies The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law. (e) Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions * * * An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote. * * * The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 3331 of Title 5, to serve for such period as the court	Time for court to act	Y	Day	10	yellow flag in WL apparently relates to proposed legislation and perhaps also to July 27, 2006 legislation that named this provision	
42	1971	(e)	(d) Jurisdiction; exhaustion of other remedies The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law. (e) Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions * * * An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote. * * * The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 3331 of Title 5, to serve for such period as the court	Time for governme nt to act	Y	Day	10	yellow flag in WL apparently relates to proposed legislation and perhaps also to July 27, 2006 legislation that named this provision	

43	1062		It shall be the duty of the United States attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also conferred on any United States district court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this chapter; and it shal	Time to make a motion or other filing	Y	Day	5		
45	159		First. Filing of award The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate. Second. Conclusiveness of award; judgment An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties. * * * Fifth. Appeal; record At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding an	Time to make a motion or other filing	Y	Day	10		

45	159		First. Filing of award The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate. Second. Conclusiveness of award; judgment An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties. * * * Fifth. Appeal; record At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding an	Time to take appeal from court	Y	Day	10		
49	32707	(c)	(c) Service and impoundment of property.--(1) A warrant issued under this section must be served and proof of service filed not later than 10 days after its issuance date. The judge or magistrate may allow additional time in the warrant if the Secretary of Transportation demonstrates a need for additional time. Proof of service must be filed promptly with a written inventory of the property impounded under the warrant. The inventory shall be made in the presence of the individual serving the warrant and the individual from whose possession or premises the property was impounded, or if that individual is not present, a credible individual except the individual making the inventory. The individual serving the warrant shall verify the inventory. On request, the judge or magistrate shall send a copy of the inventory to the individual from whose possession or premises the property was impounded and to the applicant for the warrant.	Time for governme nt to act	Y	Day	10	not clear whether this is a criminal or civil/admin proceeding	

46 App	1710	(h)	(h) Injunction (1) In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business. (2) After filing a complaint with the Commission under subsection (a) of this section, the complainant may file suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint. Any such suit shall be brought in the district i	TRO time limit	Y	Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

3-E

MEMORANDUM

DATE: August 9, 2006

TO: Judge Mark R. Kravitz

FROM: Catherine T. Struve

RE: 28 U.S.C. § 452, cognate rules, and the definition of "last day"

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." Corresponding provisions exist in the Bankruptcy,[1] Civil[2], Criminal[3] and Appellate[4] Rules. During the time-computation subcommittee's July 31 conference call, the question was raised whether the "courts always open" provisions bear upon the time-computation definition of the end of the "last day."

A quick survey of treatises and caselaw discloses divided authority concerning the effect of such provisions on whether a litigant can timely file after the closing of the clerk's office, and if so, how. Cases that focus on this issue generally separate into two camps: those that require the after-hours filer to find a court official to whom to hand the papers, and those that permit the after-hours filer to place the papers in the court's night depository or even in another location within the court's custody. The majority of treatises (including Federal Practice and Procedure) take the former view, though Moore's argues that putting the papers in a designated depository should work. It is notable that none of these discussions grounds its conclusions in an argument concerning the intent behind Section 452; this is unsurprising, since there is no indication that the statute or its predecessors was designed to address the issue. This brief survey of authorities indicates that a time-computation provision defining the end of the "last day" could bring clarity to this murky area and would not contravene a discernable statutory purpose.

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[1] Bankruptcy Rule 5001(a) provides: "The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules."

[2] Civil Rule 77(a) provides: "District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules."

[3] Criminal Rule 56(a) provides: "In General. A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order."

[4] Appellate Rule 45(a)(2) provides in relevant part: "When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order."

The statutory and rules provisions. The predecessors of Section 452 date back to 1842.[5] In 19th-century treatises, predecessor provisions are mentioned sometimes in the course of discussions concerning the terms of court,[6] and sometimes during discussions of jurisdiction.[7] Both contexts suggest that the purpose of courts-always-open provisions was to address the power of the courts to act.[8] This was the view taken in the House Report concerning the 1948 legislation that codified the present Section 452: "The phrase 'always open' means 'never closed' and signifies the time when a court can exercise its functions. With respect to matters enumerated by statute or rule as to which the court is 'always open,' there is no time when the court is without power to act."[9]

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[5] Section 5 of the Act of August 23, 1842, 5 Stat. 517, 518, provided in part:

> That the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits.

This provision (a predecessor to Revised Statutes §§ 638 and 574) was mirrored in Equity Rule 1 of the Rules of Practice for the Courts of Equity of the United States, January Term 1842.

[6] See, e.g., Horace Andrews, Manual of the Laws and Courts of the United States, and of the several States and Territories 9 (1873) (in a section discussing the "terms of the courts of the United States," noting that "[t]he circuit courts, as courts of equity, are always open for the purpose of filing pleadings, issuing and returning process and commissions, and for interlocutory proceedings").

[7] See, e.g., Robert Desty, A Manual of Practice in the Courts of the United States 51 (5th issue 1881) (section on "Courts always open for certain purposes" listed under the topic heading "Circuit Courts – Jurisdiction"); George W. Field, A Treatise on the Constitution and Jurisdiction of the Courts of the United States 146 (1883) (discussing fact that "circuit courts . . . are always open" in chapter on jurisdiction).

[8] See John M. Gould and George F. Tucker, Notes on the Revised Statutes of the United States 89 (1889) (observing with respect to Rev. St. § 574 that "while common-law judges properly exercise their authority only when holding a court, and have no power to sit in vacation, yet courts of equity are always open, the chancellor's authority being personal . . . and capable of exercise equally in term time and in vacation"); cf. Horn v. Pere Marquette R. Co., 151 F. 626, 635 (C.C. E.D. Mich. 1907) ("The power of a United States judge to do chamber business is in large part ascribable to the statutory provisions of section 638, Rev. St. . . . , whereby Circuit Courts are declared to be always open for the transaction of certain business . . . .").

[9] H. Rep. No. 308, 80th Cong., 1st Sess., A52 (1947). The legislative history of the 1963 amendments to Section 452 corroborates the view that the provision was designed to address the question of when courts have the power to act. See S. Rep. No. 88-547, 1963 U.S.C.C.A.N. 996,

The advisory committee notes to the relevant Rules generally do not indicate the purpose of the courts-always-open provisions, other than to say that the provisions correspond in substance to Section 452.[10]

The divided caselaw. Some caselaw indicates that "courts always open" provisions allow a litigant to file after the closing of the clerk's office[11] so long as the litigant can find an appropriate court official[12] to receive the papers after hours.[13] Thus, for example, the First Circuit cited Civil Rule 77(a) for the principle that "A person wishing to file a notice of appeal

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997 (1963) ("[T]he requirement [of] holding formal periodic terms by the district courts no longer serves a useful purpose and . . . those statutory requirements should be eliminated.").

[10] See Civil Rule 77, 1937 advisory committee note (rule states substance of Section 452); see also Bankruptcy Rule 5001, [1983] advisory committee note (rule is drawn from Civil Rule 77); Criminal Rule 56, 1944 advisory committee note (stating that relevant part of rule is drawn from Civil Rule 77, and noting "policy of avoiding the hardships consequent upon a closing of the court during vacations").

[11] One district court, though, suggested that reliance on such an interpretation would be risky. Holding that Civil Rule 6(a) applied to the statute of limitations for a Jones Act claim (so that the last day of the period, falling on a Sunday, should be extended to the following Monday), the court rejected the argument that Civil Rule 77(a)'s "courts always open" provision would satisfactorily address such a situation: "Theoretically, the putative litigant might hunt up a Judge of this Court or the Clerk at his residence or elsewhere and file with one of them. But I think it unfair that substantial rights should depend upon the doubtful contingencies which may arise in the attempt to do so." Rutledge v. Sinclair Refining Co., 13 F.R.D. 477, 479 (S.D.N.Y. 1953).

[12] An early case indicated that the judge is not such an appropriate official: In In re Gubelman, 10 F.2d 926, 929 (2d Cir. 1925), *modified on other grounds*, Latzko v. Equitable Trust Co. of New York, 275 U.S. 254, 257 (1927), the Second Circuit interpreted "filing" (for purposes of a statutory provision concerning bankruptcy) to require presentation to the court clerk: "A paper is not filed by presenting it to the judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the clerk of the court, for the purpose of making it a part of the records of the case." But see, e.g., Civil Rule 5(e) ("The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. . . .").

[13] At least one early case applied this principle to determine whether a diversity action was filed within the relevant state statute of limitations. See Hagy v. Allen, 153 F.Supp. 302, 305 (E.D. Ky. 1957) (citing Civil Rule 5(e) and rejecting defendants' argument "that since the complaints we[re] filed [with the clerk at her home] and not at the office that they were not properly filed on December 31"). *Hagy*, of course, predates the Supreme Court's holding that Civil Rule 3 (providing that an action is commenced by filing complaint) is not "intended to toll a state statute of limitations." Walker v. Armco Steel Corp., 446 U.S. 740, 750 (1980).

after closing hours on the last day may seek out the clerk or deputy clerk, or perhaps the judge . . . , and deliver the notice to him out of hours. The notice of appeal would then be filed within the statutory period." Casalduc v. Diaz, 117 F.2d 915, 917 (1st Cir. 1941); see also McIntosh v. Antonino, 71 F.3d 29, 35 n.5 (1st Cir. 1995) (citing *Casalduc* for proposition that "[a]fter hours, papers can validly be filed by in-hand delivery to the clerk or other proper official"; noting that "some clerks' offices reportedly have established so-called 'night depositories' to accommodate after-hours filings"; and declining to decide whether an item is filed at the time it is placed in such a depository after hours).[14]

Other cases are yet more liberal, and provide that the "courts always open" provisions mean that filing has been effected when litigants to leave the papers at the clerk's office (or another place designated by the clerk's office, such as a post office box) even if no one from the clerk's office is there to receive it at that time.[15]

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[14] Likewise, a district court considering a case in which the statute of limitations ran out on a Sunday and the litigant's representative "arrived at the office of the clerk of this court, as he says, at 12:15 P.M. [on Saturday] only to find it closed," observed that the suit "could have been filed on [that] Saturday . . . , with any judge of the court." Rose v. United States, 73 F. Supp. 759, 760 & n.1 (E.D.N.Y. 1947). See also In re Asher Development III, Inc., 143 B.R. 788, 788-89 (D. Colo. 1992) ("Although there is no explicit local bankruptcy rule on point, custom allows an attorney to make prior arrangements to file tardy pleadings with the clerk of a court at a convenient location outside of normal business hours."); In re Peacock, 129 B.R. 290, 291 (Bankr. M.D. Fla. 1991) (in rejecting argument that filing could not have been accomplished on a Sunday, citing Bankruptcy Rule 5001 for proposition that "that the clerk and the court are always available to accept filings, even at their homes"); Greeson v. Sherman, 265 F. Supp. 340, 342 (W.D. Va. 1967) (interpreting Civil Rules 3 and 5(e) and holding that filing was effective at the time that "plaintiff's complaint was delivered to the home of the Deputy Clerk on the night of December 30, 1966 by plaintiff's counsel"); Muse v. Freeman, 197 F. Supp. 67, 69-70 (E.D. Va. 1961) ("Irrespective of the validity of the order closing the Clerk's Office to the public on Saturdays, the evidence is clear that deputy clerks, whenever called upon to do so, will accept legal documents for filing on Saturdays. Moreover, the Judge is generally available in his office on Saturdays due to the congested docket prevailing in this area. That the present action could have been filed on Saturday, April 23, 1960, cannot be denied.").

[15] See, e.g., Greenwood v. State of N.Y., Office of Mental Health (OMH), 842 F.2d 636, 639 (2d Cir. 1988) (holding that time-stamped deposit of Section 1983 complaint in court's night depository box constituted filing for purpose of statute of limitations); Freeman v. Giacomo Costa Fu Andrea, 282 F. Supp. 525, 527 (E.D. Pa. 1968) (reasoning "that if plaintiff's messenger had deposited the complaint in the clerk's mail-slot or slipped it under the door of the clerk's office, as soon as he arrived at the courthouse, the action would have been 'commenced' during decedent's lifetime"); see also Johansson v. Towson, 177 F. Supp. 729, 731 (M.D. Ga. 1959) (holding that "the receipt by the Deputy Clerk of these complaints in his Post Office Box in the early morning hours of Saturday, August 23, constituted a sufficient filing of these suits prior to midnight of the following day, notwithstanding the fact that the Clerk did not open the box until 8:30 a.m. on Monday, August 25"); Johnson v. Esso Standard Oil Co., 181 F. Supp. 431, 433-34

The treatises. Almost all the treatises that I surveyed take the view that if the clerk's office is closed the litigant must find an appropriate court official and deliver the papers to that person. See, e.g., Wright, Miller & Marcus, 12 Fed. Prac. & Proc. Civ.2d § 3081 (as updated 2006) (courts-always-open provision "does not mean that the office of the clerk of the court must be physically open at all hours or that the filing of papers can be effected by leaving them in a closed or vacant office. Under Rule 5(e) papers may be filed out of business hours by delivering them to the clerk or deputy clerk or, in case of exceptional necessity, the judge").[16] Moore's Federal Practice notes that "[h]anding over papers to the clerk may take place at the clerk's office or home," and warns that "[l]eaving papers under the door of the clerk's office after the office is closed has, in the past, been held to be insufficient to constitute filing." Mary P. Squiers, 1-5 Moore's Federal Practice - Civil § 5.30. The treatise argues, however, that in light of Civil Rule 77(a), "the placement of papers in a night depository box maintained exclusively by the clerk" ought to be held "sufficient to constitute filing as of that date for statute of limitations purposes." Id.[17]

(W.D. Pa. 1960) (finding that complaint "was . . . placed in the Clerk's post office box on November 24, 1958, after 2:30 p.m. and before 5:00 p.m., and . . . picked up by the Clerk's office the following day," and holding that "the delivery of this complaint to the Clerk in his post office box on Monday, November 24, 1958, constituted a filing of the complaint and commencement of plaintiffs' action on that day"). Another case relied on a "courts always open" provision to hold a 5:55 p.m. filing timely; since the court did not specify that the litigant sought out a court official at that hour, this may have been a case in which the litigant simply dropped off the papers at the clerk's office. See In re Warren, 20 B.R. 900, 902 (Bankr. D. Me. 1982).

[16] See also David G. Knibb, Federal Court of Appeals Manual § 7.3 (4th ed., updated through 2006) ("The desperate appellant can still meet the deadline after the clerk's office has closed on the last day by personally delivering the notice to the clerk, together with the prescribed filing fee."); 8 Federal Procedure, Lawyers' Edition § 20:330 (database updated through June 2006) ("There is some authority that, if a deadline is approaching and the clerk's office is closed, a party wishing to file a paper must seek out the clerk and place the paper in his actual custody.") (citing *Casalduc*); Lawrence R. Ahern, III & Nancy Fraas MacLean, Bankruptcy Procedure Manual § 5001:01 (2006 ed.) (citing Bankruptcy Rules 5001 and 5005(a) and stating that "[f]iling is accomplished during non-business hours by personal delivery to either the clerk or the judge of the court where the case under the Code is pending"); Suzanne L. Bailey et al., 36 C.J.S. Federal Courts § 488 (database updated May 2006) ("A notice of appeal may be filed on the last day after the closing hours of the clerk's office by seeking out the clerk or deputy clerk and delivering the notice of appeal to him or her . . . .").

[17] One treatise seems to go further than Moore's, suggesting that when an official cannot be found to receive the papers in person, the "courts always open" provision permits the litigant to deliver the papers to the closed office:

> The fact that the clerk's office is physically closed should not deter a party from taking steps to file papers either by slipping or sliding the papers under the door of the clerk's office, by leaving the papers in the clerk's mail slot or post office box, by delivering the papers to the clerk at his or her home, or by delivering the papers

to the judge. And, if the clerk's office is open but there is no one present to receive the papers, the papers may be left in his or her office. . . . When papers are "filed" but are not physically handed over to the proper official, counsel should, at the earliest opportunity, call the clerk of court to inform him or her about such "filing" to insure that the papers are not lost or misplaced; otherwise the papers might not be considered "filed," at least in those jurisdictions where "filing" requires delivery of the paper into the actual custody of the proper official.

8A Federal Procedure, Lawyers' Edition § 22:24 (database updated June 2006).

4-A

Rule 30(b)(6)

Concerns about Rule 30(b)(6) were first raised by the New York State Bar Association. A Subcommittee was formed to investigate and evaluate concerns about this rule. The Subcommittee has concluded that going forward with amendments to this rule is not indicated at this time, although the work product concerns raised by the discussion of Rule 30(b)(6) might prove significant in connection with ongoing consideration of issues raised by Rule 26(a)(2), which is also on the agenda for this meeting. This memorandum is designed to report on the Subcommittee's conclusions.

By way of background, an initial examination of Rule 30(b)(6) issues occurred during the Committee's Fall 2005 meeting in Santa Rosa. At that time, the Committee received an extensive presentation on the subject from David Bernick, who recently finished his term as a member of the Standing Committee. One idea that was suggested was to limit Rule 30(b)(6) depositions to identifying sources of proof. After the Fall 2005 meeting, the Subcommittee circulated an invitation to comment on Rule 30(b)(6) to a number of bar groups and received a significant number of very thorough and thoughtful responses. Altogether, this assistance has been very valuable to the Subcommittee in evaluating the possible need to proceed with amendment proposals for this rule. One thing that has become clear is that Rule 30(b)(6) can be, as its framers hoped, a valuable tool for gathering information possessed by an organizational litigant.

During the Committee's Spring meeting, the Committee had before it a lengthy memorandum evaluating a number of possible areas for amendment. By that time, research into the original adoption of Rule 30(b)(6) had shown that it was intended from the outset to go beyond locating sources of proof, and there was no support among the bar groups that responded to the Subcommittee's request for comment for imposing such a limitation on the rule. Based on the discussion at the meeting, the conclusion was that further discussion of possible amendments would not be worthwhile for a number of the other areas identified -- the scope, timing, or number of depositions, amending the rule to state (as the courts have uniformly held) that the organization has a duty to prepare the witness, or commanding that the "most knowledgeable" person be the one designated by the corporation. At the end of that discussion during the Committee's May meeting, however, the conclusion was that the Subcommittee should give further attention to three topics that were raised -- addressing the "judicial admission" issue in the rule, providing for supplementation of Rule 30(b)(6) deposition testimony, and addressing work product concerns.

The Subcommittee therefore met by conference call to evaluate the need for further action on these three topics. That conference led to the conclusion that no further effort on these topics is presently indicated.

Judicial admissions: The judicial admissions concern was certainly one of the major issues that emerged from the commentary and discussion. But the nature of that concern was not uniform. For some, the concern was that judges too infrequently imposed preclusion as a sanction on organizations for failure adequately to prepare their representatives, thereby undercutting the value of 30(b)(6) depositions due to frequent failures to prepare witnesses adequately. For others, the concern was that some judges have inappropriately precluded organizational parties from offering any evidence that varied from the deposition responses given by their Rule 30(b)(6) representatives, perhaps even when the representative's testimony was "I don't know" and the evidence being offered came from outside the organization (and therefore was not information "reasonably available to the organization" within the rule).

Although it seemed that no group or Committee member favored treating all testimony in Rule 30(b)(6) depositions as a judicial admission, the Subcommittee concluded that it would be

more prudent not to proceed with an amendment to address this issue. For one thing, a rule provision would have to condition a prohibition on use of the preclusion power on full preparation of the witness. Surely judges must continue to have the power to use preclusion as a sanction for obstructive failure to comply with the preparation requirements of the rule. Explaining in a rule or Committee Note exactly what such preparation should entail might itself prove a challenge, however. And any action by the Committee might disturb the caselaw on the nature of the duty to prepare the representative.

At the same time, it was not clear that judges had used preclusion in a way inconsistent with what an amendment would seek to accomplish. To the contrary, the courts seem to be going in the right direction and eschewing a strong version of judicial admission treatment. In particular, preclusion rulings appear rare, and those that are made appear to result from the organization's failure to prepare its witness as the rule requires. Should this pattern in judicial decisions change, there could be a reason to revive attention to the judicial admission issue under Rule 30(b)(6). But for the present there appear to be at least two Court of Appeals decisions consistent with the desired approach, and little or no district court caselaw actually supporting a rigid judicial admissions approach.

Supplementation: The idea of amending Rule 26(e) to provide for supplementation of Rule 30(b)(6) depositions was offered largely as an alternative technique for dealing with concerns about judicial admission treatment. Given the conclusion that the judicial admission concern itself does not seem pressing, there appeared little need to continue with consideration of a Rule 30(b)(6) provision in Rule 26(e), for the possible positive effects seemed debatable. And there might be negative effects. Given the concern that organizations may shirk their obligation to prepare their representatives, a rule change that might be read to permit the witness to say "I don't know, but I'll get back to you" could be a move in the wrong direction. To add specific reference to Rule 30(b)(6) depositions to Rule 26(e) would mean treating them differently from all other depositions; while they have some distinctive features, this does not seem warranted at this time. Moreover, adding them to Rule 26(e) could prompt concerns like the ones articulated in regard to the judicial admission topic because such a change to Rule 26(e) could make the exclusionary provisions of Rule 37(c)(1) applicable to any information not provided by the Rule 30(b)(6) witness. Accordingly, the supplementation idea is to be shelved, although later developments reviving concerns about judicial admissions might be a reason for further consideration of this issue.

Work Product: This concern was mentioned by some, but did not seem a widespread one. Nonetheless, the issues about inappropriate intrusion into the interaction between the lawyer and the witness, and inquiry about counsel's analysis of the cases, both seem similar to concerns raised about disclosure of interaction between lawyers and expert witnesses under Rule 26(a)(2). Those Rule 26(a)(2) issues have been referred to the Subcommittee, and the best treatment of the analogous concerns under Rule 30(b)(6) seems to be to keep the Rule 30(b)(6) concerns "on hold" during consideration of the Rule 26(a)(2) issues. Depending on how the consideration of Rule 26(a)(2) evolves, further attention to the analogous concerns under Rule 30(b)(6) may be warranted.

4-B

Rule 26(a)(2) Issues

The purpose of this memorandum is to introduce the issues that have been raised regarding Rule 26(a)(2), which was added to the rules in 1993. These issues fall into three categories: (1) The exemption from the report requirement in Rule 26(a)(2)(B) for regular employees of a party or others who have not been "specially employed" to provide expert assistance in preparation of the litigation; (2) The question whether core work product or otherwise privileged material provided to a testifying expert must be disclosed in such a report; and (3) The question whether the expert's draft reports and/or notes must be disclosed.

Background on Expert Discovery

A starting point is to revisit the background for the current expert discovery rules that existed before Rule 26(a)(2) was adopted in 1993.

Before 1970, there was very limited discovery regarding testimony from expert witnesses. The idea was that "[t]he expert, unlike an ordinary witness, has no unique knowledge. That is, the other side, at least in theory, can obtain the same information merely by engaging an expert of its own. Hence, it may be argued that a lawyer could want to obtain information from his adversary's expert only to avoid doing any preparation himself, and to save his client considerable expense. Ultimately this could lead to a deterioration in case presentation and lower the standards of the bar generally." Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 482-83 (1962). Thus, the starting (and seemingly current) point is that discovery or disclosure regarding experts is not warranted merely because it could provide information bearing on the case; a party could not use expert discovery to build its case.

The problem, however, was that the opposing party needed information to prepare to cross-examine the expert. The courts began authorizing some discovery for this purpose, and the practices diverged in different places. According to John Frank, who was on the Advisory Committee when expert discovery rules were added to the Civil Rules, the practice in the West was to allow discovery rather freely, while in the East expert discovery was frowned upon. McLaughlin, Discovery and Admissibility of Expert Testimony, 63 Notre Dame L. Rev. 760, 764 (1988) (quoting John Frank). These regional differences are worth noting because they may endure to this day.

The discovery revisions in 1970 therefore included a compromise measure regarding expert discovery. Rule 26(b)(4)(A) thus provided that, by interrogatory, a party could compel the other side to identify expert witnesses who would testify and to "state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." That was the only expert discovery provided as a matter of right, although Rule 26(b)(4)(A) went on to say that the court could order further discovery (often by deposition of the expert) on motion. Again, it seems that the practice in different places diverged; in the New York area expert depositions were reportedly rare, while in the West they were customary. Thus, Judge Schwarzer, reflecting the western view, reported in 1987 that "experts who are prospective witnesses are normally produced for deposition by the opposing party as a matter of course." Schwarzer, Guidelines for Discovery, Motion Practice and Trial, 117 F.R.D. 273, 276 (1987).

An additional strand regarding examination of expert witnesses comes from the Federal Rules of Evidence. Fed. R. Evid. 803(18) now provides a hearsay exception for use of a "learned treatise." Before the adoption of this rule an expert witness could not be asked about what a book said unless he or she testified to having relied on it. And there was often great difficulty in obtaining the admission that the expert actually relied on a given book. Now the questioner has a multitude of ways to show that something is a learned treatise and need not show that the witness relied on it to use it in examining the witness.

Against this background, the expansion of expert discovery in 1993 was a significant further breakthrough. It is worth recalling that 1993 was a year of great controversy about discovery amendments. The initial disclosure requirement of Rule 26(a)(1), in particular, was the object of a veritable firestorm of criticism. The Advisory Committee eventually went forward with it, but with an opt-out provision. Despite that, there was a broad effort in Congress to excise it from the amendment package. The administration supported this effort. Both business group lobbyists and civil rights group lobbyists favored the legislation excising this provision (the latter mainly because the legislation also overturned numerical limitations on depositions and interrogatories). The House unanimously passed this legislation, and it would have been adopted by unanimous consent in the Senate and signed by the President but for the opposition of one Senator. Due to that Senator's refusal to consent to suspending the rules, the legislation failed and the rules went into effect as written.

The point of this digression is that one could make a good argument that 26(a)(1) was really a paper tiger, and that the big deal in the amendments package was 26(a)(2), along with the change to Rule 26(b)(4)(A), which got virtually no attention in the hoopla about other discovery rule changes. Since 1993, there has been a lot of litigation about 26(a)(2), and one might say it proved to be a real tiger. Maybe the time to look carefully at how it has worked is upon us.

One major feature of the 1993 amendments is that Rule 26(b)(4)(A) now makes depositions of expert witnesses automatically available (although usually postponed until after the expert report is prepared). A second major feature is that Rule 26(a)(2)(A) requires disclosure of the identity of "any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence" 90 days before trial unless another date is set; no longer must interrogatories be submitted for that purpose. A third major feature is that Rule 26(a)(2)(B) also requires a very detailed report from the expert witness, a requirement backed up with the simultaneous adoption of Rule 37(c)(1) on exclusion of information that was not disclosed as required to be disclosed. But as discussed in (1) below, that report requirement (and the attendant delay in deposition) does not apply if the expert witness is a regular employee of a party who does not normally provide expert testimony or is a witness who was not "specially employed" to provide it in this case. A fourth major feature of the rule is that it says the report should "contain a complete statement of * * * the data or information *considered* by the witness in forming the opinions." Thus, the report was not limited to what the witness relied upon. Finally, the Committee Note said with regard to this disclosure requirement:

> Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions -- whether or not ultimately relied upon by the expert -- are privileged from disclosure when such persons are testifying or being deposed.

This feature gave rise to what is considered in (2) below -- a dispute about whether certain "core" work product or other confidential materials provided to testifying expert witnesses should be subject to disclosure. In the background is the further issue raised in (3) below -- whether the expert's draft reports, working papers, etc. should be subject to disclosure because they also indicate what the witness considered.

The 1993 amendments to the Civil Rules thus ushered in a brave new world of expert discovery, particularly in places (reportedly including New York) where it had been quite circumscribed before. Many challenges were brought to the adequacy of expert reports, and in some instances expert witnesses were not allowed to testify, or were not allowed to testify to certain things, because their reports were not adequate. See 8A Fed. Prac. & Pro. § 2289.1 at n.3 (Supp. 2006)

(describing cases). Efforts to supplement such reports at the last minute were sometimes rebuffed on the ground that it was unfairly late to introduce new theories or conclusions.

A final piece of the present situation came with the 2000 amendment of Fed. R. Evid. 701 to say that "lay opinion" testimony should not be allowed when the opinion was "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The Committee Note explains that this amendment was designed to defeat attempts to proffer an expert witness in "lay witness clothing." Although the main objective of the amendment was to ensure that the judge would act as a "gatekeeper" regarding such testimony, it also had significance for discovery obligations. Rule 26(a)(2) is phrased in terms of whether testimony is offered under Rules 702 et seq. The Fed. R. Evid. 701 change made it clearer that testimony offered by one who was partly (or mainly) a "fact" witness might still be subject to disclosure requirements, at least to the extent of identifying the person as one who would provide testimony under Fed. R. Evid. 702. The Committee Note to Rule 701 recognized that, "[b]y channelling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16."

(1) Exemption from report requirement for some employees

Mickum & Hajek, Guise, Contrivance, or Artful Dodging?: The Discovery Rules Governing Testifying Employee Experts, 24 Rev. Lit. 301 (2004), strongly argues that the exemption from the report requirement in current Rule 26(a)(2)(B) for employees who do not ordinarily testify as expert witnesses should be removed. In large measure the authors' premise is that, even with the right to take the deposition of such people, this exemption creates an unfair playing field. Thus, the article stresses "the importance of an expert report to a meaningful deposition" and asserts that "it is difficult to argue that an attorney deposing an expert without a report that sets forth the expert's opinions and data considered by an expert is not disadvantaged." Id. at 316. Contrasting what was available before 1993 -- no right to a deposition and only a very sketchy interrogatory answer -- one could raise questions about whether, given the right to take a deposition, it is also essential to have the sort of thorough report required by the rule.

The article asserts that this exemption has produced a "rising use of employees as testifying experts in litigation" (24 Rev. Lit. at 303), although it also seems to suggest that this increase has not happened yet but will happen unless this alleged loophole is closed. See id. at 304 ("Unless this is done, there is likely to be an explosion in the use of employees as testifying experts in litigation.") Although there are many, many cases involving the application of the 1993 expert discovery amendments, the number of cases raising this issue is very limited. But as set forth below, some courts resist the exemption plainly included in the rule.

The goal of the exemption seems to have been to excuse the preparation of the very detailed report required by Rule 26(a)(2)(B) in some instances, leaving it to the courts to require more if that seemed warranted. Thus, the Committee Note explains:

> The requirement of a written report in paragraph (2)(B) however, applies only to those experts who are retained or specially employed to provide such testimony [under Fed. R. Evid. 702] in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

The treating doctor is a prime example of the sort of problem the Committee was attempting to avoid -- if a party must get the doctor to prepare such a report to call the doctor, it may often be impossible to do so. As many cases have recognized, treating doctors do not ordinarily have to prepare such reports under Rule 26(a)(2). See 8 Fed. Prac. & Pro. § 2031.1 n.6 (Supp. 2006). But if the testimony goes beyond treatment, a report may be required. See Ordon v. Karpie, 223 F.R.D. 33 (D. Conn. 2004) (report required of treating doctor because testimony went to questions of causation that were beyond the scope of the facts made known to the doctor in his course of treatment).

Whether the treating doctor is suitably addressed by the "specially employed" language in the rule might thus be debated. The doctor's exemption depends on the conclusion that he or she was not so retained; the dividing line seems to be whether the doctor has done something more to prepare for litigation than would be true in the treatment role. There may be many instances in which an argument could be made that the doctor did not consider a certain aspect of the patient's situation until the lawyer asked about it. The question whether that would mean that the doctor was "specially employed" with regard to that insight could lead to arguments about whether a report was required. Perhaps something more explicit could be put into the rule to address the protection for treating doctors.[1] But specifying who is covered and in what circumstances could be difficult.

The need for the exemption for ordinary employees seems considerably less compelling than the one for the treating doctor, if the issue is the difficulty of getting such a report from such a person. It seems unlikely that most employers would find it difficult to get such a report. Hence, this is the point on which some courts have resisted the exemption in the rule. If the employee is "specially employed," the report requirement applies. But the use of this phrase raises potential difficulties because it is used in two places.

One situation is the one on which this memorandum focuses -- the exemption from the report requirement. That ceases to apply if the employee is "specially employed to provide expert testimony in the case." Perhaps this could be read to mean that an employee is "specially employed" whenever identified under Rule 26(a)(2)(A) as a testifying expert witness. One court seems inclined to this view:

> When a corporate party designates one of its employees as an expert, it typically authorizes the employee to perform special actions that fall outside of the employee's normal scope of employment. * * * Accordingly, the court finds that U.S. Can has "specially employed" McGowan by designating him as an expert opinion witness.

KW Plastics, Inc. v. United States Can Co., 199 F.R.D. 687, 690 (M.D. Ala. 2000); see also Day v. Consolidated Rail Corp., 1996 WL 257654 (S.D.N.Y., May 15, 1996) (adopting similar reasoning). In terms of the problem of getting a report, this reasoning makes sense because the employer can

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[1] Judge Mark Kravitz, a member of the Standing Committee, has expressed particular concern about the problems presented by uncertainty about whether and when a treating doctor is subject to the identification requirements of Rule 26(a)(2)(A) and the report requirements of Rule 26(a)(2)(B). Some lawyers, at least, appear to believe that a report is never required so long as the identity of the doctor is disclosed, raising issues about whether the doctor is allowed to testify about such things as causation or prognosis. And the issue is often raised on the eve of trial at the final pretrial conference. By that time, it is likely to be too late to solve the problem. Either one party is denied the doctor's testimony, or the other is deprived of a report on the opinions the doctor offers in testimony. A rule change might be a way to avoid such problems in the future.

readily get the report. But it does not seem to conform to what the rule says, because the rule exempts some employees who are designated as expert witnesses from preparing the report.

Putting aside the fealty of this interpretation to the language of Rule 26(a)(2)(B), a broad reading of "specially employed" could raise problems in a very different situation where the phrase is also used in relation to expert advice in litigation. Rule 26(b)(4)(B) provides very strong protections against discovery about the facts learned or opinions developed by anyone (including an employee) who is "specially employed * * * in anticipation of litigation or preparation for trial." In this instance, there is reason to resist a broad reading of "specially employed."[2] Thus, this language does not seem suited to solve the problem (if it is one) presented by the exemption from the Rule 26(a)(2) report requirement for employees who will offer expert testimony at trial.

A few courts, perhaps recognizing what the rule says, have not stressed the "specially employed" language but nevertheless resisted the exemption on the ground that it is inconsistent with the general thrust of the rules: "This Court joins in finding that requiring testifying experts to submit written reports is entirely consistent with the spirit of Rule 26(a)(2)(B). It is not only likely that such reports will serve to streamline or even eliminate the necessity for deposition testimony, but they will undoubtedly serve to minimize the element of surprise." Minnesota Min. & Manuf. Co. v. Signtech USA, Ltd., 177 F.R.D. 459, 461 (D. Minn. 1998). Contrast Duluth Lighthouse for the Blind v. C.G. Bretting Manuf. Co., 199 F.R.D. 320, 325 (D. Minn. 2000) ("While we agree with the Court, in *Signtech*, that it is undesirable for litigants to elude the automatic expert disclosure requirements by guise, contrivance, or artful dodging, we are not empowered to modify the plain language of the Federal Rules so as to secure a result we think is correct.").

Although the rule is not presently written this way, one might approach this question in terms of whether the proffered employee was a "pure" expert witness or a "fact" witness who (like a treating doctor) adds insights to testimony about historical facts on which the witness has percipient knowledge by employing specialized training. An example of such analysis is provided by Prieto v. Malgor, 361 F.3d 1313 (11th Cir. 2004), which includes considerable dicta about the issue. In that excessive force case against Miami-Dade County, the County called Rodriguez, one of its officers who trained others in the use of force, to testify about the propriety of the use of force on the occasion in suit. Defendant did not provide a report from Rodriguez on the ground that he was exempt, relying on the notion that Rodriguez was a "hybrid" witness, providing "factual" and "expert" testimony. The majority rejected defendant's view:

> [H]e functioned exactly as an expert witness normally does, providing a technical evaluation of evidence he had reviewed in preparation for trial. Because he had no direct, personal knowledge of any of these facts, his role was simply not analogous to that of a treating

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[2] 8 Fed. Prac. & Pro. § 2023 offers the following caution:

> There is a legitimate concern that a party may try to immunize its employees who are actors or viewers against proper discovery by designating them experts retained for work on the case. One of the tasks an employee of a party often perform is to assist the party's lawyers in work on the case. * * * Something more than this ordinary assistance to counsel ought ordinarily be required to establish that an expert who is a regular employee was "specially" retained to work on the litigation. Accordingly, courts should be exceedingly skeptical when employees who have otherwise discoverable information are designated "experts," and efforts must be made to preserve the opportunity for the opposing party to discover that information.

> physician, the example offered by the Advisory Committee of an employee exempt from the written report requirement.

Id. at 1319. The majority therefore concluded that "the County was obligated to provide the expert witness report." Id. at 1319. But it also held that plaintiffs had withdrawn the objection and could not, in their appeal, challenge the district court's order permitting Rodriguez to testify. One judge refused to join the discussion of Rule 26(a)(2) on the ground that it was pure dicta and relied on a point not raised below. See id. at 1320-21 (Cox, J., specially concurring).

In sum, although there are few cases on point there are forceful arguments that in cases like *Prieto* the rule should be different, or at least that the reasons that apply to treating physicians do not apply there. Surely the County would have encountered no difficulty in getting a report from Rodriguez, and it could only have obtained similar testimony from a nonemployee expert by "specially employing" that person. But it is also true that courts have broad powers under the current rules to order preparation of reports -- whether or not required by Rule 26(a)(2)(B) -- when needed, and even to provide for such situations by local rule. Indeed, some cases cited as rejecting the limitation in Rule 26(a)(2)(B) actually involve sanctions for failure to obey such orders.[3]

There is another problem, however, which anticipates the second topic of this memorandum. In at least some instances, adopting the requirement that all materials provided to the witness automatically be turned over to the other side could intrude very dramatically on privilege and work product protection. This does not seem a significant difficulty in relation to a witness like Rodriguez in *Prieto*. But consider a hypothetical from mass tort litigation: The chief medical officer of a medical products company would be called as a witness in a suit alleging that a product was dangerous. As a witness, this person would likely offer testimony about the development and testing of the product, but also offer testimony under Evidence Rule 702 regarding whether the testing was adequate and whether the results indicated that the product was safe. Should such a person be required to prepare a report? The potential invasion of privilege could be very large. Often such a person will, by virtue of her position in the corporation, have ongoing interaction with in-house and perhaps outside counsel about the progress of the litigation. This interaction will likely involve both confidential attorney-client communications and the most sensitive tactical discussions of counsel. The effort involved in having such a person prepare a report might not be too substantial, but the invasion of privilege would be very serious.

The current rule avoids that predicament by excusing the preparation of a report. A lower level insider selected solely to provide "expert" testimony might be more analogous to an outsider hired for a similar purpose and not raise the same sort of issues. An example is that in the automobile industry some manufacturers have an in-house staff of testifying experts (who would probably have to provide reports under the current rule because their duties regularly include giving expert testimony). That's simply a cheaper and simpler way of providing the sort of evidence an outsider could otherwise provide.

With the chief medical officer example, imposing a report requirement presents a dilemma: It may be essential to call this person as a witness because the jury will expect to see her, but the price in invasion of privileged material is very large. Reportedly, in such situations the practice has been to identify the person as required by Rule 26(a)(2)(A) and state that no report will be forthcoming because of the exemption under Rule 26(a)(2)(B), leaving it to the other side to say

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[3] See Applera Corp. v. MJ Research, Inc., 220 F.R.D. 13 (D. Conn. 2004) (excluding testimony of employee experts for failure to comply with scheduling order requiring that reports be submitted).

whether it takes the position that a report should be provided. If it takes that position, the matter is worked out.

During the Committee's meeting in Santa Rosa in October, 2005, there was some initial discussion of the current exclusion of employees from the report requirement, reflected in the minutes of that meeting as follows:

[Excerpt from Oct. 2005 minutes]

Rule 26(a)(2)(B): Employee Expert Witnesses

This topic was brought to the docket by a law review article submitted as a suggestion. Rule 26(a)(2)(B) clearly limits the obligation to disclose an expert witness report to an expert trial witness who is "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve the giving of expert testimony." That means that a report need not be provided for an employee who will testify as an expert witness but whose duties as an employee do not regularly involve the giving of expert testimony. Or so it seems. A majority of the reported cases dealing with this subject take a different approach. They say that disclosure of an expert report is a good thing because it facilitates deposition of the expert, and might at times make it unnecessary to depose the expert. The Committee Note extols the virtues of expert witness reports. In effect, the Committee did not really appreciate what it was doing when it wrote the rule text, so the rule should be read to require a report because an employee who does not regularly give expert testimony is specially retained or employed to give testimony in this case.

These cases fairly pose the question: if the 1993 rule had it right, something might be done to restore the intended meaning. But if the cases are right in believing that a report should be required, finding no worthy distinction based on the regularity with which a particular employee provides expert testimony, something might be done to adopt this revisionist view in the rule text.

Discussion began with the observation that this is a real problem in practice. The conflict in the cases may not be resolved in a particular case until it is too late to provide expert testimony in some other way. A careful response is to give notice to the other side that a particular witness is or is not required to give a report, inviting a response in case of disagreement. There is a particularly serious problem with privilege waiver.

It was noted that in 1997 the ABA Litigation Section offered a report, subsequently withdrawn, complaining that some courts were requiring treating physicians to give expert witness reports under 26(a)(2)(B) even though the Committee Note offers them as a clear illustration of expert witnesses who need not give a report and the cases recognize that a treating physician becomes specially retained or employed only if asked by a lawyer to do something in addition to regular treatment and testimony based on the treatment.

A further question may arise from the relationship to Rule 26(b)(4)(B), which severely limits the right to depose an expert who has been retained or specially employed in anticipation of litigation but who will not be used as a witness at trial.

The problem of privilege waiver is addressed in the Rule 26(a)(2)(B) Committee Note, where it is observed that "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used 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." Some lawyers continue to fight a rearguard argument

that work-product information need not be included in the report even though it was consulted in forming the expert's opinion.

It was asked whether, apart from possible problems of work-product and privilege, there is a good reason not to require a report?

One response was that the 1993 changes in the wording of Rules 26(b)(3) and (4) have introduced uncertainty about the extent of work-product protection for employees. There is a risk that some will be designated as nontestifying "retained" experts to shield against discovery.

A second response was that an employee may be designated as an expert witness under Evidence Rules 702, 703, or 705 because the party is not sure whether the testimony can be admitted as lay opinion testimony under Rule 701. Requiring an "expert" report in these circumstances may be too much.

Beyond opinion, moreover, employee witnesses often will be testifying to blends of historic fact and opinion quite different from the opinions typically provided by a professional expert witness. The universe of information considered by an employee may be far broader than the information provided to a professional expert witness. There may be compelling reasons to enable employee witnesses to talk with the employer's attorneys under shield of privilege. There was a lot of law to that effect before adoption of Rule 26(a)(2)(B).

Privilege was recognized as a problem, but with the suggestion that it tends to be raised early on in the litigation as the parties discuss deadlines for exchanging reports. The careful practitioner, moreover, will ask who has the burden: is it on the party offering a witness to give a report? Or on the other party to depose the witness? If there is no obligation to give a report, a trial-witness expert can be deposed without waiting for the report. Questions asked at deposition may be blocked by an assertion of privilege. Then the privilege question will need to be addressed.

This line was pursued further by asking why it should make any difference to privilege whether a report is required. If privilege and work-product protection should be waived by offering information to a witness for consideration in forming an expert opinion, adoption of an expert-report requirement does nothing more than advance the point at which the otherwise

protected information must be revealed. Examination at deposition or trial should be subject to the same waiver principle even though there was no requirement to disclose a report. If the Committee Note to Rule 26(a)(2)(B) got it right, it is not because there is a distinction with respect to privilege waiver between expert trial witnesses who are obliged to give a disclosure report and those who are not. The same holds true for the Evidence Rule 612 provisions on production of documents used by a witness to refresh recollection, provisions that may be invoked at deposition as well as at trial.

This discussion led to the question whether indeed privilege-waiver theories should distinguish between hired experts (and the functional equivalent in employees who regularly give expert testimony) and employees who occasionally are called upon to give expert testimony. There may be an important difference between the need to disclose a 10-page advocacy summary provided to a hired expert witness and the full range of information available to an employee who may of necessity be involved in helping to prepare the fact information required to try the case. Truly privileged information may deserve protection, being careful to distinguish merely "confidential" information that may deserve a protective order but not the absolute protection of privilege. This distinction may be implicit in the 1993 Committee Note to Rule 26(a)(2)(B), and in turn reflect on the reasons for distinguishing between employees whose duties regularly involve giving expert testimony and other employees sporadically called upon to provide expert testimony.

This thought was expressed more succinctly. The "hired gun" expert witness is a better subject for privilege waiver than the employee who is no more than an occasional trial expert witness. The rule is designed to focus on the independent expert.

A subtle variation was suggested: perhaps privilege should be waived only if the employee actually relied on the privileged information in forming an opinion. If it was merely considered but not relied upon, there would be no waiver.

It was noted that Professor Capra, Evidence Rules Committee Reporter, believes that there is a lot of confusion in this area and that it deserves further work.

Further discussion reiterated concern that several cases seem to disregard what the rule clearly says about reports from employees who do not regularly give expert testimony. It may be better to require reports from all expert trial witnesses, subject to protecting privilege and work-product information. On the other hand, protecting privilege and work product may prove particularly difficult with respect to employees. And it is important that a party know what are the consequences of designating an expert trial witness.

At the end of the discussion it was concluded that the 1993 rule may well have got it right, but that there are very difficult problems of privilege in addition to the question whether it is better to identify a category of employee expert trial witnesses subject to deposition directly without an obligation to first disclose an expert report. The question will be carried forward for discussion at the spring meeting. Among the materials to be considered may be a revision of Rule 26(a)(2)(B) that sharpens the distinction now drawn among categories of employee experts and that provides Committee Note discussion that further explains the problems of privilege and work-product waiver.

* * * * *

(2) Disclosure of materials "considered" by expert

As noted above, before the adoption of Fed. R. Evid. 803(18) there had sometimes been difficulties obtaining from expert witnesses an acknowledgement that they had relied on certain materials in reaching their conclusions. Rule 26(a)(2) uses the term "considered" rather than limiting its effect to those materials on which the expert will profess to rely. As interpreted by the Committee Note, it broadly requires disclosure of anything "considered" by the expert witness.

But Rule 26(a)(2)'s incursion into privilege protection is tied to the report requirement. As noted in (1) above, there are valid arguments that disclosure of everything given to the expert witness should occur whether or not the witness also has to provide a report. Such a change to the rule would magnify its intrusion into privileged areas, however.

The Federal Practice Task Force of the ABA Section of Litigation has provided the Committee with a thorough report (included in these agenda materials) recommending a change in the other direction:

> We therefore recommend that federal and state rules be adopted or amended, consistent with American Bar Association policy, to protect from discovery draft expert reports and attorney-expert communications that are an integral part of the collaborative process in preparing an expert's report. Although this might bar opposing counsel from

inquiring into an expert's preliminary thought processes, we believe that the adverse consequences of allowing inquiry into these issues significantly outweigh their benefits.

Based on this concern with insulating the interaction between lawyers and experts, the Task Force offers the following specific proposals:

(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.

Proposal (i) is addressed in (3) below. The argument in favor of the proposals regarding attorney-expert communications is that current practice intrudes too deeply into the relationship between attorney and expert, and is unnecessary to effective preparation to meet the expert's testimony. Although the Committee Note also recognizes that the attorney may assist the expert in preparing the report, this opportunity may be undercut by efforts to show that the expert is really the lawyer's mouthpiece. Moreover, the intrusiveness of the process with regard to testifying experts means that lawyers sometimes feel they must retain double sets of experts, one to counsel them on preparation of the case and the other to provide actual testimony. The lawyer can then interact fully with the consulting experts while carefully constraining communications with the testifying experts. But this process is both cumbersome and costly. According to the ABA Task Force, lawyers regularly recognize that the disclosure regime is inappropriate and stipulate around it by agreeing to exempt their cases from requirements for production of attorney-expert communications, or to limit disclosure to the materials relied upon by the expert rather than all considered by the expert. Moreover, where stipulations do not occur, extensive deposition questioning about the involvement of counsel in the preparation of the expert's report prolongs expert depositions with little corresponding benefit. As the ABA Task Force explains, "The expert will ultimately be gauged by the strength of the opinion and the facts or data on which the expert relies, not on the extent to which the opinion was influenced by counsel."

Besides urging specific rule changes on the merits, the ABA Task Force emphasizes the difficulties confronted by lawyers due to the variety of rules on these subjects in different places and before different judges. In part, those differences result from state-court rules or rulings, but they also result from the persistence of some disagreements among federal judges on the proper application of Rule 26(a)(2). This may be a topic on which regional differences persist.

That disagreement among federal courts prompted another proposal to the Committee on this same subject. In 2000, the New York State Bar Ass'n submitted a report making a very different recommendation -- that the rule be amended to make explicit what was in the 1993 Committee Note to Rule 26(a)(2), i.e., that everything the lawyer gives to the testifying expert will be discoverable. This submission (00-CV-E) is also included in these agenda materials. During the Advisory Committee's October, 2002, meeting, the Discovery Subcommittee considered this proposal. The memorandum analyzing the memorandum and the notes of that subcommittee discussion follow.

[Excerpt from Sep. 23, 2002, memo
analyzing N.Y. State Bar Ass'n report]

In a lengthy and thoughtful submission (00-CV-E), the Committee on Federal Procedure of the Commercial and Federal Litigation section of the New York State Bar Association has proposed that the discovery rules be amended to prescribe that any materials considered by a testifying expert be discoverable, whether "core" work product or not.

The basic problem identified by the New York Bar State Association committee is easy to describe: When a lawyer supplies materials to a testifying expert, can the other side obtain those materials even if they contain the lawyer's legal impressions? As noted below, the starting point in discussion probably should be whether the Subcommittee believes the rule should call for disclosure or not. If so, undertaking a rule change may be unnecessary because the courts seem to be reaching that result on their own more often than not, but there have been decisions that go the other way. If the Subcommittee believes that enhanced protection is warranted, a rule change might be seen as more important. Because both views are possible, this memorandum will begin by noting difficulties presented should the Subcommittee desire to ensure that protections are preserved after materials are supplied to a testifying expert.

Before 1993, this issue had arisen due to the provision in Fed. R. Evid. 612(2) that when a witness "uses a writing to refresh his memory for the purpose of testifying . . . before testifying," the court may in its discretion order that the adverse party may inspect the writing. In Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977), Judge Frankel concluded that under that rule "[t]here would appear, in short, to be room for allowing discovery on a theory of waiver or of qualified privilege, where an attempt is made to exceed decent limits of preparation on the one hand and concealment on the other." Id. at 617. Finding that, in the case before him, there was "no indication of a calculated plan to exploit the work product in a significant way for preparing the experts while planning to erect the shield of privilege," the judge declined to require that the materials defendant's lawyer provided the expert be provided to the plaintiff. He did sound a warning: "From now on, as the problem and pertinent legal materials become more familiar, there should be a sharp discounting of the concerns on which defendant is prevailing today." Id. One might question whether Rule 612(2) itself is directed to materials provided the expert before he reaches an opinion (as opposed to the preparation thereafter for a deposition or trial), but the situation before Judge Frankel involved background materials provided the expert to assist in forming an opinion.

As the attached New York State Bar Association memorandum outlines, the question whether materials provided to the expert could be withheld on the ground that they contained "core" work product divided the courts before the addition of the expert disclosure. A divided panel of the Third Circuit concluded that the second sentence of Rule 26(b)(3)'s protection of "core" work product would apply despite the caveat in Rule 26(b)(3) that its protections are "[s]ubject to the provisions of subdivision (b)(4)" concerning discovery regarding expert witnesses. Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984). The majority in that case also concluded that access to such materials was not particularly important to enable the adverse party to prepare for its cross-examination of the expert witness. Judge Becker disagreed, urging that "evidence demonstrating that an economist's theory did not originate or evolve as a result of his own research but rather as a result of the hiring lawyer's suggestion" could "critically alter the fact finder's assessment of the expert's testimony."

In Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991), the other leading case cited by the memorandum, Magistrate Judge Brazil concluded that the caveat in Rule 23(b)(3) applied to its second sentence (dealing with mental impressions of an attorney) because the second sentence referred to "such materials," a reference back to the first sentence, which itself says that its

protections are subject to (b)(4). He also agreed with Judge Becker about the need to grant access to such materials:

> The trier of fact has a right to know *who* is testifying. If it is the lawyer who really is testifying surreptitiously through the expert (i.e., if the expert is in any significant measure parroting views that are really the lawyer's), it would be fundamentally unfair to the truth-seeking process to lead the jury to believe that the background and personal attributes of the expert should be taken into account when the persuasive power of the testimony is assessed.

The adoption of Rule 26(a)(2) in 1993 potentially altered the situation, for it requires a testifying expert to submit a report that includes "a complete statement of . . . the data or other information considered by the witness in forming the opinions." The Committee Note seemed to speak directly to the problem presented:

> 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 to be used 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.* (emphasis added)

It might bear noting that Magistrate Judge Brazil was a member of the Advisory Committee at the time this amendment was under consideration.

Analyzing the amendment, Greg Joseph found that it had adopted a "'pay-to-play' approach to waiver -- that is, the Rule makes waiver an unavoidable cost of putting an expert forward to testify." Joseph, Emerging Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97 (1996). He argued, however, that the amendment's reference to "data" and "information" implied that the disclosure requirement applied only to "factual matter furnished by counsel to a testifying expert." "'Data' and 'information' connote subjects that are factual in nature, not ephemera like 'mental impressions,' conclusions, opinions or 'legal theories' of the sort protected by Rule 26(b)(3)." He thought that this interpretation was supported by the amendments' further focus on items "considered by" the witness, adding that "[n]othing in the Advisory Committee Note or in the text of the Rule reflects any intention to abrogate the protection afforded core work-product."

Since 1993, there has been a division in the lower courts about whether "core" work product supplied to a testifying expert may be withheld. For examples, see 8 Fed. Prac. & Pro. § 2016.2 at nn. 39-41 (Supp. 2002). Perhaps the leading case protecting against discovery of "core" work product is Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995), which held that an expert witness could not be questioned during a deposition about conversations with counsel due to the protection of "core" work product.[4]

In addition, the two leading treatises somewhat disagree on the point. Moore's Federal Practice (of which Greg Joseph is an editor) finds that the Haworth approach is correct. Federal Practice and Procedure (with which I am associated) cuts the other way. All of this may indicate that a rule clarification is warranted.

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[4] A 2006 shepardization of Haworth showed that it had been cited by 13 other courts, all seemingly negatively (e.g., "Rejected by," "Disagreed With by," "Declined to Follow by," and "Disapproval Recognized by").

A number of issues would arise if there were an effort to change the rules to clarify on this topic. These issues are more evident if one considers the possibility of strengthening the protections of "core" work product. First, the Civil Rules do not make any mention of "core" work product. To the contrary, the first sentence of Rule 26(b)(3) says that materials "prepared in anticipation of litigation or for trial" should be subject to discovery only upon a showing of "substantial need of the materials in the preparation of the party's case." The second sentence then says that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

As a consequence, any amendment to the rules to alter the treatment of "core" work product would have to define what that is. For purposes of cases like Haworth, it would presumably have to deal with a second feature of Rule 26(b)(3) -- the fact that it only limits discovery of "documents and tangible things" -- since the actual discovery sought there was of conversations with counsel. There is no protection anywhere in the Civil Rules for intangible work product; Hickman v. Taylor itself supplies whatever protection there is. That could certainly be modified by a Civil Rule, as Rule 26(b)(3) somewhat did where it applies, but it does seem that we are dealing here with a court-created phenomenon. Addressing it in the rules would require more considerable surgery because Rule 26(b)(3) currently is limited to documents and tangible things.

A third challenge, therefore, might be to make clear what the rule-based protection is. At present, Rule 26(b)(3) appears to direct the court to try to mask portions of documents or other tangible things that include "conclusions, opinions, or legal theories" in ordering production of those materials. Should more protection be required? A possibility that has been addressed by the lower courts is providing absolute protection.

Some states do afford virtually absolute protection to the sort of thing that seems to be involved here. See Cal. Code Civ. Proc. § 2018(c) ("Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.") And at the time it decided Hickman v. Taylor, the Supreme Court had pending before it a proposed rule amendment that would have provided protection like that afforded by the first sentence of current Rule 26(b)(3), but with nearly absolute protection instead of the more limited protection of current Rule 26(b)(3): "The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories." See Report of Proposed Amendments to Rules of Civil Procedure, 5 F.R.D. 433, 457 (1946). Instead of adopting this rule, the Court in Hickman said in dictum that no showing justifying discovery of such things had been made, and that such discovery should occur only in "rare situations."

In Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975), the court concluded that "no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or theories." Id. at 734. In a later case, the same court said such material "is immune to the same extent as an attorney-client communication." National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992); see also In re Grand Jury Proceedings, 473 F.3d 840, 848 (8th Cir. 1973) (no showing could justify ordering production of attorneys' personal recollections, notes and memoranda pertaining to conversations with witnesses); compare In re Grand Jury Investigations, 599 F.2d 1224, 1231 (3d Cir. 1979) ("special considerations" govern discovery of such documents, and they may be obtained only in a "rare situation"). The Supreme Court noted this disagreement about notes of oral statements from witnesses in Upjohn Co. v. United States, 449 U.S. 383, 401 (1981), but went on to say that "[w]e do not decide the issue at this time."

But in some circumstances courts have found that discovery of attorney work product is justified. For example, where the lawyer's opinion is directly at issue, it has been held subject to discovery. See Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7 (D. Mass. 1997); Frazier v. Southeastern Pennsylvania Transp. Auth., 161 F.R.D. 167 (E.D. Pa. 1995). Given the possibility that a lawyer could decide to provide *only* his opinion work product to an expert witness if that were absolutely protected, it would seem inappropriate to conclude that an absolute prohibition should apply. Judge Frankel's warning in 1977 about "exceeding decent limits" in using such material for expert preparation still deserves attention.

A fourth issue might be to determine whether this protection only applies to attorneys' "core" work product. On its face, it includes such opinions, etc., of somebody other than a lawyer. It is worth recalling that Rule 26(b)(3) provides initial protection for the litigation preparation activities not only of lawyers but also of the party itself, or its "consultant, surety, indemnitor, insurer, or agent." Other cases which deal with discovery of opinion work product find that it also is discoverable if directly at issue. See, e.g., Holmgren v. State Farm Mut. Ins. Co., 976 F.2d 573 (9th Cir. 1992). Yet the Fourth Circuit said that the same protection applies to nonlawyers' opinion work product. Se Duplan Corp., supra, 509 F.2d at 737.

Admittedly, these difficulties would be more pertinent to an effort to write into the rule the interpretation that Greg Joseph urges than the one that the N.Y. Bar section thinks should be correct. So far as that purpose is concerned, it seems more appropriate under the rules as currently written, and reading Rule 26(a)(2) as limited to "factual" material is a strain. Perhaps it could be revised somewhat as follows:

> the data or other information considered by the witness in forming the opinions <u>including any mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of the disclosing party</u>, . . .

That would leave undisturbed the various other issues mentioned above. But the existence of those issues, which are not the subject of any rule provision, suggests the possible delicacy of undertaking rule changes that might affect the interpretation of Rule 26(b)(3).

Accordingly, it would probably be best to determine at the outset whether the Subcommittee feels that the disclosure rule (the one favored by the N.Y. Bar Ass'n section) or the no-disclosure rule (favored by Greg Joseph) is preferable. Then the question could be whether that preference should be embodied in a rule amendment to disapprove of the cases that have embraced a different view. On that subject (and depending on the preference of the Subcommittee), the Subcommittee could take up some of the additional issues mentioned above.

Alternatively, the issue could be left to the courts. The appellate courts have until now been largely silent on these questions, and they might provide some additional direction. One has come to the pro-disclosure view. In re Pioneer Hi-Bred International, Inc., 238 F.2d 1370, 1375 (Fed. Cir. 2000) ("Indeed, we are unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party.") But it may be unusual for the appellate courts to be asked to deal with this problem, so that could be a reason for proceeding with a rule change. If the goal is to endorse the pro-disclosure approach, however, it may well be that the lower courts will reach that view in the absence of further rulemaking. A magistrate judge in the S.D.N.Y., for example, recently noted that the Second Circuit had not addressed the question and that there was a split among district courts, but added: "Notwithstanding Judge Orenstein's [1997 decision excluding "core" work product from disclosure], the overwhelming weight of authority in this Circuit -- including several recently decided cases -- indicates that the Rule 26(a)(2)(B) disclosure requirement trumps the substantial

protection otherwise accorded opinion work product under Rule 23(b)(3)." Aniero Concrete Co. v. New York City School Const. Auth., 2002 WL 257685 (S.D.N.Y., Feb. 22, 2002) (Maas, M.J.).

A final possibility is to put the question on hold along with the more general topic of privilege waiver, which remains on the Subcommittee's back burner. One could treat the question of attaching consequences to delivering materials to an expert as somewhat analogous to other waiver problems we have discussed in the past. And the consideration of e-discovery may cause us to return to privilege waiver in the foreseeable future. But the issues presented here are really quite different. The privilege waiver question considered in the past was limited to facilitating discovery without waiver consequences. This one has to do with facilitating interaction with experts by removing discoverability of certain privileged materials.

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[Excerpt from Notes of Discovery
Subcommittee's Oct 3, 2002, discussion]

The Committee on Federal Procedure of the Commercial and Federal Litigation section of the New York State Bar Association submitted a proposal (00-CV-E) that there be rule changes to make clear that "core" work product provided to a testifying expert is subject to disclosure or discovery.

Prof. Lynk introduced the issue by noting that the 1993 amendments to Rule 26 included broad disclosure requirements with regard to witnesses who will testify as experts. Rule 26(a)(2) thus requires an expert witness to provide a report that includes "the data or other information considered by the witness in forming the opinions." Before 1993, there had been disagreement among courts about whether materials containing the mental impressions of counsel were discoverable if they had been provided to testifying experts in connection with their preparation for testifying. Although the Committee Note accompanying the 1993 amendments contained strong language about making available anything provided to the expert witness, whether or not privileged, there was some disagreement among courts about whether "core" work product remained immune to disclosure or discovery. The two leading treatises, indeed, seem to come out on different sides of the question.

At the outset, support was voiced for the pro-disclosure position of Judge Motley in B.C.F. Oil. Ref., Inc. v. Consolidated Edison Co., 171 F.R.D. 57 (S.D.N.Y. 1997), described at pp. 27-29 of the N.Y. Bar Ass'n submission. It was asked whether it would be suitable to examine the entire area of work product as protected by the rules. To this, it was responded that the coverage of the current rules is incomplete; Rule 26(b)(3) applies only to "documents and tangible things," and the rules themselves provide no protections with regard to opinion work product in other forms. But tackling that set of broader problems would involve overhauling Rule 26(b)(3). One member supported going into the whole question, and voiced support for the view that core work product should be insulated from disclosure even when provided to expert witnesses. Another voiced uneasiness about supplanting the appellate courts on this issue. There is division among the district courts, but the Committee might hesitate before "reversing" those that adopted the interpretation that it now wishes to disapprove.

It was noted that the issue raised by this submission is much narrower than a complete reconsideration of the handling of work product. The only question raised is about expert witnesses, and in that context there is considerable reason to worry about the role of the advocates in shaping the testimony and ensuring that the trier of fact gets an accurate picture of the role played by the lawyer in formation of the opinion being expressed by the expert witness. This is a focused problem

that need not call for revisiting the more general treatment of work product under the amendments adopted in 1970. And the question will not often reach the courts of appeals, so there may be no other way to resolve the differences among district courts except through action by this Committee.

Discussion then shifted to whether the Subcommittee would favor the "full disclosure" view proposed by the N.Y. Bar Ass'n Committee or the "no disclosure" position adopted by some district courts. One member said that he liked the "no disclosure" position but that he had assumed the reverse was true in his practice. Another said that careful lawyers don't give material to expert witnesses with the expectation that it can be withheld from the other side, and that amending Rule 26(a)(2) to say so more seemed an "easy fix." Another member also had assumed that there was disclosure.

The chair called the question on whether the Subcommittee should embrace the "full disclosure" position. Although some members were in favor of adopting that position, others were uneasy about taking a position at this time. Some were not prepared to vote and said they would like to know more about the problem. One member opposed the "full disclosure" position, saying that it creates serious problems for the lawyer in talking to the expert witness. The attorney is forced to hire a consultant on the side to try out ideas without revealing them to the expert who will ultimately testify.

Under the circumstances, it was resolved not to decide which position should be adopted and to keep the topic on the Subcommittee's agenda. The chair and the Special Reporter will discuss ways to develop more information on the subject. One possibility would be to ask the FJC to develop material, but it was cautioned that we need to be conservative in burdening the FJC, and observed that it may not be necessary to involve it in consideration of this problem. Seeking more input from the organized bar could amplify the Subcommittee's understanding of the issue.

* * * * *

The prevalent caselaw currently (2006) appears to favor the pro-disclosure view discerned in 2002. The ABA Task Force recognizes that "most federal courts and the more recent decisions have held that even attorney trial strategy, mental impressions, and other traditional work product, if turned over to a testifying expert, should be produced." (ABA report, p. 3) The article that challenges the exemption of employees not specially employed from the reporting requirement (item (1) above) says that "the vast majority of recent decisions" require disclosure. Mickum & Hajek, 24 Rev. Lit. at 360. Thus, it is not clear whether there would be reason to act on this issue to provide uniformity within the federal court system.

The basic policy judgment is whether the 1993 amendment package, as applied by the courts, has intruded too far into the interaction between lawyers and their experts. Compared to what was possible before 1993, and certainly to what was provided before 1970, that intrusion is very large. And the ongoing reality is that such disclosure and discovery are only intended to assist a party in cross-examining its adversary's expert, not otherwise to generate discoverable matter. So one could conclude that less intrusive disclosure requirements would suffice. Another consideration would be whether the intrusion into this relationship should only apply when a report is required, so that employees who don't have to prepare a report need not disclose their interactions with counsel either.

(3) Disclosure of experts' drafts

As part of its effort to insulate the lawyer/expert interaction, the ABA Task Force urges that Rule 26(a)(2) be amended to specify that a testifying expert's draft reports and related background work not be subject to disclosure. It reports that federal judges approach these issues in a variety of

ways, and that some even issue early case management orders requiring the preservation of all expert drafts. It also notes that the rise of E-Discovery has magnified the problem by opening the possibility of keystroke-by-keystroke examination of the expert's mental processes in developing the conclusions embodied in the report. "Requests for electronic versions of expert's reports, including 'meta-data' showing how the report evolved at each step, are now commonplace. The focus becomes not on the merit of the report but on the process by which the expert arrived at the final conclusions in the report." ABA Task Force report, p. 18. Altogether, it adds, this potential intrusion breeds a "clandestine environment" portrayed in the following example (id. at p. 16):

> One expert reported on his standard methodology. He never writes anything down that could be viewed as "even an appearance of opinion." He never prints a draft, and always takes care to overwrite or delete anything he is removing from the draft. If an attorney wants to review the draft, the expert takes his laptop to the attorney's office and they both make edits at the same time. He defragments his computer at least once a month using a Department of Defense quality "file scrubber" so there is no recoverable data other than well-organized files. Before preparing his actual report, the saves it in Rich Text Format, then defragments his hard disk, runs the file scrubber, then defragments it again. He then prints the report in "pdf" format, deletes it from his hard disk, and repeats the defragment-scrub-defragment process.

At one level, one could readily distinguish between disclosure of the information the lawyer gave the expert and disclosure of the expert's developing thought processes in evaluating that information. This is somewhat different from what the ABA report endorses, because that report focuses on the lawyer's interactions with the expert and this orientation focuses on the expert's activities outside the lawyer's sphere of influence. It is debatable whether a court should regard the expert's internal reflection and thought processes as "information considered by the witness in forming the opinions," which the rule requires to be disclosed. See, e.g., McDonald v. Sun Oil Co., 423 F.Supp.2d 1114, 1122 (D. Or. 2006) ("This rule [Rule 26(a)(2)(B)] does not require the production of an expert's working notes. * * * The only information not produced were some working notes that the experts failed to retain. This information is not subject to Rule 26 disclosure.").

Yet we are told that some judges do require disclosure of such information, even including provisions in case management orders requiring that it be preserved. As a starting point, it would not seem that a change to Rule 26(a)(2) would limit the power of a district judge to require preservation of such information. It might make clear that Rule 26(b)(3) or like protection should be applied to such information, which could prevent disclosure of the preserved material absent a showing of suitable need.

The policy issue, however, is whether it would be desirable to try to provide such protection for the expert's internal analytical activities. There may be much to be said for ensuring that the expert can operate with some privacy in formulating initial thoughts and opinions. Most lawyers would resist inquiry into each thought that went through their minds in developing the arguments presented in a brief, for example. The goal of permitting the opposing party to challenge the conclusions of the expert need not, it could be said, include such intrusion into the expert's nascent thoughts. A counter to this would stress the value of careful inquiry into the assumptions and thought processes the expert used to reach the conclusions in the report. Surely deposition questions about those mental processes would not be ruled improper so long as they reasonably bore on the reliability of the conclusions. Why, one might ask, shouldn't material that would provide a much more certain ground for tracing that development be made available? The answer may be, as would perhaps be the case with the lawyer writing the brief, that this would unduly deter full and disciplined consideration of matters in issue, and that it would also not significantly aid in the

assessment of the ultimate conclusion. But the lawyer preparing the brief is different, for the court is able to evaluate the arguments made in the brief without such background about how they were developed.

Assuming one is persuaded that the rule should be amended to provide the expert this degree of privacy in developing an opinion, such an amendment need not extend to excusing disclosure of material that the expert has received from the lawyer. The preparation-privacy component for the expert need not insulate that; once the opposing side can show what the lawyer gave the expert it is adequately able to explore whether the expert is parroting the theories of the lawyer or opinions developed by the expert.

But there could be a risk of compromising the goal of showing the influence of the lawyer if all "draft reports" were off limits. For example, if the lawyer reviewed the drafts before the final report was completed, that would seem to offer a much more direct way for the lawyer to influence the content of the report than by the selection of materials to provide to the expert before the analysis and report are begun. It could happen that the analysis and conclusions of the draft report changed greatly after input from the lawyer. Thus it may be that defining what is a "draft report" insulated from disclosure would prove difficult.

The 1993 Committee Note addressed the role of the lawyer:

> Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

At a minimum, this passage is designed to ensure that assistance from the lawyer is not a ground for striking the report or other adverse action. But does providing meaningful assistance require confidentiality? It has been urged that requiring disclosure of the lawyer's role undermines the lawyer's ability to participate meaningfully in the preparation of the report. Surely the possibility of later scrutiny of the nature of such assistance will sometimes constrain lawyers providing it, but the above passage does not say that the nature of the assistance should be immune to examination. Moreover, the Committee Note also emphasizes that the report should reflect the testimony of the witness, suggesting that attention properly may be given to the relative roles of the lawyer and the witness in preparing the report.

If it is important to provide an avenue for determining the role of the lawyer in the preparation of the final report, limiting disclosure to the final report may be unworkable. It may be that the great majority of final reports reach that status only after being reviewed and blessed by the lawyer. If that is the case, it is difficult to see how one could adequately evaluate the role of the lawyer without knowing at least what the expert said in the "draft" that preceded the lawyer's involvement. Yet if avoidance strategies like those described above will insulate the lawyer's role from examination, it may be that the rule only requires meaningful disclosure when a party is unable to afford those strategies or not sophisticated to use them.

Possible courses from this point

As pointed out at the beginning of this memorandum, the 1993 amendments constituted a major expansion of the expert discovery provisions, building on the 1970 expansion. Throughout, the challenge has been to calibrate the amount of disclosure that is needed to permit fair preparation for challenging the other side's expert testimony while avoiding undue discovery. Although there

might have been arguments that the idea of a required and detailed report was too intrusive and burdensome, those arguments have not been advanced.

Instead, the questions presented are (a) whether the report requirement should be amended, (b) whether amendments should be adopted to provide a zone of confidentiality for attorney-expert interaction, and (c) whether amendments should provide at least a zone of confidentiality for the expert's report preparation. These issues are interconnected, but a number of possible avenues for proceeding exist:

(1) Amending the Rule 26(a)(2)(B) report requirements: Various possible reactions to concerns about the operation of the report requirement might be addressed, together or separately:

(a) Removing the exemption to the report requirement for employee expert witnesses: This change would in some ways be easy to accomplish if one wanted simply to close the exemption for employees. But making a change would likely raise a number of issues concerning nonemployee expert witnesses like treating physicians and privilege waiver consequences. Perhaps a lesser change would be to preserve the exemption for "hybrid" employee witnesses who were actors or viewers, but who can bring their expertise to bear on explaining what they did or saw.

(b) Handling the treating physician problem: Deleting the exemption for employees would raise questions about how best to handle treating physicians, and whether there are other categories deserving exemption from the report requirement. It might be possible that this exemption could include the "hybrid" employee witness who was an actor or viewer but will testify about those matters through the prism of some expertise. One idea might be to try to include a provision in the text of the rule exempting treating physicians (and others?), but that could prove difficult to articulate in a way that both includes all one wants to include and deals with the possibility that such a person might undertake additional litigation-preparation work at the behest of the lawyer that should be subject to the report requirement.

(c) Severing the link between the report requirement and the loss of privilege or work product protection for materials considered by expert witnesses: The uneasy link between the report requirement and the abrogation of privilege protection could be undone, with the report applying to all expert witnesses (except treating physicians and the like), and privilege protection handled separately. That would raise the challenge of deciding what that protection should be (treated also in (2) below) with regard to privilege waiver. A number of possibilities exist, including:

(i) Limiting the disclosure requirement to information "relied upon" by the expert, rather than information "considered by" the expert: This change could very significantly contract the disclosure obligation, assuming that experts would take a narrow view of what they relied upon in forming their opinions. And it would often excuse revelation of materials for which no privilege or work product protection could be claimed.

(ii) Excluding "core" work product from the disclosure requirement: This would seem to respond to a major concern of segments of the bar, but would present the challenge of defining "core" work product in the rules. As noted again in (2) below, this could entail revisions to Rule 26(b)(3).

(iii) Excepting certain employee experts from the obligation to reveal privileged or work product materials: For other purposes, the discovery rules do treat some employee witnesses differently from others. Thus, Rule 30(b)(6) singles out officers, directors, and managing agents. Perhaps some similar effort could be fashioned to protect against privilege waiver for the sorts of employees whose positions present the most troubling possibilities.

(iv) Excluding from disclosure information that an employee received in the normal course of his or her duties: A main concern with overbroad waiver for employee expert witnesses is about privileged information an employee receives as part of ordinary work. Perhaps the rule could require only that information provided by the lawyer be subject to disclosure, or exempt disclosure of information the employee received in the normal course of his or her duties. Both those ideas could prove challenging to implement in rule language. If the employee's ordinary work includes interacting with the lawyer, drawing lines may be particularly difficult. And there might be some risk of circumvention if the information were passed from the lawyer to organization higher-ups who then provided it to the employee, raising a question about what was within the employee's normal course of duties.

(2) Amending Rule 26(a)(2)(B) to address work product and other privileged materials explicitly: The current Committee Note speaks aggressively of the need to disclose such material, but the rule does not deal explicitly with whether its command overrides work product or other protections that would otherwise apply to materials shared with expert witnesses. In particular, in light of a number of expressed concerns, it might be desirable to deal expressly in the rule with whether "core" work product must be disclosed. Requiring disclosure appears to be the dominant view of the courts under the rule and Note as presently written, so an amendment might not be worthwhile to make it clear that disclosure is the rule. If the desire is to change that rule, it may prove difficult to define what would suffice to require disclosure, for it could happen that all information provided to an expert would be claimed to be subject to a privilege. These issues raised by the ABA present two possible courses for proceeding:

(a) Amending Rule 26(a)(2) to provide protection for the interaction between the lawyer and the expert witness: This effort would likely be a challenge. The ABA's own proposed approach calls for an adequate opportunity to develop cross-examination. Ensuring that opportunity while providing the protection desired may prove difficult. Some of the routes that might be used have already been mentioned in (1) above -- limiting disclosure to material "relied upon" by the expert, or excluding disclosure of "core" product, for example.

(b) Broadening attention to include Rule 26(b)(3): If the main concern is work product protection, and particularly "core" work product, it may be that a rule-based definition of that concept would be necessary. A logical place to provide such a definition would be in Rule 26(b)(3). In addition, other features of Rule 26(b)(3) might bear on an effort to deal with the expert witness problem. For example, the rule provides protection for litigation preparation (whether "core" or ordinary) only with regard to "documents and tangible things." That does not include oral interaction between the lawyer and the expert witness, which receives no protection from current Rule 26(b)(3). And that definition of the rule's protection presents potential difficulties in handling of electronically stored information, which some might urge is neither a "document" nor "tangible" for purposes of Rule 26(b)(3) protection. So it might be timely to re-examine the limitation of Rule 26(b)(3) to "documents and tangible things." Other features of Rule 26(b)(3) might bear scrutiny as well. But any substantial effort to revise Rule 26(b)(3) would raise a host of issues about settled caselaw and practice.

(3) Amending Rule 26(a)(2)(B) to provide that "draft" reports need not be disclosed: This could present some difficulties in defining "draft" reports. It would also raise the issue whether, after amendment, courts could ever order disclosure (or perhaps even preservation) of such materials unless the party seeking them has satisfied the standards of Rule 26(b)(3).

(4) Leaving Rule 26(a)(2) as it is and relying on sensible district court decisions: This avenue may be the wisest given the difficulties and contending policies mentioned above. With regard to the first issue -- reports by employees -- the 1993 Committee Note explicitly invites such

rulings. More generally, it may be that the range of circumstances that bear on the sensible determination of individual cases makes effective line-drawing by rule impossible.

4-Bi

Adopted by ABA House of Delegates at its

August 7-8, 2006, Meeting

RESOLUTION

Resolved that the American Bar Association recommends that consistent rules should be established throughout the federal and state courts to govern the scope of required disclosures or discovery of testifying experts and their reports.

Further resolved that the American Bar Association recommends that applicable federal and state rules and statutes governing civil procedure be amended or adopted to protect from discovery draft expert reports and attorney-expert communications relating to an expert's report, as follows:

(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 the 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.

Further resolved that the American Bar Association recommends that, until federal and state rule and statutory amendments are adopted, counsel should enter stipulations protecting from discovery draft expert reports and communications between attorney and expert relating to an expert's report.

4-Bii

REPORT OF THE FEDERAL PRACTICE TASK FORCE

FEDERAL AND STATE RULES OF PROCEDURE SHOULD BE AMENDED OR ADOPTED SO THAT DRAFT EXPERT REPORTS AND COMMUNICATIONS BETWEEN AN ATTORNEY AND AN EXPERT REGARDING THE EXPERT'S REPORT ARE PROTECTED AS ATTORNEY WORK PRODUCT AND NOT DISCOVERABLE

Introduction

The law in the federal courts and in state courts on expert witness discovery is both uncertain and varied. Many federal courts require the production of all draft reports, the expert's handwritten notes and all attorney-expert communications. A few judges issue early case management orders to require the preservation of all expert drafts and other work product materials to counter the practice of experts who avoid generating draft reports or discard them in the ordinary course.

Other federal courts and judges continue to hold that these drafts and communications are attorney work product and are not discoverable. Other judges have individual "local local" rules with different requirements. The practice among the states also varies considerably, even in those states that ordinarily adopt federal procedural rules as the norm.

This uncertainty has produced practices that, among other things, (1) impede the collaborative process between attorney and testifying expert, (2) make litigation considerably more expensive, (3) impose unnecessary burdens on preparing expert reports and (4) provide a distinct advantage to the well-heeled litigant. The uncertainty and varied requirements among different courts are themselves problematic.

This uncertainty stems from the 1993 amendment to Fed. R. Civ. P. 26(a)(2), (and state analogues), that expanded expert discovery from the materials *relied on* by an expert to any "data or other information" *considered* by an expert in forming his or her opinion. Some courts have

defined "other information considered" to include not only facts or data provided to the expert, but also all draft expert reports and all attorney communications with the expert. Others continue to protect this information as attorney work product under Rule 26(b)(3).

We believe counsel and experts should be subject to consistent rules and court expectations around the country. This will minimize unnecessary expense and properly focus discovery on the soundness of the expert's opinion by itself, rather than on the preliminary mental thought processes and experimentation that led up to it.

We therefore recommend that federal and state rules be adopted or amended, consistent with American Bar Association policy, to protect from discovery draft expert reports and attorney-expert communications that are an integral part of the collaborative process in preparing an expert's report. Although this might bar opposing counsel from inquiring into an expert's preliminary thought processes, we believe that the adverse consequences of allowing inquiry into these issues significantly outweigh their benefits. Nothing in our proposed formulation would preclude counsel from fully exploring the bases for the expert's opinions, including whether the expert considered alternative approaches and views, just as counsel did before the 1993 amendments were adopted.

Background

Fed. R. Civ. P. 26(a)(2) was amended in 1993 to require a party to provide the other parties with a written report from "a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony."

Rule 26(a)(2) was also amended to require that the expert's report disclose not only data or facts *relied on* by the expert in formulating his or her opinion, but also that the report contain

"the data or other information *considered by* the witness in forming the opinions" given in the report (emphasis added).

This change was intended to require experts to disclose the data and facts they had available to them for "consideration," not merely those that they ultimately believe they "relied on."

As the 1993 Advisory Committee Note states:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts and 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 to be used 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.

But at the same time, the 1993 Advisory Committee Note also recognizes counsel will normally need to assist experts in preparing their reports:

> Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

Given the language in Rule 26(a)(2)(B) that the report must "disclose the data and other information considered by the expert," most federal courts and the more recent decisions have held that even attorney trial strategy, mental impressions and other traditional work product, if turned over to a testifying expert, should be produced.

A minority of federal courts have held that this language was not intended to trump the work product protections of Rule 26(b)(3).

As a practical matter, the proviso in the Note that "Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports" has become illusory and offers no protection. Anything the expert looks at or hears, including an attorney's input, is

deemed to have been "considered by the expert" and has become fair game for discovery by the other side. This includes (i) any communications (e-mail, notes of phone conversations, etc.) between counsel and the expert, (ii) counsel's review of spread sheets or other preliminary or tentative calculations and (iii) preliminary drafts that may have been exchanged between them.

The result, whether intended or not, has been to make virtually every case where an expert is retained both (a) more cumbersome and (b) more expensive. In many cases, particularly ones involving significant dollars or issues, it has also required counsel to retain two sets of experts. The first set are "consulting" experts with whom counsel can freely explore his or her theories of the case or the evidence – without fear that this traditional "work product" will have to be disclosed to the other side. The second set of experts are "testifying" experts whose thought processes are not "tainted" with the input of trial counsel's thoughts and strategies.

Even this expensive practice does not solve the problem. The "testifying" expert still has to communicate with counsel and, except in rare cases, has to prepare a draft that will (and properly should) reflect both the expert's and counsel's mental processes – bringing the issue back to square one.

Where only "testifying" experts are retained, the rule has had other unwarranted consequences. Some courts or judges require that experts preserve all drafts (as well as e-mails and other communications with counsel) and make them available to the other side – because they constitute "information considered by the expert." Carried to its logical conclusion, every keystroke an expert enters into his or her report could arguably be made available to the opposing party because it was considered in arriving at the expert's final views.

The wary testifying expert thinks long and hard about what he or she puts down on "electronic" paper. It is difficult to try out different theories or calculations when the expert (and

counsel) knows that they are going to be fair game for the opposing side to use in attempting to discredit or challenge the expert's testimony.

The draft of a "report" is an iterative process by which the expert's analysis is refined, often with false starts. What should matter in litigation is not how the expert arrived at his or her final conclusion, but whether that conclusion holds water and can stand scrutiny tested on its merits.

It has therefore now become common practice for an expert to try to avoid having to keep and then produce information "considered" in arriving at a final opinion.

Experts typically commit to the computer only an unsaved draft, and then to have counsel come to the expert's office (or bring a laptop to counsel's office) so they both can work on the opinion and have it appear as the first – and only – report that is then produced to the other side. The result is that an expert may not realistically have an opportunity to test his or her views before being required to share them with counsel who retained the expert, much less before being required to produce his or her "initial" draft to the other side for scrutiny.

This is not simply a "large case" problem. Nor is it an issue that affects only defendants or plaintiffs. It directly impacts every case in which an expert is being used. It is also a problem on two levels.

First, it places artificial restrictions on both (i) the relationship between counsel and the expert and (ii) their collaborative search for not only the most persuasive view of the issue, but also the expert's ability to fashion an opinion that has a solid empirical basis.

Second, it pushes lawyers and experts alike toward intellectual dishonesty both in the process used to arrive at an opinion and the ultimate opinion itself.

We are aware of no evidence, empirical or otherwise, that suggests that the requirement to produce drafts, to the extent they exist, provides a better method for presenting and assessing an expert's trial testimony. There are significant countervailing reasons why it should be changed.

Proposed Rule Provisions

Consistent rules should therefore be established throughout the federal and state courts to govern the scope of required disclosures or discovery of experts and expert reports.

In particular, applicable federal and state rules and statutes governing civil procedure should be amended or adopted to protect from discovery draft expert reports and attorney-expert communications relating to an expert's report so that:

(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.

Until federal and state rule and statutory amendments are adopted, and consistent with the policy expressed in the Association's Civil Discovery Standards (August 2004), counsel should enter stipulations protecting from discovery draft expert reports and communications between attorney and expert relating to an expert's report.

American Bar Association Policy

In August 1999, the American Bar Association's House of Delegates adopted the Association's Civil Discovery Standards. The Standards recognize a need to protect

communications between counsel and their testifying experts that convey the attorney's trial strategy or constitute strategic litigation planning.

Civil Discovery Standard 21 provides in pertinent part:

> e. **No Waiver of Attorney Work Product. The provision in section 21(b)(iii) above that an expert's report describe "the data or information the expert is relying on in formulating [his or her] opinion" does not require the disclosure of communications that would reveal an attorney's mental impressions, opinions or trial strategy protected under the attorney work product doctrine. The report should disclose, however, any data or information, including that coming from counsel, that the expert is relying on in forming his or her opinion. In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.**

The Comment to this Standard explains that

> Subsection (e). Other than court-appointed experts, which *are sui generis, an* expert *is* retained to provide testimony to assist one side in the case. The expert is entitled to have the benefit of the theories, however tentative or preliminary they may be, of the counsel that has retained the expert. Experts logically come within the "zone of privacy for strategic litigation planning" that is the rationale for the attorney work product doctrine. *See United States v. Adlman,* 68 F.3d 1495, 1501 (2d Cir. 1995) (construing Fed. R. Civ. P. 26(b)(3) in an unrelated context). Counsel should be able to explore counsel's theories or ideas about the litigation with an expert without the worry that the discussion is tantamount to disclosure to the other side.
>
> At least in federal practice, however, there is a split of authority as to whether communications to an expert of an attorney's "core" or "opinion" work product are immune from disclosure after the 1993 amendments to Rule 26.
>
> For cases holding that all work product is now discoverable under Fed. R. Civ. P. 26(a)(2)(B), *see, e.g., Musselman v. Phillips*, 176 F.R.D. 194 (D. Md. 1997); *Bama v. United States*, No. 95 C 6552, 1997 U.S. Dist. LEXIS 10853 (N.D. III. July 23, 1997); *B.C.F. Oil Ref. v. Consolidated Edison Co.*, 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *Kam v. Ingersoll Rand,* 168 F.R.D. 633, 639-40 (N.D. Ind. 1996).
>
> For cases holding otherwise, *see, e.g., Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634 (D. Kan. 1993); *see also* Gregory P. Joseph, *Emerging Expert issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil*

Procedure, 164 F.R.D. 97, 101-04 (1996) (collecting cases, and outlining reasons why the continuing recognition of protection for opinion work product is appropriate after recent amendments to Rule 26).

Particularly where an expert is acting as a consultant, the expert's report is likely to reflect counsel's mental processes and legal theories. The court may, however, assess whether there is "substantial need" for using the report to impeach the expert that would outweigh the policy of protecting work product. *National Steel Prods. Co. v. Superior Court*, 210 Cal. Rptr. 535, 543 (Ct. App. 1985).

An attorney's mental impressions, theories and strategies – archetypal "work product" – that have been conveyed to an expert should not have to be disclosed if the expert is not relying on them in his or her testimony. The ability to have untrammeled access to the process by which an expert has formulated his or her final opinion(s) in the case is outweighed by (1) the undesirability of placing substantial barriers to a full and free exchange of ideas and theories between counsel and the expert; (2) the fact that the expert has been retained to advise and assist one side in an adversary trial system; (3) the added, unnecessary expense of having to retain two experts – one to testify and the other to consult – if a lawyer wants to maintain the confidentiality of his or her work product, and (4) the ability of counsel to obtain and cross-examine the expert on anything the expert is actually relying on in his or her opinion.

If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) ("It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed."). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Although a stipulation that there will be no waiver by sharing work product with an expert would probably protect the information in the particular case, there is no guarantee that it would protect it against nonparties in another setting. *E.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (the test is whether disclosure is done in a way that "substantially increases the likelihood that the work product will fail into the hands of the adversary").

Other parts of the Civil Discovery Standards were amended by the House of Delegates in August 2004, but Standard 21 remains in the 2004 version unchanged from its 1999 text.

Why Federal and State Rules Should Be Amended

There are seven basic reasons why federal and state rules should be amended or adopted to protect draft expert reports and attorney-expert communications in preparing an expert's report.

First, the policy underlying the work-product doctrine is that counsel should be free to explore different theories and options in preparing his or her case. This is archetypal work product – a lawyer's mental impressions – and a rule requiring their disclosure makes it difficult for counsel to strategize, theorize and develop the client's case and the expert's testimony to support it.

Second, the current version of the rule hampers an expert's ability to arrive at a carefully considered opinion by testing different hypotheses, permutations and calculations.

Third, there is no evidence, empirical or otherwise, that we are aware of that disclosure of preliminary analyses and attorney-expert communications improves the quality of justice.

Fourth, because of the uncertainty attached to the discoverability of drafts and the expert's mental processes – and the now-universal ability to track editorial changes in a word processing program – lawyers and experts typically avoid "creating tracks" or producing discoverable drafts and attorney-expert communications that the opposing side can use in attacking the report.

Fifth, a disclosure requirement imposes unnecessary costs on the litigation process and advantages the well-heeled litigant who can afford two experts. It therefore runs contrary to the cardinal principle of Fed. R. Civ. P. 1 – "to secure the just, speedy, and inexpensive determination of every action" – and similar state provisions.

Sixth (and consistent with established American Bar Association policy in the Civil Discovery Standards), experienced counsel are simply stipulating around the current version of the rule by agreeing to exempt their case from the requirements to produce draft reports and attorney-expert communications.

Seventh, some states have either not adopted the federal rule or are now adopting rules that depart from it and keep preliminary drafts and attorney-expert communications from being discoverable. The practice in federal courts also varies considerably from court to court and judge to judge. A rule of discovery and disclosure should be consistent around the country so that litigants, counsel and experts know what the ground rules are, regardless of what court they are in or which judge they are before.

A. Public Policy Favors Encouraging a Collaborative Effort Between Expert and Attorney and a Disclosure Rule Hinders that Effort

Uncertainty in the legal requirement for discovery of draft expert reports and attorney-expert communications that reveal an attorney's mental impressions and trial strategy hinders the collaborative effort between attorney and testifying expert.

Rule 26 was amended in 1993 to require experts retained or specially employed to give expert testimony to submit written reports to the opposing side as a matter of course. The written report was never intended as a substitute for testimony at trial. Its sole purpose is to give the other fair side notice of the expected testimony. This allows counsel to decide whether (a) he or she wants to take the expert's deposition (or simply cross-examine at trial) or (b) he or she needs to retain his own expert, either to challenge the validity of the other side's expert's opinion or to offer another one.

Rule 26, both before and after the 1993 amendment, continued to protect an attorney's work product, including legal theories, mental impressions and strategies disclosed to the attorney's consultants and other agents. Fed. R. Civ. P. 26(b)(3) provides that:

> [s]ubject to the provisions of subdivision (b)(4) of this rule [which deals with expert depositions, discovery of the opinions of non-testifying experts, and cost shifting], a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, *consultant*, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. (Emphasis added.)

These provisions incorporate the work product doctrine articulated in *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981). They recognize the special protection given to counsel's mental impressions ("core" work product) and that work product is not limited to counsel (material can be prepared by or for a "party's representative").

In *Nexxus Producs. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999), the defendant moved to compel the production of documents the other side's experts had relied on, including materials related to "exclusively draft versions of the expert reports." After discussing the split among courts and commentators, *id.* at 8-9, the court denied the motion to compel, relying in large part on Advisory Committee Notes to the 1993 amendment that the Rule "does not preclude counsel from providing assistance to experts in preparing the report, and indeed, . . . this assistance may be needed." *Id.* at 8, 10. The court also relied on *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-95 (W.D. Mich. 1994) ("For the high privilege accorded

attorney opinion work product not to apply would require clear and unambiguous language in a statute").[1]

6 Moore's Federal Practice, § 26.80[1][a] (2005) takes this view, stating that "nothing in the advisory committee notes to the 1993 amendments . . . suggests that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product [in *Upjohn*]. Moore's also notes that "the *Haworth* rule has 'three additional benefits: (1) it does not favor wealthy parties who can afford to hire both testifying and non–testifying experts, (2) it discourages the use of strained hypotheticals between expert and counsel in order to avoid disclosure, and (3) it avoids a potential conflict with the Rules Enabling Act by not abolishing or modifying an arguably evidentiary privilege.'" *Id.*

As a practical matter, many federal courts require the disclosure of anything an expert "considers" – including the input of counsel.[2] In these courts, counsel would have to be very

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[1] *See also Kennedy v. Baptist Memorial Hospital-Boonville, Inc.*, 179 F.R.D. 520 (N.D. Mi 1998) (protecting as work product attorney-expert communications before first expert report but permitting discovery of such communications after report's amendment); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984) (pre-1993 case protecting attorney work product) ("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." 738 F.2d at 595); *Magree v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642-643 (E.D.N.Y. 1997); *All West Pet Supply Co. v. Hill's Pet Prod.*, 152 F.R.D. 634, 638 (D. Kan. 1993).

[2] *See, e.g., In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) ("the Federal Rules of Civil Procedure make clear that documents and information disclosed to an expert in connection with his testimony are discoverable by the opposing party"); *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 29 (W.D.N.Y. 2002) ("the overwhelming majority of district courts in this Circuit as well as in other jurisdictions have concurred" that "Rule 26(a)(2)(b) requires a party to disclose core work product, or other privileged or protected material supplied by the party to its testifying expert"); *Aniero Concerte Co, Inc. v. New York City School Constr. Auth.*, No. 94CIV.9111CSHFM, 2002 WL 257685, at *3 (S.D.N.Y. Feb. 22, 2002) ("any documents 'that were provided to and reviewed by the expert,'" including core attorney work product found in counsel's letter to expert, were discoverable); *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 282 (E.D. Va. 2001) ("[a]ny information reviewed by an expert will be (footnote continued)

unwise to "provide assistance" to an expert, whether an auto mechanic or anyone else, because opposing counsel will use this discovery to try to show that the expert is really the other side's lawyer's mouthpiece. The idea that counsel can assist the mechanic in making his or her report comprehensible to the finder of fact, when that this assistance will become discoverable, is an illusion. The rule also makes it difficult for counsel to explore alternative theories with a testifying expert. This hurts the plaintiff in a car accident just as much as it hurts the defendant in a multi-million dollar antitrust case.

B. The Current Rule Hampers an Expert's Ability to Arrive at a Carefully Considered Opinion

The risk that drafts and attorney-expert communications will face discovery makes it very difficult for the expert to do the necessary independent thinking and testing to arrive at a considered opinion. One leading expert consulting firm has noted that "when there are rules setting forth what is discoverable, there is a good chance that the potentially discoverable material simply will not be created."

This creates at least four significant problems:

- Counsel may be hesitant in asking the expert to prepare analyses for settlement purposes.

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subject to disclosure including drafts of reports sent from and to the testifying experts"); *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997) ("when an attorney communicates otherwise protected work product to an expert witness retained for the purposes of providing opinion testimony at trial – whether factual in nature or containing the attorney's opinions or impressions – that information is discoverable"); *Fidelity National Title Ins. Co. of N.Y. v. Intercounty National Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005) (requiring production of expert's notes even if he did not rely upon them); *Lacy v. K.L. Villenueve*, 2005 U.S. Dist. LEXIS 31639 (W.D. Wa. 2005) (requiring production of e-mail conversations between counsel and testifying expert); *Colindres v. Quietflex Mfg.*, 228 F.R.D. 567 (S.D. Tex. 2005) (requiring production of counsel-expert e-mails); *American Fidelity Assurance Co. v. Bayer*, 229 F.R.D. 520 (D.S.C. 2004); *Synthes Spine Co., L.P. v. Walden*, 2005 U.S. Dist. LEXIS 34974 (E.D. Pa. 2005); *In re Omeprazole Patent Litigation*, 2005 U.S. Dist. LEXIS 6112 (S.D.N.Y. 2005).

- Counsel may also be hesitant in asking the expert to prepare a critique of the opposing expert for fear that it would have to be disclosed in discovery and forewarn the other side of questions that might be asked in deposition or at trial.
- The expert will take pains to avoid creating anything that might be used to trap him or her or confuse the issues.
- Most important, counsel may be hesitant to explore alternative analyses with their experts for fear that, if disclosed, they could be used to cast doubt on the strength of the expert's convictions and the methodology ultimately used in the expert's report. Just as important, counsel, who have lived with their cases longer than the experts, may be more hesitant to focus the experts or their reports on the critical issues in the case for fear that this focusing will be perceived as "testifying" for the experts.

C. There Is No Evidence that Disclosure of Draft Reports and Attorney-Expert Communications Improves the Quality of Justice

Although counsel may have strong views based on their own practices or experiences, there is no empirical evidence of which we are aware that disclosure of draft expert reports and attorney-expert communications has improved the quality of justice, or that without that disclosure, counsel or the trier of fact has been hindered in the ability to test the merits of an expert's opinion.

Many attorneys, aware of court requirements to require disclosure of draft reports, routinely ask for their production. There is considerable disparity in the extent to which draft reports are produced. Drafts are often destroyed in the ordinary course and most rules do not forbid this practice. Drafts are usually available only from the unwary or the careless expert.

In jurisdictions where drafts are required to be produced, even if none exists, attorneys almost uniformly ask questions of experts in depositions about their preparation of drafts, their

retention of them and the extent to which counsel has had input in the preparation of the expert's report. This questioning almost always prolongs expert depositions, frequently with little corresponding benefit. The expert will ultimately be gauged by the strength of the opinion and the facts or data on which the expert relies, not on the extent to which the opinion was influenced by counsel or on the mechanics of the report preparation process.

In 2002 the State of New Jersey therefore changed its rule to protect from discovery draft expert reports and communications between expert and attorney that constitute the collaborative process in preparing the expert's report. After careful consideration, the subcommittee's report supporting the rule change found as follows:

> The subcommittee believes that the desirability of the retaining attorney and expert discussing the contents and format of an expert's report substantially outweighs the potential loss of information which might have been used to attack an expert's credibility and particularly his or her independence. After all, the value of an expert's opinion is based on the facts assessed and/or assumed and the reasoning process used to analyze them. Too much time is now spent on discovery with little benefit gained in examining the report preparation process. In the subcommittee's view, a bright line standard reflected in this safe harbor recommendation should simplify discovery, streamline judicial review and focus the cross-examination on the veracity of an expert's opinion rather than the attorney's role in the production of the final report.

Report of the Subcommittee of the Civil Practice Committee on The Discoverability of Experts' Draft Reports to the Supreme Court Civil Practice Committee (September 5, 2001).

To arrive at a considered opinion, experts should therefore be free to think about their analysis as broadly as possible without the artificial constraints placed on them by having to turn them over as part of discovery.

D. Seasoned Experts and Counsel Now Go to Great Lengths to Avoid Creating Discoverable Drafts and Communications

Although we have not conducted exhaustive research, it appears that it is standard operating procedure for experienced experts to go to great lengths to avoid creating a "trail" that would disclose how they arrived at their opinions or to reveal counsel's input.

One expert reported on his standard methodology. He never writes anything down that could be viewed as "even an appearance of opinion." He never prints a draft, and always takes care to overwrite or delete anything he is removing from the draft. If an attorney wants to review the draft, the expert takes his laptop to the attorney's office and they both make edits at the same time. He defragments his computer at least once a month using a Department of Defense quality "file scrubber" so there is no recoverable data other than well-organized files. Before preparing his actual expert report, he saves it in Rich Text Format, then defragments his hard disk, runs the file scrubber, and then defragments it again. He then prints the report in "pdf" format, deletes it from his hard disk, and repeats the defragment-scrub-defragment process.

Some may argue this procedure should not be viewed as within the spirit if not the letter of the requirement to disclose all drafts and other information considered by the witness in forming the opinions. And given modern computer forensics, it is not at all clear that it would succeed. But it does show the lengths to which the rule now drives experts in the preparation of their opinions.

A leading expert consulting firm has commented that the current version of the rule not only fosters the kind of clandestine environment described above, but cautious counsel will studiously avoid sending any "bad documents" to their testifying experts, even if they will not impact the experts' conclusions. This often results in the expert's not seeing certain documents until their deposition or when they testify at trial. As they put it, "surprising an expert with new

information serves no purpose for the court, if the expert could have taken account of that information when forming the opinions."

The same firm noted that "experts make a habit and a virtue of not taking notes during meetings or conference calls. This means that the expert's final opinions will be based on their recollection of information . . . rather than on notes or records." And "notes and summaries of materials reviewed are not prepared, even if [they] would assist the expert in more efficiently preparing for trial."

In the "old days" an expert would write or type a draft, consider it and revise it. Only when the expert was satisfied that it truly reflected his or her views would it be given to counsel. And counsel could then comment on it and make sure that it was based on accurate information. When both counsel and expert were satisfied, the report would then be put in final and given to the opposing side, who would be able to probe its strength and weaknesses based on what the expert was relying on to support it.

The advent of electronic discovery – with its ability to track not only the existence of a document, but every stroke of the word processor and an expert's every thought (at least if he or she commits it to the keyboard) – has dramatically changed the equation. Every iteration can now be viewed – literally – by the other side. Those who believe they have protected drafts, by overwriting them, may nevertheless have them disclosed by zealous adversaries willing to spend what may be needed in forensic experts. The written report, designed to give fair notice of testimony at trial, without a rule change, may become the focus of a trial within a trial – the trial of the expert's tentative thought processes leading to his expert conclusions.

E. The Requirement to Produce Draft Expert Reports and Attorney- Expert Communications Imposes Unnecessary Costs on the Litigation Process and Advantages the Well-Heeled Litigant Who Can Afford Two Experts

To avoid revealing counsel's and the expert's mental processes – *i.e.,* work product – well-heeled litigants frequently retain two sets of experts. One set is used to formulate the expert opinions, with the usual free exchange between counsel and the experts that is not discoverable. Once they have arrived at those opinions, counsel then has to retain another set of experts to testify. They are then carefully spoon fed only the "the data or other information considered by the witness in forming the opinions" within the meaning of Rule 26(a)(2)(B) to be used in the case.

This is expensive. It goes against the fundamental premise of the Federal Rules of Civil Procedure articulated in Rule 1: "to secure the just, speedy, and inexpensive determination of every action." *See also* Fed. R. Civ. P. 16(a)(3) ("discouraging wasteful pretrial activities"); 26(c) (authorizing a protective order to avoid "undue burden or expense").

Less well-heeled parties may not be able to afford the luxury of two experts and they risk greater exposure of discovery of their experts' drafts and attorney-expert communications. They also face greater risk of producing overlooked drafts that were inadvertently created and potentially embarrassing attorney-expert communications.

There are other transactional costs associated with requiring an expert to disclose everything he or she considered. Requests for electronic versions of expert's reports, including "meta-data" showing how the report evolved at each step, are now commonplace. The focus becomes not on the merit of the report but on the process by which the expert arrived at the final conclusions in the report. This, too, is not only time-consuming and expensive, but creates satellite litigation that serves no meaningful purpose in the overwhelming majority of cases.

F. Experienced Counsel Are Stipulating Around The Rule

As noted above, the ABA's Civil Discovery Standard 21 specifically provides that

> **. . . In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.**

And the Comment points out that

> If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) ("It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed."). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Even in jurisdictions where disclosure will likely be required, a growing number of experienced counsel are therefore stipulating at the start of the case to provisions that avoid these problems.

A typical stipulation provides that

> 3. The following categories of data, information, or documents need not be disclosed by any party, and are outside the scope of permissible discovery (including deposition questions):
>
> a. any notes or other writings taken or prepared by or for an expert witness in connection with this matter, including correspondence or memos to or from, and notes of conversations with, the expert's assistants and/or clerical or support staff, one or more other expert witnesses or non-testifying expert consultants, or one or more attorneys for the party offering the testimony of such expert witness, unless the expert witness is relying upon those notes or other writings in connection with the expert witness' opinions in this matter;
>
> b. draft reports, draft studies, or draft work papers; preliminary or intermediate calculations, computations or data runs; or other preliminary, intermediate or draft materials prepared by, for or at the direction of an expert witness;
>
> c. any oral or written communication between an expert witness and the expert's assistants and/or clerical support staff, one or more other expert witnesses or

non-testifying expert consultants, or one or more attorneys for the party offering the testimony of such expert witness, unless the expert witness is relying upon those notes or other writings in connection with the expert witness' opinions in this matter.

Instead of having to stipulate to these "opt out" provisions, this practice should be the rule.

G. Consistent Practice in Both Federal and State Courts Calls for One Rule, Not Different Ones

A basic policy underlying the ABA's Civil Discovery Standards is that best practices should be used throughout the American justice system.

It does no service to the system itself – or its users – to have separate rules for how experts prepare their reports, and what information they are required to keep and then disclose, to have inconsistent rules and practices.

States such as New Jersey, Massachusetts, Texas and others expressly exempt drafts and attorney-expert communications from disclosure or discovery. Although the weight of authority in the federal courts now seems to require this disclosure, there are still courts who hold that attorney-expert communications are protected work product.

Even in those federal districts where courts require disclosure, individual judges have different rules. Some require that experts and counsel retain – and then turn over – any and all drafts of whatever ilk and however preliminary they may be. Other judges may have a rule that protects drafts up until the expert turns one over to counsel. Still others protect the drafts until a report is turned over to the other side.

The result is uncertainty and does not materially advance the truth-finding process of litigation. As noted above, this uncertainty also fosters conduct that could be viewed as counterproductive and adding unnecessary cost to litigation.

Litigants, counsel and experts, as well as the public at large that relies on our justice system, deserve a consistent rule, for all cases – if not in both federal and state courts, then certainly in all federal courts.

Recommendations

A. *Federal and State Rules Should Be Amended or Adopted*

We therefore recommend that federal and state rules should be amended or adopted to make it clear that draft expert reports and attorney-expert communications other than the facts and data considered or relied upon by the expert should ordinarily be protected from discovery.

B. Counsel Should Enter Stipulations to Protect Draft Expert Reports and Their Collaborative Communications with their Experts

Until federal and state rules can be amended to make clear that draft expert reports and attorney-expert communications are protected from discovery, consistent with established ABA policy, counsel should stipulate that they will not seek this discovery from each other.

* * * * *

Jeffrey J. Greenbaum, Co-Chair
Loren Kieve, Co-Chair
Michael P. Lynn, Co-Chair
Peter M. Ellis
Honorable Joseph A. Greenaway, Jr., U.S.D.J.
Gregory P. Joseph
Jonathan S. Mothner
Kevin F. O'Malley
Garth T. Yearick

Members of the Federal Practice Task Force

The Honorable Nancy Friedman Atlas, U.S.D.J. and the Honorable Margaret M. Morrow, U.S.D.J., also members of the Task Force, abstain from this report.

21. Written Reports From Each Testifying Expert.

a. When the Report Should Be Disclosed. At the same time a party discloses the identity of its expert, it should also furnish to the other side a written report signed by the expert.

b. What the Report Should Contain. The expert's report should contain:

i. A complete statement of each opinion the expert will give;

ii. The basis and reason(s) for that opinion;

iii. The data or information the expert is relying on in formulating the opinion and a description of where this data or information can be found if it is not part of the record or has not been produced in discovery;

iv. Any exhibit(s) to be used as a summary of or support for the opinion;

v. The expert's qualifications, including a list of any publication written by the expert in the last ten years;

vi. The compensation paid or to be paid to the expert;

vii. A list of any cases, including each case's name, court, docket number and the name, address and telephone number of each counsel of record, in which the expert has testified at trial or in deposition in the last four years; and

viii. If not provided in response to subsection (v) above, the expert's current resume and bibliography, if any.

c. When a Non-Testifying Consultant Becomes a Testifying Expert. A testifying expert who was initially retained as a non testifying consultant and who prepared a written report in a consultant capacity should disclose the written report to the opposing party in the same manner and subject to the same requirements as any other testifying expert.

d. Supplementation of an Expert's Opinion.

i. Ordinarily an expert's report, as well as his or her deposition testimony, should be final and complete when given, and not subject to later revision or amendment. The parties may stipulate that an expert's opinion can be supplemented within a reasonable specified time before trial.

ii. **In the absence of stipulation, a party wishing to supplement an expert's opinion less than 30 days before trial or a discovery cut-off or other date set by the court should first obtain leave of court. Factors that a court should consider in determining whether or not to allow supplementation include:**

A. **The good faith of the party seeking to supplement the opinion;**

B. **Whether the information was available to that party and/or the expert at an earlier date;**

C. **Unfair prejudice to any party; and**

D. **Whether it would result in an unfair delay of the trial.**

iii. **A party that is permitted to supplement its expert's opinion less than 30 days before trial or a discovery cut-off date should promptly make the expert available for deposition.**

e. **No Waiver of Attorney Work Product. The provision in section 21(b)(Iii) above that an expert's report describe "the data or information the expert is relying on in formulating [his or her] opinion" does not require the disclosure of communications that would reveal an attorney's mental impressions, opinions or trial strategy protected under the attorney work product doctrine. The report should disclose, however, any data or information, including that coming from counsel, that the expert is relying on in forming his or her opinion. In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.**

f. **Failure to Provide a Report or Opinion. The court should consider whether a party's failure to disclose the identity of its expert or to provide the expert's written report or a deposition within a reasonable period of time before trial or by a date set for doing so should preclude that party from (i) calling the expert at trial or (ii) introducing that part of the expert's opinion *that was not* timely disclosed.**

g. **Sanctions: Factors to Consider. Among the factors a court should consider in assessing what sanctions, if any, should be imposed for a party's failure to identify an expert or to provide the expert's report in timely fashion are:**

i. **The party's good or bad faith in the matter;**

ii. **Whether or not the failure was due to circumstances beyond the party's control;**

iii. Whether there has been unfair surprise or prejudice to the opposing side; and

iv. Whether the failure will unreasonably delay the trial or any other key events in the case.

Comment

Subsection (a). See Comment above for Standard 20(a). Unlike the federal rule, this Standard requires that reports be provided by any person, other than a "hybrid" fact-opinion expert, who will give expert testimony at trial. In jurisdictions where there is no requirement that all experts furnish written reports containing the information listed in this Standard, it would be prudent to serve interrogatories that ask for this information.

Subsection (b). This Standard is modeled on the disclosure and discovery requirements in Fed. R. Civ. P. 26(a)(2)(B) and similar state rules, *e.g.,* Tex. R. Civ. P. 194.2(f). Compare Cal. Civ. Proc. Code § 2034(f) (which requires less detailed information); *Castaneda v. Bornstein,* 43 Cal. Rptr. 2d 10, 17 (Ct. App. 1995) (expert should not be excluded for failure to disclose the "general substance" of testimony).

Subsection (d). A party has a duty to supplement its expert's disclosure whenever it learns that the disclosure is incomplete or incorrect in some material respect. This duty applies to changes in the opinions in the expert's report, as well as those the expert gives in deposition. While supplementation should be made promptly after the deficiency has been discovered, the Standard sets a 30-day deadline before trial or a discovery cut-off after which a party must obtain the court's permission to make the change. *Accord* Fed. R. Civ. P. 26(e), (a)(3).

Subsection (e). Other than court-appointed experts, which *are sui generis, an* expert *is* retained to provide testimony to assist one side in the case. The expert is entitled to have the benefit of the theories, however tentative or preliminary they may be, of the counsel that has retained the expert. Experts logically come within the "zone of privacy for strategic litigation planning" that is the rationale for the attorney work product doctrine. See *United States v. Adlman,* 68 F.3d 1495, 1501 (2d Cir. 1995) (construing Fed. R. Civ. P. 26(b)(3) in an unrelated context). Counsel should be able to explore counsel's theories or ideas about the litigation with an expert without the worry that the discussion is tantamount to disclosure to the other side.

At least in federal practice, however, there is a split of authority as to whether communications to an expert of an attorney's "core" or "opinion" work product are immune from disclosure after the 1993 amendments to Rule 26.

For cases holding that all work product is now discoverable under Fed. R. Civ. P. 26(a)(2)(B), *see, e.g., Musselman v. Phillips,* 176 F.R.D. 194 (D. Md. 1997); *Bama v. United States,* No. 95 C 6552, 1997 U.S. Dist. LEXIS 10853 (N.D. Ill. July 23, 1997); *B.C.F. Oil Ref. v. Consolidated Edison Co.,* 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *Kam v. Ingersoll Rand,* 168 F.R.D. 633, 639-40 (N.D. Ind. 1996).

For cases holding otherwise, *see, e.g., Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634 (D. Kan. 1993); see also Gregory P. Joseph, *Emerging Expert issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 101-04 (1996) (collecting cases, and outlining reasons why the continuing recognition of protection for opinion work product is appropriate after recent amendments to Rule 26).

Particularly where an expert is acting as a consultant, the expert's report is likely to reflect counsel's mental processes and legal theories. The court may, however, assess whether there is "substantial need" for using the report to impeach the expert that would outweigh the policy of protecting work product. *National Steel Prods. Co. v. Superior Court*, 210 Cal. Rptr. 535, 543 (Ct. App. 1985).

An attorney's mental impressions, theories and strategies – archetypal "work product" – that have been conveyed to an expert should not have to be disclosed if the expert is not relying on them in his or her testimony. The ability to have untrammeled access to the process by which an expert has formulated his or her final opinion(s) in the case is outweighed by (1) the undesirability of placing substantial barriers to a full and free exchange of ideas and theories between counsel and the expert; (2) the fact that the expert has been retained to advise and assist one side in an adversary trial system; (3) the added, unnecessary expense of having to retain two experts – one to testify and the other to consult – if a lawyer wants to maintain the confidentiality of his or her work product, and (4) the ability of counsel to obtain and cross-examine the expert on anything the expert is actually relying on in his or her opinion.

If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) ("It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed."). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Although a stipulation that there will be no waiver by sharing work product with an expert would probably protect the information in the particular case, there is no guarantee that it would protect it against nonparties in another setting. *E.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (the test is whether disclosure is done in a way that "substantially increases the likelihood that the work product will fail into the hands of the adversary").

Subsection (f). This Standard is modeled on Fed. R. Civ. P. 37(c)(1). The Standard creates a presumption that an expert will not be permitted to give trial testimony that has not first been disclosed in either a report or a deposition. *But see Martinez v. City of Poway*, 15 Cal. Rptr. 2d 644, 646 (Ct. App. 1993) (if an expert declaration has been submitted the expert cannot be excluded based on the inadequacy of the information in the declaration). The Standard

also recognizes the court's discretion to use other remedies than an absolute bar on the expert's testimony.

Subsection (g). This subsection identifies factors that are among those to be considered in determining whether or not a failure to identify an expert or to provide a report in a timely fashion should result in some form of sanction and, if so, what form. The list is not exclusive and a court should consider any other factors that would promote the interests of justice.

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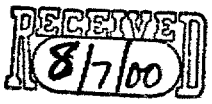

00-CV-E

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Changes in the Federal Rules of Civil Procedure

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On June 22, 2000, the Section overwhelmingly approved the enclosed Report of Expert Witness Disclosure and "Core" Work Product. This report highlights an area involving the interplay between the work-product doctrine under Rule 26(b)(3) of the Federal Rules of Civil Procedure and the disclosures required of experts under Rules 26(a)(2) and 26(b)(4) of the Federal Rules of Civil Procedure which we believe requires clarification. On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

Gregory K. Arenson

GKA:sm
Enclosure

cc: Sharon M. Porcellio, Esq. (w/o encl.)
Chair, Commercial and Federal Litigation Section

REPORT ON EXPERT WITNESS DISCLOSURE AND "CORE" WORK PRODUCT

New York State Bar Association
Commercial and Federal Litigation Section
Committee on Federal Procedure

June 22, 2000

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SUMMARY

The Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 511-12, 67 S. Ct. 385, 393-94 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383, 400-02, 101 S. Ct. 677, 688-89 (1981), has recognized that the work-product doctrine to some extent protects from disclosure to adversaries material prepared or gathered by attorneys in anticipation of litigation or in preparation for trial and protects to an even greater extent information revealing an attorneys' mental impressions, conclusions, opinions or legal theories, which has been called "core" work product. To a great degree, these views have been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

Experts are retained to present testimony concerning scientific, technical or other specialized knowlege supporting a party's position. It is rare that the expert's views are not affected in some manner by information transmitted by the party's counsel. That information will frequently reflect the attorney's mental impressions or conclusions. To the extent that an expert is required to disclose the information considered in reaching an opinion, disclosure of "core" work product may occur.

Prior to the 1993 amendments to the Federal Rules of Civil Procedure, there had been a split in authority as to the protection to be afforded to information disclosed to experts by counsel for a party. Following the revamping of expert disclosure in the 1993 amendments, there has continued to be a split in authority.

After reviewing the pre-amendment case law (part I) and the 1993 changes in procedure for disclosure of expert opinion (part II), the Section has concluded that it was the intent of the amendments not to provide protection to "core" work product disclosed to experts. After considering the competing purposes for protection of "core" work product and for disclosure of information considered by expert witnesses, the Section recommends that the Federal Rules of Civil Procedure be amended to make explicit that all information disclosed to testifying experts by attorneys is discoverable.

I. LAW AND POLICY PRIOR TO THE 1993 AMENDMENTS

There are several concepts that intersect at the issue of the disclosure of communications between attorneys and experts: the work-product doctrine, the exploration of the bases for an expert's opinion, and the evidentiary requirement that a document from which a witness testifies should be disclosed to the interrogator. However, it was not until after 1970, when the reluctance to permit pre-trial discovery of experts was reversed through the adoption of Rule 26(b)(4) of the Federal Rules of Civil Procedure and the protection of material prepared in anticipation of litigation or for trial was ensconced in Rule 26(b)(3) of the Federal Rules of Civil Procedure, that the issues at the intersection became apparent.

A. THE WORK-PRODUCT DOCTRINE

Hickman v. Taylor, 329 U.S. 495, 511-12, 67 S. Ct. 385, 393-94 (1947), first articulated the work-product doctrine. After decades of not always consistent case law development, the 1970 amendments to the Federal Rules of Civil Procedure added Rule 26(b)(3), which codified

an approach to materials prepared in anticipation of litigation or for trial, including information subject to the work-product doctrine.[1]

Rule 26(b)(3) defined two categories of material subject to protection: (1) "fact" or "ordinary" work product, and (2) "opinion" or "core" work product. Documents or tangible things comprising the former were discoverable upon a showing of substantial need and an inability to obtain the equivalent without undue hardship. *Upjohn Co. v. United States*, 449 U.S. 383, 400, 101 S. Ct. 677, 688 (1981). The latter were either absolutely protected, *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 736 (4th Cir. 1974), *cert. denied*, 420 U.S. 997, 95 S. Ct. 1438 (1975), or disclosable only after an extraordinary showing of necessity, *In re Murphy (United States v. Pfizer Inc.)*, 560 F.2d 326, 336 (8th Cir. 1977). The Supreme Court, while recognizing that "opinion" work product was subject to a higher standard for disclosure, in *Upjohn* refrained from deciding whether it was absolutely protected. 449 U.S. at 401-02, 101 S. Ct. at 688-89. *See generally*, Annot., *Protection from Discovery of Attorney's*

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[1] The 1970 version of Rule 26(b)(3) was:

> **Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Opinion Work Product Under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 A.L.R. Fed. 779 (1987).

A strong public policy to promote the proper functioning of our system of justice underlies the work-product doctrine. *Upjohn*, 449 U.S. at 398, 101 S. Ct. at 687; *Hickman*, 329 U.S. at 510, 67 S. Ct. at 393. The work-product doctrine allows an attorney to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman*, 329 U.S. at 510, 67 S. Ct. at 393.

> Proper preparation of a client's case demands that he [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

Id., 329 U.S. at 511, 67 S. Ct. at 393. "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes," *Upjohn*, 449 U.S. at 398, 101 S. Ct. at 687, and exposes the attorney to the possibility of being called to testify about what he or she remembers or what he or she wrote down regarding a witness' remarks, *Hickman*, 326 U.S. at 513 (Murphy, J.), 517-18 (Jackson, J. concurring), 67 S. Ct. at 394, 396-97.

However, work-product protection may be waived by attempting to make testimonial use of work-product materials. *United States v. Nobles*, 422 U.S. 225, 239 & n.14, 95 S. Ct. 2160, 2170-71 & n.14 (1975).

B. EXPERT DISCOVERY AFTER 1970

With the adoption in 1970 of Rule 26(b)(4) of the Federal Rules of Civil Procedure,[2] the procedure regarding experts changed dramatically. This was further accelerated in 1975 with

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[2] Rule 26(b)(4) provided:

> **(4) Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
>
> (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
>
> (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

the Congressional adoption of the Federal Rules of Evidence, and, in particular, Rules 702, 703 and 705.[3]

Rule 26(b)(4) was adopted, because "[e]ffective cross-examination of an expert witness requires advance preparation." Advisory Committee Notes to Rule 26(b)(4), 1970 Amendments. For testifying experts, Rule 26(b)(4) contemplated that interrogatories would normally be served to discover the substance of an expert's opinions and the grounds for those opinions, and depositions of experts would not be the rule. However, in practice, "[t]he information disclosed . . . in answering interrogatories . . . was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert." Advisory Committee Notes to Rule 26(a)(2), 1993 Amendments. Moreover, with the adoption of the Federal Rules of Evidence discouraging

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[3] Rule 702 stated:

> **Testimony by Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703 stated:

> **Bases of Opinion Testimony by Experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 705 stated:

> **Disclosure of Facts or Data Underlying Expert Opinion.** The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

hypothetical questions, encouraging cross-examination to discover the factual bases for an expert's opinion, and broadening the materials upon which an expert might rely to include materials not admissible in evidence, the need for pre-trial discovery of experts increased. *See Smith v. Ford Motor Co.*, 626 F.2d 784, 794 (10th Cir. 1980); Advisory Committee Notes to 1972 Proposed Rules 703 and 705.[4]

C. THE INTERSECTION OF EXPERT TESTIMONY AND THE WORK-PRODUCT DOCTRINE

Prior to 1993, there was a split of authority on whether documents containing work product revealed to an expert were discoverable. The leading case prohibiting discovery was *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984); the leading case permitting discovery was *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991). Each is discussed below.

1. Bogosian v. Gulf Oil Corp.

Bogosian was an antitrust class action by gasoline dealers against 15 major oil companies. 738 F.2d at 589. The district court directed that plaintiffs' eight experts on gasoline marketing, statistics, economics, chemistry and automotive engineering would be deposed under Rule 26(b)(4)(A)(ii) and that plaintiffs would produce, among others, all documents sent to the experts

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[4] The Advisory Committee Notes to 1972 Proposed Rule 705 stated, in part:

> Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area [the supporting facts or data for any expert's opinion], obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts.

by plaintiffs or their counsel and all documents utilized, relied upon, consulted or reviewed by each expert for the opinion the expert would express at trial. *Id.* Plaintiffs produced over 700 documents and identified hundreds of additional documents that were otherwise publicly available, but withheld 115 documents specified as work product. 738 F.2d at 590. The Third Circuit assumed that the 115 documents were "core" work product. 738 F.2d at 593.

The court first held that showing the material to the experts did not waive the protection for attorney work product. 738 F.2d at 593. *Cf. Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977).

Judge Sloviter then analyzed the language of Rule 26(b)(3), and, in particular the introductory proviso to the first sentence, "Subject to the provisions of subdivision (b)(4) of this rule." 738 F.2d at 594. Distinguishing between the first sentence of Rule 26(b)(3), which requires a showing of "substantial need" before work product must be produced, and the second sentence, which requires greater protection against disclosure of the mental impressions, conclusions, opinions or legal theories of attorneys, the court found that the proviso did not limit the second sentence. *Id.*

The Third Circuit then turned to Rule 26(b)(4). It acknowledged that the Advisory Committee Notes to the 1970 amendments stated that the rule rejected "as ill considered the decisions which have sought to bring expert information within the work-product doctrine," *id.*, but it found:

> The thrust of Rule 26(b)(4) is to permit discovery of facts known or opinions held by the expert. 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. . . . [T]he marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product.

738 F.2d at 595. The court then held that the district court should review the documents *in camera* to separate the facts from the legal theories of counsel, and protect the latter from disclosure. 738 F.2d at 595-96.

Judge Becker dissented. He believed that the majority had failed to consider the most important interest of the party seeking the information: "the need to impeach plaintiffs' expert economist at his deposition." 738 F.2d at 597. Judge Becker wrote:

> I disagree with the majority's pronouncement . . . that evidence demonstrating an economist's theory did not originate or evolve as a result of his own research, but rather as a result of the hiring lawyer's suggestion, is of only "marginal value." Rather, such a revelation could, in some cases, critically alter the finder of fact's assessment of the expert's testimony.

738 F.2d at 598. However, Judge Becker, like his colleagues, suggested that the district judge review the documents *in camera* and decide whether their impeachment value would significantly outweigh the chill on the development of legitimate attorney work product if disclosed. *Id.*

Cases that followed *Bogosian* prior to December 1993 include *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283, 286 (M.D.N.C. 1985) (under *Duplan* "'opinion' work product is absolutely immune from discovery even if shared with an expert witness"); *Bethany Medical Center v. Harder*, Civ. A. No. 85-2415, 1987 WL 47845 at *8, *10 (D. Kan. Mar. 12, 1987) (providing to expert materials containing attorney's legal analysis and mental impressions, which were not relied upon by expert, held not to waive work-

product protection and no showing of substantial need or undue hardship was made to overcome the protection); and *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 284 (D. Kan. 1989) (discovery denied where no showing that the expert reviewed the documents to develop his opinion, to refresh his recollection or to prepare testimony and no strong showing of substantial need for the disclosure for impeachment after *in camera* review of the documents).

2. **Intermedics, Inc. v. Ventritex, Inc.**

In *Intermedics*, despite the mootness of the controversy that gave rise to a motion to compel an expert to respond to deposition questions and produce documents, Magistrate Judge Brazil announced the "law of the case" to govern discovery of communications between attorneys and testifying experts relating to subjects about which the experts would testify. 139 F.R.D. at 385.

The *Intermedics* court disagreed with the *Bogosian* court's reading of the proviso in Rule 26(b)(3). From the 1970 Advisory Committee's Notes, Magistrate Judge Brazil found "it clear that a purpose of creating a separate subsection of the Rule and devoting it specifically to discovery from experts was to 'reject as ill-considered the decisions which have sought to bring expert information within the work product doctrine.'" 139 F.R.D. at 388. The Magistrate Judge inferred that

> the drafters of these rules wanted to make sure that courts recognized that analysis of discovery of work product and analysis of discovery of information from expert witnesses were two conceptually quite distinct enterprises . . . .

Id. From this inference, Magistrate Judge Brazil concluded that the *Bogosian* court was incorrect to conclude that the proviso in the first sentence of Rule 26(b)(3) did not apply to the

second sentence. *Id.* He then examined the language of the two sentences and found that the reference in the second sentence to "'such materials' clearly relates back to and incorporates by reference the concepts at the center of the immediately preceding sentence" so that the proviso of the first sentence must therefore qualify and limit the second sentence. 139 F.R.D. at 388, 389.

The *Intermedics* court did not stop at this point, though. It acknowledged that the drafters of the 1970 amendments probably did not consider the interplay between work product and expert testimony, 139 F.R.D. at 389, and it found an unarticulated and unanticipated tension between paragraphs (3) and (4) of Rule 26(b), as well as between Rule 26(b)(3) and Federal Rules of Evidence 702, 703 and 705, 139 F.R.D. at 391.

> Given that we are dealing with rules of presumptively comparable standing, we believe that it is appropriate to resolve the tensions between them by . . . a truly open balancing analysis in which we (1) identify the interests that the work product doctrine is intended to promote, (2) make a judgment about how much those interests would be either (a) harmed by a ruling that the kinds of communications in issue here are discoverable or (b) advanced by a ruling that these kinds of communications are not discoverable, (3) identify the relevant interests that are promoted by Federal Rule of Civil Procedure 26(b)(4) and by Federal Rules of Evidence 702, 703 and 705, and then (4) make a judgment about how much those interests would be either (a) harmed by a ruling that the kinds of communications in issue here are not discoverable or (b) advanced by a ruling that these kinds of communications are discoverable.

139 F.R.D. at 391-92.

Magistrate Judge Brazil identified the interests promoted by the work-product doctrine as "preserving the incentive system that is perceived as essential to our adjudicatory process and creating an environment in which counsel are free to think dispassionately, reliably, and creatively both about the law and the evidence in the case and about . . . strategic approaches

to the litigation." 139 F.R.D. at 392. The Magistrate Judge then asked: "[H]ow much harm is likely to be caused to work product interests when lawyers know in advance that communications between them and testifying experts will be discoverable if those communications are related to the matters about which the experts will testify?" *Id.* Magistrate Judge Brazil found that such a rule would not interfere with an attorney's capacity to think dispassionately and creatively about the client's case in private, as long as the attorney did not share thoughts with an expert expected to testify, and as long as any uninhibited, roaming, or educational exchanges with experts were with non-testifying experts. 139 F.R.D. at 392, 393. The court conceded that retaining such a non-testifying expert carried a financial cost. 139 F.R.D. at 393.

The court also addressed the argument that making attorney communications with a testifying expert discoverable "would impair lawyers' ability to teach experts efficiently what they need to know to prepare to offer useful and well grounded opinions." *Id.* The court found that this accelerated learning would come at too high a price: "What obviously is threatened by such communications is the independence of the expert's thinking, both her analysis and her conclusions. The risk is that the lawyer will do the thinking for the expert, or, more subtly, that the expert will be influenced, perhaps appreciably, by the way the lawyer presents or discussed the information." 139 F.R.D. at 393-94. These risks would be reduced if it were known that all communications with counsel would be reviewable by other experts and made known to the trier of fact. 139 F.R.D. at 394.

> In sum, we are not persuaded that a rule that would permit discovery of communications from counsel to an expert about matters related to the expert's

> testimony would in fact cause significant harm to the principal interests that the work product doctrine is intended to advance.

Id.

Magistrate Judge Brazil identified the relevant interests promoted by Federal Rule of Civil Procedure 26(b)(4) and by Federal Rules of Evidence 702, 703 and 705, as "nothing less than the integrity and reliability of the truth finding process." *Id.* The court found that

> assertive, probing, coherent, and well-informed cross-examination was essential to equipping the trier of fact to judge the persuasive power and reliability of such testimony [from experts] and to determine which of competing expert views should be credited, and that often that kind of cross-examination would not be possible unless counsel had been permitted to explore thoroughly in pretrial discovery the mental route that the expert had travelled on the way to his or her conclusions.

Id.

Magistrate Judge Brazil then directly disagreed with the *Bogosian* majority's conclusion that it was of only marginal value to know that an expert's view may have originated with an attorney. 139 F.R.D. at 395.

> [I]t would be fundamentally misleading, and could do great damage to the integrity of the truth finding process, if testimony that was being presented as the independent thinking of an "expert" in fact was the product, in whole or significant part, of the suggestions of counsel. The trier of fact has a right to know who is testifying.

139 F.R.D. at 395-96.

> The fact that so much expert testimony concerns matters that are essentially out of empirical control makes it all the more important for the trier of fact to know, accurately, the source of the testimony. When matters are debatable, the background, attributes of mind, character and personality, and the perspective (or intellectual biases) of each of the debaters can play crucial roles in a jury's or judge's assessment of the different positions being taken. These considerations

> make it even more important that the trier of fact know what the real source of expert testimony is.

139 F.R.D. at 396-97.

The Magistrate Judge found that these policies would be promoted if counsel knew in advance that their communications with testifying experts would be discoverable, because it would improve the likelihood that an expert's opinions really were the expert's. 139 F.R.D. at 397.

Accordingly, the *Intermedics* court "h[e]ld that all communications from counsel to a testifying expert that relate to the subjects about which the expert will testify are discoverable." *Id.*

Cases that reached the same result as *Intermedics* prior to 1993 include *Boring v. Keller*, 97 F.R.D. 404, 407, 408 (D. Colo. 1983) (documents constituting "opinion" work product not protected where an expert witness uses them to formulate his or her opinion, so as to preserve the opportunity to impeach the expert on cross-examination); *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 613, 616, 617 (D.N.J. 1989) (draft of expert's report wholly authored by attorney ordered produced based on a demonstrated substantial need to obtain the discovery, which could not be obtained in a substantial equivalent by other means); and *Bio-Rad Lab., Inc. v. Pharmacia*, 130 F.R.D. 116, 119, 122-23 (N.D. Cal. 1990) (work-product protection inapplicable to expert witness who could not distinguish his opinions from those formulated in consultation with trial counsel).

D. USING DOCUMENTS TO REFRESH A WITNESS' MEMORY

It has also been argued that Federal Rule of Evidence 612 bears on the discovery of "core" work product shown to an expert. *See Bogosian, supra*, 738 F.2d at 595 n.3; *Intermedics, supra*, 139 F.R.D. at 386 n.1. Federal Rule of Evidence 612 governs the production to adversaries of writings used to refresh memory while a witness is testifying or before testifying.[5] Thus, by its terms, Rule 612 is inapplicable to documents shown to an expert to permit the expert to formulate an opinion. It should only apply to documents shown before or while testifying to refresh recollection. Nonetheless, one of the first cases to examine the concepts underlying the work-product doctrine and Rule 612 arose in the context of disclosure of documents shown to an expert. *Berkey Motor, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 614 (S.D.N.Y. 1977). Therefore, while Rule 612 is not directly applicable to all information attorneys share with experts, cases that have arisen under the Rule further illuminate

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[5] Rule 612 states, in part:

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either --
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> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto.

the issues that bear on whether "core" work product should be disclosed to an adversary after being presented to an expert.

As proposed by the Advisory Committee in 1972, Rule 612 provided that, except under 18 U.S.C. § 3500, if a witness used a writing to refresh his or her memory "either before or while testifying," an adverse party was entitled to have the writing produced at the hearing and to cross-examine on it. Notes of the Committee on the Judiciary, H.R. Rep. No. 650, 93rd Cong., 1st Sess. 8 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7086. Congress changed the proposed rule. Congress kept the rule intact for writings used to refresh memory while testifying, but left the production of writings used to refresh memory before testifying to the court's discretion "in the interests of justice," referencing existing law, citing *Goldman v. United States*, 316 U.S. 129, 62 S. Ct. 993 (1942). Notes of the Committee on the Judiciary, H.R. Rep. No. 650, 93rd Cong., 1st Sess. 8 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7086. The House Judiciary Committee also wrote that it intended "that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory." *Id.* Rule 30(c) of the Federal Rules of Civil Procedure made Rule 612 applicable to depositions and deposition testimony. *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir.), *cert. denied*, 474 U.S. 903, 106 S. Ct. 232 (1985).

Application of Rule 612(1) is straightforward. In *S&A Painting Co. v. G.W.B. Corp.*, 103 F.R.D. 407, 408 (W.D. Pa. 1984), a third-party defendant during his deposition referred to handwritten notes he had prepared at the request of counsel setting forth events relevant to the litigation. Although the notes were protected by both the attorney-client privilege and the

work-product doctrine, the court held that the protection had been waived under Federal Rule of Evidence 612(1) and directed production of that portion of the notes to which reference had been made during the deposition. 103 F.R.D. at 408-09.

Application of Rule 612(2) is less straightforward, because, by directing that courts exercise their discretion, Congress imposed a balancing test to determine whether the "interests of justice" require production of documents used to refresh recollection before testifying.

> On a case-by-case basis, it is appropriate to balance the competing interests in the need for full disclosure and the need to protect the integrity of the adversary system protected by the work-product rule.

In re Joint E. & S. Dist. Asbestos Litig., 119 F.R.D. 4, 5 (E.D.N.Y. 1988).

Generally, courts prior to December 1993 that denied discovery under Rule 612(2) did so because of the great weight placed on protection of work product. *See Sporck v. Peil*, *supra*, 759 F.2d at 318-19 ("Proper application of Rule 612 should never implicate an attorney's selection, in preparation for a witness' deposition, of a group of documents that he believes critical to a case. Instead, identification of such documents under Rule 612 should only result from opposing counsel's own selection of relevant areas of questioning, and from the witness' subsequent admission that his answers to those specific areas of questioning were informed by documents he had reviewed. In such a case, deposing counsel would discover the documents through his own wit, and not through the wit of his adversary."); *Bogosian*, *supra*, 738 F.2d at 595 n.3 (*dicta*: "the purposes of Rule 612 are generally fully served without disclosure of core work product"); *Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd.*, 85 F.R.D. 118, 120 (W.D. Mo. 1980) (attorney's notes subject to the attorney-client privilege given "special

discretionary safeguards" against disclosure, even though used to refresh his recollection before testifying at a deposition); *Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.*, 553 F. Supp. 45, 52 (S.D.N.Y. 1982) (documents protected by the work-product doctrine protected from disclosure under Rule 612(2)); *Bloch v. Smithkline Beckman Corp.*, Civ. A. No. 82-510, 1987 WL 9279 at *4 (E.D. Pa. Apr. 9, 1987) (desire to impeach or corroborate a witness' testimony cannot overcome the strong presumption against the protection afforded an interview memorandum); *Derderian v. Polaroid Corp.*, 121 F.R.D. 13, 16-17 (D. Mass. 1988) (plaintiff's contemporaneous notes created for the purpose of communicating with counsel and reviewed prior to deposition not discoverable because they were likely of meetings or communications with agents or employees of defendant to whom defendant had full access).

On the other hand, courts that granted discovery prior to December 1993 under Rule 612(2) did so on the ground of the importance of full disclosure and the ascertainment of truth. *See Wheeling-Pittsburgh Steel Corp. v. Underwriters Lab., Inc.*, 81 F.R.D. 8, 9, 10 (N.D. Ill. 1978) (defendant company's files, including one captioned "communications with counsel" borrowed and reviewed by former employee prior to deposition must be produced to serve the paramount purpose of federal discovery rules to ascertain the truth); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144, 146 (D. Del. 1982) (decision by counsel to educate company's principals, officers and employees in preparation for deposition by showing binders with documents selected by counsel held a waiver of work-product protection requiring disclosure under Rule 612(2)); *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 26 (N.D. Cal. 1985) (government did not demonstrate it would suffer substantial harm from disclosure of prior appraisal report used to refresh employee witnesses' recollection in preparation for

depositions so that the policy in favor of effective cross-examination resulted in disclosure); *In re Joint E. & S. Dist. Asbestos Litig.*, *supra*, 119 F.R.D. at 6 (after review of material *in camera*, court concluded that the documents sought did not reveal much concerning the attorney's thinking or legal strategy and therefore should be produced); *In re Atlantic Fin. Management Sec. Litig.*, 121 F.R.D. 141, 143 (D. Mass. 1988) (deposition transcripts and documents previously produced in the case provide minimal exposure of the attorney's mental process and must be produced after review by witness prior to deposition).

II. THE 1993 AMENDMENTS AND THEIR EFFECT ON DISCOVERY OF COMMUNICATIONS BY ATTORNEYS WITH EXPERTS

A. THE 1993 AMENDMENTS TO RULE 26

The 1993 amendments made significant changes with respect to expert discovery. Rule 26(a)(2) was added to require detailed disclosures, usually including a written report, with respect to proposed expert testimony.[6] Rule 26(b)(4)(A) was amended to permit specifically

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[6] Rule 26(a)(2) states:

> **(2) Disclosure of Expert Testimony.**
>
> (A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
>
> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be

depositions of testifying experts and to eliminate expert interrogatories.[7] No change was made in Rule 26(b)(3) relating to work product.

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used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

[7] Rule 26(b)(4) now provides:

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

In amending Rule 26(b)(4) in 1993 to provide for the deposition of testifying experts, the Advisory Committee stated that this conformed "the norm stated in the rule to the actual practice, followed in most courts, in which depositions of experts have become standard." Rule 26(b)(4) also references new Rule 26(a)(2)(B) in stating that "[i]f a report from the expert is required . . ., the deposition shall not be conducted until after the report is provided."

Rule 26(a)(2)(B) provides detailed requirements for an expert report:

(1) a complete statement of all opinions to be expressed, and the basis and reasons therefor;

(2) "the data or other information considered by the witness in forming the opinions;"

(3) any exhibits to be used by the expert;

(4) the detailed qualifications of the witness, including publications;

(5) the witness' compensation; and

(6) a listing of any other cases in which the expert witness has testified within the last four years.

The Advisory Committee devoted five paragraphs of its 1993 Note to elucidating new Rule 26(a)(2). It stated that the expert disclosures are required "sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross-examination" and to obtain an expert witness of their own. In discussing the data and other information and the exhibits and charts to be supplied, the Advisory Committee wrote:

> Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used 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 Advisory Committee did not, however, cross-reference this statement to Rule 26(b)(3) or further indicate how this provision was to interrelate with the admonition to protect "core" work product. As a result, Rule 26(a)(2), while it has clarified some issues, has not eliminated argument. Instead, it has stimulated further litigation over the question of how expert witness disclosure and protection of "core" work product are to be reconciled.

B. CASE LAW AFTER 1993

The 1993 amendments have ended certain disputes relating to work product and expert discovery. It appears to be generally accepted that purely factual material transmitted and considered by an expert, even if work product, is discoverable. *See B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997). Moreover, in order for the opposing party to discover "the data or other information" given to the expert, it is no longer necessary to show that the expert relied upon it in forming his or her opinion, just so long as he or she "considered" it. *See Musselman v. Phillips*, 176 F.R.D. 194, 196 (D. Md. 1997). However, there has been litigation over whether information was in fact "considered" by expert witnesses or was so far removed from the proposed testimony that it was probably not considered. *See B.C.F. Oil*, 171 F.R.D. at 67.

Yet, the issue of whether "core" or "opinion" work product provided to an expert witness is discoverable has not been completely solved by the 1993 amendments. Indeed, the cases and commentary dealing with the issue have been virtually evenly divided.

1. Cases in Which The Discovery Of "Core" Attorney Work Product *Is Not* Permitted.

The cases that do not permit discovery of "opinion" work product are typically based, as before the 1993 amendments, on the proposition that, unlike "fact" work product, "opinion" work product is given at least nearly absolute protection from mandatory discovery by Rule 26(b)(3). A relatively early case in which "core" work product was held not to be discoverable when transmitted to a testifying expert was *Haworth, Inc. v. Herman Miller Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995). The issue there arose at the deposition of plaintiff's expert when he was questioned about conversations with plaintiff's counsel. Plaintiff objected; the Magistrate Judge granted defendant's motion to compel; the district court reversed on appeal.

The district court first addressed whether the proviso in the first sentence of Rule 26(b)(3) also affected the second sentence concerning "core" work product. The court rejected the application of the proviso to the second sentence, holding that the expert discovery requirements dealt only with "fact" work product and did not reach "core" work product. 162 F.R.D. at 294 ("[t]his Court reads the words as meaning only that all factual information considered by the expert must be disclosed in the report").

The court then discussd the 1993 Advisory Committee Note quoted above, suggesting that materials provided to experts was not privileged or protected from disclosure, but concluded that

the Advisory Committee only intended to deal with the argument of whether factual material shown to an expert is to be turned over to the opposing party. The court concluded: "For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute," 162 F.R.D. at 295, citing *Hickman v. Taylor*, 329 U.S. 495, 514, 67 S.Ct. 385, 395 (1947).

Next, the court considered the argument that cross-examination of an expert is significantly helped by knowing the nature of counsel's influence on the expert. In the court's judgment, "a more effective cross-examination and impeachment of the opposing party's expert witness . . . is not the type of circumstance the Supreme Court contemplated would overcome the strong policy against disclosing an attorney's opinion work product." *Id.* The court viewed the use of opposing experts as adequate to handle the problem.

Several other courts have, since 1993, expressed similar sentiments and reached similar results. *See, e.g., Magee v. Paul Revere Life Insurance Co.*, 172 F.R.D. 627, 643 (E.D.N.Y. 1997) ("[a]lthough the level of protection afforded "core" work product materials has not been defined precisely by either the Supreme Court or the Second Circuit Court of Appeals, it is clear that it is substantially higher than that provided by the 'substantial need' and 'undue hardship' test," *citing In re Murphy* (*United States v. Pfizer Inc.*)). These cases generally rely on *Hickman*: "It would be 'a rare situation' which would justify disclosure of attorney opinion work product. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." 329 U.S. at 514, 67 S.Ct. at 395.

The primary rationale for providing "opinion" work product with additional protection is to maintain and encourage the free exchange of ideas in developing litigation strategy. *Kennedy v. Baptist Memorial Hospital-Booneville, Inc.*, 179 F.R.D. 520, 522 (N.D. Miss. 1998). It is argued that this necessary and important exchange would not be possible without statutory and judicial assurance that disclosure of attorney opinions and strategy to experts does not waive privilege upon such disclosure. *Musselman v. Phillips*, 176 F.R.D. 194, 196 (D. Md. 1997). The creation of a bright-line rule requiring discovery of all materials turned over to an expert would, it is argued, discourage attorneys from providing experts with necessary documents and materials, "thus arguably impairing the expert's ability to fully evaluate the relevant issues and the attorney's ability to receive a full and objective assessment of the issues." *Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999).

Likewise, some courts have found that, although attorneys have control over whether and which materials to disclose to witnesses, it is unfair to require a litigant to incur the additional expense of hiring a separate expert as a consultant in order to both have a free exchange of ideas with an expert and protect "core" work product documents from discovery. James Wm. Moore et al., *Moore's Federal Practice (3d)*, ¶26.80[1] (1998) (noting that the *Haworth* line of cases has the additional benefit that it "does not favor wealthy parties who can afford to hire both testifying and non-testifying experts").

Further, these cases argue, to mandate disclosure of all materials considered or relied on by an expert is not necessary to ensure adequate cross-examination and protect against undue attorney influence. In *Ladd Furniture, Inc. v. Ernst & Young*, No. 2:95CV00403, 1998 WL

1093901 at *13 (M.D.N.C. Aug. 27, 1998), the court found that "the adversarial system acts as a check against attorneys who would [improperly influence an expert's opinion] because experts are required in the first instance to explain the bases of any opinions expressed in their Rule 26(a)(2)(B) reports." *See also Magee*, 172 F.R.D. at 643. The *Haworth* court stated that "the reasonableness of an expert opinion can be judged against the knowledge of the expert's field," and that an expert's opinions and analyses are "always subject to the scrutiny of other experts." 162 F.R.D. at 295-96; *see also Nexxus*, 188 F.R.D. at 10. Even without the production of "core" work product, these courts believe that an opposing party has ample opportunity to test the expert's opinion in court and to call additional experts to refute untrustworthy testimony. Any deficiencies in the basis of the expert's opinion will become apparent during subsequent cross-examination of the expert and in the course of testimony from the opposing experts. *Nexxus*, 188 F.R.D. at 10.

For these reasons, several courts have agreed with *Haworth* in stating that the strong protection accorded to "core" work product, both statutorily and judicially, requires an unambiguous statement by Congress that disclosure to an expert witness constitutes waiver. *See Ladd Furniture, Inc.*, 1998 WL 1093901 at *13. The 1993 amendment of Rule 26(a)(2)(B) requiring the production of factual materials considered by the expert -- "data or other information" -- is not interpreted by these courts as being either clear or explicit enough to override the strong policy against mandatory disclosure. *Nexxus*, 188 F.R.D. at 10.

2. Cases in Which The Discovery Of "Core" Attorney Work Product *Is* Permitted.

There are also several thorough and instructive decisions that have come to the opposite conclusion -- *i.e.*, that "opinion" work product ought to be produced if it has been given or shown to the expert to be considered in forming the expert's opinion. The most frequently stated rationale for this result is that showing the document to the expert constitutes a waiver. Other courts have reasoned that the need for effective cross-examination of an opposing expert is such that this circumstance should be one of the few exceptions to the virtually absolute protection given "core" work product.

One of the more instructive decisions is that of District Judge Motley in *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57 (S.D.N.Y. 1997). There were a number of issues dealing with documents related to expert testimony presented in that case:

(1) Invoices sent by an expert to plaintiff were held not producible, because they were not documents "considered" by the expert in connection with rendering his opinion. 171 F.R.D. at 61.

(2) Material provided to an expert being used as a consultant was held not producible, but the burden was placed on the party using the expert to demonstrate that the expert was functioning solely in that role. 171 F.R.D. at 62.

(3) Documents written by the expert in connection with his report were held to be producible, because it was not clear that the documents were not related to the expert's testimony. *Id.*

(4) Documents containing facts provided by the attorney to the expert were held to be producible under the clear language of Rule 26(a)(2)(B) (the expert report must include the "data or other information considered by the witness"). 171 F.R.D. at 63.

(5) Attorney opinions reviewed by the expert were held producible for a variety of reasons. *Id.*

(a) Rule 26, by its amended language, was intended "to resolve the tension between work product and disclosure of expert testimony." 171 F.R.D. at 66. The Advisory Committee Note stated that arguments over the issue should be resolved by the amendment. *Id.* The court rejected the *Haworth* analysis finding that the only significant pre-amendment discovery dispute related to producing "core" work product, so the Advisory Committee must have been talking about "core" work product. 171 F.R.D. at 65, 66.

(b) The work-product codification in Rule 26(b)(3) is "subject to the provisions of subdivision (b)(4) of this rule," thus making clear that expert disclosure takes precedence over work product. 171 F.R.D. at 66-67.

(c) As a policy matter, both fact-finder and opposing counsel should be fully aware of the extent to which the expert's views have been influenced (or created) by counsel. 171 F.R.D. at 66.

(d) A ruling requiring disclosure should cause no serious hardship, since work-product protection can still be preserved if the "core" work product is not shared. *Id.*

(e) The "bright line" test allows both attorneys and the court to determine easily what is producible and what is not. *Id.*

(6) Documents created by attorneys of their conversations with experts, but not shown to the experts, were not producible under Rule 26(b)(4), because they were not "considered" by the expert. 171 F.R.D. at 67.

The cases that are in accord with *B.C.F. Oil* all recognize the "nearly absolute" privilege afforded "opinion" work product. Nevertheless, they read the revised rule as providing that the privilege traditionally afforded to "core" work product is waived when the documents are disclosed to a testifying expert witness.. *Musselman*, 176 F.R.D. at 196 ("opinion" work product receives "nearly absolute" immunity which "may, of course, be waived"); *see also Culbertson v. Shelter Mutual Insurance Co.*, No. 97-1609, 1999 WL 109566 (E.D. La. Mar. 2, 1999); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 304-5 (W.D. Va. 1998). These cases set forth a series of policy- and rule-based arguments in support of their finding that "core" work product is waived by disclosure to the expert.

First, these cases observe that the role of experts in both civil and criminal trials has increased greatly in the last few years. *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 639 (N.D. Ind. 1996). Often experts testify on subjects with which none of the judge, jury or counsel are familiar, and the experts are permitted to base their opinions on facts not admissible in evidence.

Id.; *see also Musselman*, 176 F.R.D. at 196. This increased use of experts, the importance of their testimony, and the difficulty in evaluating this type of testimony increases the possibility that experts who are unqualified, or unduly influenced, will not be detected, thus damaging the integrity of the truth-finding process. *Karn*, 168 F.R.D. at 639 ("the impact of expert witnesses on modern-day litigation cannot be overstated; yet to some, they are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired").

Effective cross-examination is extremely important to impeach an unqualified witness and to determine to what extent the attorney has influenced the expert's testimony. *Karn*, 168 F.R.D. at 639 ("Given this premise, it stands to reason that useful cross-examination and possible impeachment can only be accomplished by gaining access to all of the information that shaped or potentially influenced the expert witness's opinion. Without pre-trial access to attorney-expert communications, opposing counsel may not be able to effectively reveal the influence that counsel has achieved over the expert's testimony."); *see also Musselman*, 176 F.R.D. at 196 ("the trial judge depends upon the efficacy of cross-examination by the party opposing the expert's testimony to point out any weaknesses which might affect its admissibility as does the jury in determining how much weight to give to the expert's testimony"). These courts stress the potential for an attorney to unduly influence an expert witness's testimony and maintain that "[a]lthough it is not improper for an attorney to assist a retained expert in developing opinion testimony for trial . . . opposing counsel must be free during discovery to determine the nature and extent of this collaboration." *Musselman*, 176 F.R.D. at 201.

Many courts have found that mandatory disclosure of all documents considered or relied upon by an expert does not affect the integrity of the work-product doctrine as set forth in *Hickman*. *Karn*, 168 F.R.D. at 640. The work-product doctrine "is intended to allow counsel unfettered latitude to develop new legal theories or to conduct a factual investigation." *Id.* "[P]roviding work product to an expert witness does not further this policy in that it generally does not result in counsel developing new legal theories or in enhancing the conducting of a factual investigation. Rather, the work product either informs the expert as to what counsel believes are relevant facts or seeks to influence him to render a favorable opinion." *Id.* Additionally, an attorney's opinions or impressions would not be discoverable unless they were shared with the expert. Attorneys retain the ability to reflect in private on the strengths and weaknesses of the case and may still privately consult with an expert with respect to such matters "provided that the expert is not called to testify." *Oneida Ltd. v. United States*, 43 Fed. Cl. 611, 619 (Ct. Cl. 1999).

These courts also feel that their interpretation provides necessary clarity among the often confusing rules of discovery. Courts and practitioners can easily determine throughout the entire process of litigation "exactly which documents will be subject to disclosure and can react accordingly." *Karn*, 168 F.R.D. at 639; *Lamonds*, 180 F.R.D. at 306 ("[a]n attorney wishing to maintain the protection afforded by the work-product doctrine can choose to provide the expert with all relevant facts instead of directing the expert's attention to certain facts and instead of including opinions and conclusions drawn by the attorney").

Finally, like Judge Motley in *B.C.F. Oil,* these courts consider this interpretation of Rule 26(a)(2)(B) as mandated by the 1993 amendments. *See Karn*, 168 F.R.D. at 639. They have interpreted the wording of amended Rule 26(a)(2)(B) and of the Advisory Committee commentary as an attempt to remedy the conflict between the pre-1993 cases involving work-product protection and expert disclosure requirements by enabling Rules 26(a)(2) and 26(b)(4) to "trump" any assertion of the work-product doctrine.

C. THE COMMENTARY

The commentators also are split on this issue. Wright & Miller lists the cases (weighted heavily on the waiver side) and comments: "It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to disclosed." 8 Wright & Miller, *Fed. Prac. & Proc. 2d*, §§ 2016.2, 2031.1 at 442 (1999 Pocket Part). The Moore treatise states that it finds *Haworth* meritorious, because the Advisory Committee Notes do not state or suggest "that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product recognized by the Supreme Court in *Upjohn v. United States*." James Wm. Moore et al., *Moore's Federal Practice (3d)*, ¶26.80 at 26-234 (1998). However, the same treatise notes that a different result might well be desirable if it is obvious that the attorney had injected himself into the formation of an expert's opinion, citing *Kennedy v. Baptist Memorial Hosp.-Booneville, Inc.*, 179 F.R.D. 520, 522 (N.D. Miss. 1988).

Other commentators have focused on the uncertainty caused by the conflicting cases. *See* Note, Discoverability of Opinion Work Product Materials Provided to Testifying Experts, 32 Ind. L. Rev. 481 (1999), which concludes that Rule 26 should be amended to clarify that Rule

26(b)(3) work-product protection takes precedence over the expert discovery rules. In an article entitled "Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure," published at 164 F.R.D. 97 (1996), Gregory Joseph concluded that work-product protection should prevail because such a result:

(1) does not favor wealthy parties, who can afford both testifying experts and non-testifying experts (on whom counsel can try out his or her theories);

(2) does not encourage "coy or strained conversations cloaked as hypotheticals" to avoid disclosure; and

(3) avoids a challenge under the Rules Enabling Act.

164 F.R.D. at 106.

The last point requires some explanation as it is not discussed in detail in the cases. The Rules Enabling Act, 28 U.S.C. § 2074(b), prohibits the adoption of rules, without affirmative Congressional action, which create, abolish or modify an evidentiary privilege. Joseph argues that Rule 26(a)(2)(B) makes waiver of "core" work product an "unavoidable cost" of putting an expert forward to testify, and thus has the effect of "abolishing or modifying" work-product protection. 164 F.R.D. at 106. This argument seems to go too far; one is not compelled to share "core" work product with an expert witness. Moreover, as Joseph acknowledged, it is not clear that work-product protection is a "privilege" within the meaning of Section 2074(b).

The draft of Civil Discovery Standards proposed by the Section of Litigation of the ABA in May 1999 takes the position that the requirement for an expert's report in Rule 26(a)(2)(B)

"does not require the disclosure of communications that would reveal an attorney's mental impressions, opinions or trial strategy protected under the attorney work product doctrine." Standard 21(e). However, the Litigation Section includes the precaution that in jurisdictions where the issue has not been decided, "the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information." The Standard does not explicitly acknowledge (although it is stated in the Comment) that, of the jurisdictions that have addressed the issue, approximately half have reached the opposite result. Moreover, the Standard and the Comment might themselves be considered ambiguous: Is "core" work product absolutely protected, or only absolutely protected if not relied upon by the expert in formulating his opinion?

III. CONCLUSION AND RECOMMENDATION

The Section recommends that Rule 26 of the Federal Rules of Civil Procedure should be amended to make explicit in the rule itself that oral and written "core" work product furnished to a testifying expert witness in connection with the witness' proposed testimony is not protected from disclosure to the opposing party when the expert is being deposed or testifying at trial. There are several reasons:

(1) The language of the 1993 Advisory Committee Notes to Rule 26(a)(3) indicates that this was the result sought to be accomplished at that time, but was inadequately expressed in the 1993 amendments to the rule.

(2) There is great value in having a bright-line rule in this area, so that practitioners can determine how to proceed in their pre-trial preparation. Under the cases decided since 1993 on this subject, there is a division of authority; as a result, an attorney is unable to determine (absent an advisory ruling by the trial judge, which is not easy to obtain) what will be the consequences of sharing "core" work product with an expert.

(3) Most importantly, while there are strong arguments to be made on both sides of the issue, at bottom, evidence that an expert's testimony "did not originate or evolve as a result of his own research, but rather as a result of the hiring lawyer's suggestion" may often be a critical factor for the fact-finder in determining what weight should be given the expert testimony. Becker J., dissenting, in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 598 (1984). Full disclosure of the attorney's influence on the expert's preparation outweighs the considerations for protecting "core" work product.

New York State Bar Association
Commercial and Federal Litigation Section
Committee on Federal Procedure

June 22, 2000

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
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August 14, 2000

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Dear Mr. Arenson:

Thank you for your suggestion to amend Civil Rule 26 dealing with the discovery of information provided by an attorney to a testifying expert witness. A copy of your letter was sent to the chair and reporter of the Advisory Committee on Civil Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Paul V. Niemeyer
Honorable David F. Levi
Professor Edward H. Cooper

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Materials on Class Action Study

to be Circulated at a Later Time

6-A

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 changing the Rule 8 notice pleading standard.

The Rule 12(e) variations set out below respond in different ways to concerns with notice pleading. A central 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 on "management" of litigation in general terms or more specifically on discovery and dispositive rulings on all or some of the claims raised by the pleadings, including 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. The drafts presented below demonstrate that making Rule 12(e) a more flexible standard does not equate to restoring archaic pleading challenges. A more specific objection will be framed in terms that address heightened pleading proposals in general, raising the concern that 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 two somewhat inconsistent perceptions. The first is that heightened pleading requirements are in fact imposed in many cases today in order to achieve more detailed information about a case in advance of costly or burdensome discovery. 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 in specific cases even when the pleadings satisfy Rule 8 and present Rule 12(e) would not support compelled amendment. The second is that district courts following the Supreme Court directions as to Rule 8 and the strict standard under Rule 12(e) are unable to require more specific pleadings in cases that would benefit from earlier information as to the nature of the claims. 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), an approach allowing case-specific flexibility may work better.

(e) Motion for a More Definite Statement.

(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)[1], 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 14 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 allow courts more flexibility to require greater detail in pleadings that either appear to rest on inadequate legal premises or provide so little information as to make that determination difficult. 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 permit early identification of cases or claims that ought not proceed further. 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, impose increasingly heavy burdens on litigants and courts in more and more cases. Recognizing the nature of these burdens, litigants frequently challenge the pleadings. In ruling on such challenges, courts consider

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[1] [Style] Rule 12(d) addresses conversion of a 12(b)(6) motion or a 12(c) motion to summary judgment. Does it belong here?

often limited allegations and — if the pleading is inadequate — work 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 or specific cases within these 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 lack of a more particular pleading will hamper [the conduct and management of] discovery and [presentation and] resolution of dispositive motions.

The "second alternative" is expressed in negative terms that dampen enthusiasm for ordering a more particular pleading. The moving party will be encouraged to show the circumstances that make it difficult to conduct and manage discovery or to resolve dispositive motions. A positive version might be more inviting:

> **(B)** if a more particular pleading would enable the parties and the court to conduct and manage discovery and to [present and] resolve dispositive motions.

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 under Current Rules

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).")

6-B

Addendum

Present Rule 12(e) is a narrow device

Consideration of possible Rule 12(e) revision may be advanced by summarizing general understanding of the current rule. This summary is based on 5C Federal Practice & Procedure: Civil 3d, §§ 1374-1378.

Rule 12(e) originally provided motions both for a more definite statement and also for a bill of particulars. The object could be either framing a responsive pleading "or to prepare for trial." Motions proliferated, and courts responded with divergent interpretations. The most permissive view, adopted by a minority of courts, allowed use of Rule 12(e) to seek information that might instead "be obtained readily through discovery."

Rule 12(e) was amended in 1948 to eliminate the bill of particulars and to strike the reference to information "to prepare for trial." The Committee Note — prepared in 1946, after a bare 8 years of experience with the original rule — is often quoted:

> With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. * * *
>
> Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. * * * The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words "or to prepare for trial" — eliminated by the proposed amendment — have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, may courts have in effect read these words out of the rule. * * *

Style Rule 12(e) allows a motion "for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." Common interpretations allow the motion only in narrow circumstances. The overall view is that Rule 12(e) must not be allowed to disrupt the grand scheme of the Civil Rules: Pleading is designed to pave the way for development of an action through Rule 26(f) conferences, disclosure, discovery, and Rule 16 judicial management. Summary judgment is appropriate only after utilizing these devices, and is preferred to disposition on the pleadings.

A particularly challenging way of expressing the narrow role assigned to Rule 12(e) is to assert that it should not be used in place of a Rule 12(b)(6) motion to dismiss for failure to state a claim. The Rule 12(e) motion is available only when at least the glimmering of a claim appears in the pleading, but the glimmer is too faint to enable a response even within the generous provisions for pleading lack of knowledge or information sufficient to form a belief about the truth of an allegation. This view probably draws too fine a line for practice, at least in the early stages of an action where leave to amend is commonly granted and there may not be much distinction between ordering revision by a more definite statement and threatening dismissal unless the pleading is amended.

Skepticism about the value of refining the pleadings through Rule 12(e) is also reflected in addressing cases in which the pleader responds that discovery is needed to provide the information that will support a more definite statement. Occasionally a court will direct that a more definite statement be provided after supporting discovery, but this approach does not seem common.

Clarification of positions after fact discovery is often valuable, but the preferred means seem to be contention discovery and Rule 16 conferences.

A much more specific limit on Rule 12(e) arises from the common interpretation that an answer is not a pleading to which a responsive pleading is "permitted" [to revert to the present language]. Clarification of a defense can be sought only if the court orders a reply — generating a motive to seek the order to support a Rule 12(e) motion.

The extent of the detail that may be required also seems to narrow Rule 12(e)"s meaning. The object is to enable a response. A proposed order is likely to be submitted with the motion, seeking as much detail as the movant thinks the court may be persuaded to order. The response may be a pleading that in itself would defeat a renewed Rule 12(e) motion but that does not comply with the order. There is at least an argument that the revised pleading should be accepted.

The overall tone of the running commentary in Federal Practice & Procedure approaches hostility to Rule 12(e) as a device that adds expense and delay and that may be used to harass. Valid uses for Rule 12(e) are identified in the end,[1] but the summary of the arguments for abolishing Rule 12(e) reflects some sympathy:

> One fundamental aspect of the federal rules is the notion that a plaintiff who identifies a transaction or occurrence from which his grievance stems and specifies the injury inflicted upon him in a way that at least indicates some possibility of a right to legal redress has stated a claim for relief and is entitled to flesh out his case by discovery. It never was intended that the motion for a more definite statement should upset this plan by obliging the plaintiff to plead in more specific terms at the outset of the action. Moreover, under the framework of the rules, the plaintiff is not required either to disclose the facts underlying his claim or to limit the issues he wishes to raise until after he has had an opportunity to engage in discovery. Nonetheless, permitting frequent recourse to the Rule 12(e) motion tends to impose precisely these requirements on a pleader.

5C FP&P § 1376, pp. 328-330.

One relatively recent case, selected at random, seems a fair representation of common understanding. The plaintiff in *Home & Nature Inc. v. Sherman Specialty Co.*, E.D.N.Y.2004, 322 F.Supp. 2d 260, claimed infringement of design patents and copyrights on "tatoo-like jewelry items." The court denied a defense motion to require the plaintiff to annex full copies of the patents, applications for Certificates of Copyright, and related materials. The court began by quoting a 2004 case quoting a 2000 case for the proposition that "An underlying aim of the Federal Rules is '"to discourage motions to compel more definite complaints and to encourage the use of discovery procedures to apprise the parties of the basis for the claims made in the pleadings."' * * * Thus, a Rule 12(e) motion should be denied if a complaint comports with the liberal pleading requirements of Rule 8(a)." So "Rule 12(e) is not the proper vehicle to resolve problems of uncertainty arising

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[1] Two examples suffice. One is easily understood — a pleading stating a claim may suggest the existence of a "threshold defense" such as limitations or the statute of frauds. An order to plead the date the claim arose or whether the asserted contract was reduced to writing can advance disposition of the action. The other example is conceptually messy. It is suggested that a more definite statement may advance the purpose of the Rule 9 provisions that require particularized pleading, but at the same time it is recognized that failure to satisfy these pleading requirements is more obviously a matter for a motion to dismiss for failure to state a claim or a motion to strike an inadequate defense.

due to want of specificity or lack of detail. * * * Such problems are appropriately resolved by discovery, not by an order."

Expansion of Rule 12(e)

The general current view of Rule 12(e) is a natural product of its history and the prevailing understanding of "notice pleading." The purpose of exploring possible expansions is to determine whether it is possible to reduce to some extent the high costs that may result from notice pleading. The question is whether the evolving nature of some forms of litigation has overtaken the original reliance on discovery and summary judgment to promote fair disposition of claims that deserve to be developed through court-enforced discovery before determining whether trial is deserved. Increasing concern with the costs and delay of party-directed discovery in aid of sketchy complaints has led to increased restraint through Rule 11 standards of care in pleading, Rule 16 case management, disclosure, the Rule 26(f) conference, separation of attorney-directed discovery from broader "subject-matter" discovery, and — to some uncertain extent — additional emphasis on Rule 56 summary judgment.

The present Rule 12(e) project began with a much broader review of notice pleading. The Supreme Court decisions that reject addition of "heightened pleading" requirements outside the Rule 9 categories have noted that the desirability of raising pleading standards is best considered through the Rules Enabling Act process. *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 1993, 507 U.S. 163, 168; *Swierkiewicz v. Sorema N.A.*, 2002, 534 U.S. 506, 515 (quoting the *Leatherman* opinion). Broad revision of present notice pleading practice has been put aside, at least for the time being. But it remains to decide whether Rule 12(e) should be expanded into a device that facilitates case-specific use of the pleadings — both of claim and defense — to promote earlier disposition of cases that under the present system drag on longer than should be, imposing unnecessary cost and delay on litigants and a court system that should be spared these burdens.

Two cases add impetus to this Rule 12(e) study. The first is in the Supreme Court, *Crawford-El v. Britton*, 1998, 523 U.S. 574, 597-598. The plaintiff claimed that the defendant prison official had punished the plaintiff for exercising First Amendment rights. The Court commented on

> existing procedures available * * * in handling claims that involve examination of an official's state of mind. * * *
>
> * * * [T]he trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. * * * First, the court may order a reply to the defendant's or a third party's answer * * *, 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 passage clearly contemplates use of Rule 12(e) in a case-specific manner to at least approach heightened pleading requirements.

The other case is older, drawn from the days when many courts directly required heightened pleading in actions involving official immunity. *Elliott v. Perez*, 5th Cir.1985, 751 F.2d 1472, reversed dismissal on the pleadings of claims that a state-court judge and prosecuting attorney had conspired to retaliate against a grand-jury foreman and a grand-jury witness for seeking to indict the parish district attorney. After reviewing the purpose of absolute and qualified official-immunity doctrines to protect public officials against the burdens of discovery, Judge John R. Brown's opinion

for the court stated that in a case likely to involve official immunity "the district court should on its own require of the plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained." Then in a footnote, Judge Brown observed that although Rule 12(e) "has been deemed quite restricted under the current Rules, * * * largely because of liberal availability of broad discovery, we are not here considering the use of Rule 12(e) as a weapon available to the parties, but rather as a tool available to the court to comply with the mandate in situations of immunity." 751 F.2d at 1482 & n. 25. (At one point, the court even suggested that the Enabling Act requires that Rule 8 pleading requirements be adjusted for official-immunity cases so as not to abridge the substantive immunity right. 751 F.2d at 1479. Judge Patrick Higginbotham concurred, concluding that Rule 8 itself requires detailed pleading: "[W]hat is short and plain has no universal meaning independent of the nature of the claim." Immunity protects against discovery. Statement of a claim grants access to discovery. Thus "a well-pleaded complaint must overcome the immunity." 751 F.2d at 1482-1483.)

Taken together, the *Crawford-El* and *Elliott* cases clearly define the present task. Should Rule 12(e) be revised to become "a tool available to the court" to expand the value of pleading in managing litigation for as speedy and inexpensive a determination as is compatible with full procedural justice? Continued flirtation — or greater engagement — with heightened pleading in the lower courts suggests that revision of Rule 12(e) is a valuable opportunity to be explored vigorously.

7-A

MEMORANDUM

TO: Hon. Lee Rosenthal, Chair, Advisory Committee on Civil Rules

FROM: Rule 56 Subcommittee
Judge Michael M. Baylson, Chair, Judge C. Christopher Hagy, Robert. C. Heim, Esq.

cc: Professor Edward Cooper, Ted Hirt, Esq.

DATE: August 21, 2006

RE: Rule 56 Subcommittee

The Subcommittee on Rule 56 held a conference call on August 16. (Although Ted Hirt was not on the call, he had provided comments). The subcommittee reached a consensus that the topics listed below should be discussed by the full committee. We did not consider any specific rule language, although some drafting suggestions are provided in the materials attached. Instead, our focus for the September meeting is to obtain specific guidance from the full committee to guide the drafting work we will do in preparation for the Spring committee meeting. We hope that in addition to commenting on the topics identified below, members of the committee will suggest other areas or topics that might improve the summary judgment rule. Please note that the time counting project already recommends some significant changes to Rule 56.

1. Rule 56 should have specific language which requires the moving party to file a statement of undisputed facts, requires the responding party to respond, paragraph-by-paragraph, documenting disputed facts, and asserting any supplemental facts. The moving party should be given the opportunity to respond to any supplemental facts and also to file a reply brief. The response to supplemental facts and reply brief could be contained in one document.

2. Consistent with prior discussions of the full committee, the subcommittee recommends against any attempt to include in a revised Rule 56 a statement of the Celotex Rule. The function of the Rule is to establish procedures which allow parties to expeditiously follow Supreme Court decisions in Celotex and related cases, without attempting to draft language which attempts to summarize the substantive holdings of those cases. The language in current Rule 56, that the motion should be granted when the moving party has shown "that there is no genuine issue as to any material fact" should be retained.

3. The current Rule should be revised to clarify the Court's responsibility to examine the motion and supporting materials before granting a Motion for Summary Judgment against a party which fails to make any response, or makes a response that is inadequate. This might be accomplished by some relatively minor revisions in current paragraph 56(e).

4. The Rule should also provide for the Judge to initiate summary judgment proceedings, with adequate notice to the parties.

5. The concept of so-called "partial summary judgment" should be specifically authorized by appropriate revisions in language. This concept is touched upon in the last sentence of current Rule 56(c), and the last two sentences of current Rule 56(d) There is good reason to consider a new sub-paragraph to deal specifically with a Motion for Summary Judgment which is only granted in part.

(a) Closely related to the concept of "partial summary judgment," the revised Rule should also specify what the District Court Judge should do if a Motion for Summary Judgment is denied in whole or part. The current Rule directs the Judge to "make an Order specifying the facts that appear without substantial controversy" in Paragraph 56(d). The Rule should also contain language that the Judge "should" designate "issues" that remain for trial, either in writing, or on the record of a proceeding.. The language of the Rule should use the word "should" as in the style version of Rule 56, in stating how the Judge should convey the decision to deny summary judgment.

6. The subcommittee questions whether we continue to need Paragraph 56(g), referring to "affidavits made in bad faith" or any other reference to the imposition of sanctions, or whether this concept should be eliminated from Rule 56 in view of the broad nature of Rule 11?

7. The Federal Judicial Center, through the good offices of Joe Cecil, has expressed interest in doing some empirical research on summary judgment issues. Following conversations with Professor Cooper, Joe Cecil may be able to provide some information concerning the rates as to which summary judgment is filed in different districts and/or circuits, and the percent of such motions that are granted. Query whether his statistics show the percent of motions granted entirely, and only granted in part. This information may be useful to the bench and bar considering our proposals, but only if it can be prepared and presented in a fashion that is consistent with our time lines.

The attached materials prepared by Professor Cooper give further background information on the prior efforts to revise Rule 56, and a current working draft. We look forward to a productive and interesting discussion.

Rule 56 Addendum: Beard v. Banks

Beard v. Banks, 2006, 126 S.Ct. 2572, may provide some slight help in considering the effect of failure to respond to a summary-judgment motion. There was no opinion for the Court. Justice Breyer's plurality opinion rules that summary judgment was proper. (Two concurring Justices would affirm by applying a different test to measure the First Amendment rights of prison inmates. Two dissenters would reverse summary judgment.)

The plaintiffs were a class of Pennsylvania inmates in the most stringent level of confinement. They claimed violation of their First Amendment rights by a policy that denied access to newspapers, magazines, and photographs. The defendants moved for summary judgment, advancing several justifications for the policy. The Court considered only one — that this deprivation provided an incentive to behave well enough to advance to the next-most-restrictive level of confinement that allowed access to these materials. This justification was supported by a Statement of Material Facts Not in Dispute and by the deposition of the prison's deputy superintendent. The plaintiffs did not respond to the Statement or the motion, but instead filed a cross-motion for summary judgment that did not dispute any significant fact. The policy was attacked on its face.

The plurality opinion notes that W.D.Pa. Local Rule 56.1(E) provides that alleged facts that are claimed to be undisputed in a Statement of Material Facts are "deemed admitted" for purposes of summary judgment "unless specifically denied or otherwise controverted by a separate statement."

The plurality opinion does not directly address the question whether a nonmovant's failure to respond in the form required by local rule relieves the court of any duty to determine whether the movant has carried the summary-judgment burden. But the opinion does examine the motion and supporting materials and, if somewhat indirectly, clearly rules that the defendant did carry the summary-judgment burden. The opinion notes that all justifiable inferences must be drawn in the plaintiffs' favor, but that "we must distinguish between evidence of disputed facts and disputed matters of professional judgment." As to professional judgment, "our inferences must accord deference to the views of prison authorities. * * * Unless a prisoner can point to sufficient evidence regarding such issues of judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage." The Third Circuit erred in reversing summary judgment because it "offer[ed] too little deference to the judgment of prison officials * * *." The plaintiffs failed to point to specific facts that would support invalidation of the policy.

Decision turned on a matter of law-application. The historic facts seem not to be disputed. Particularly given cross-motions, there could be no question of "default." The implicit example of deciding that the defendants had carried the summary-judgment burden is useful, but does not much advance the task of drafting revised Rule 56 procedures.

7-B

Rule 56. Summary Judgment

~~**(a) By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:~~

~~**(1)** 20 days have passed from commencement of the action; or~~

~~**(2)** the opposing party serves a motion for summary judgment.~~

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

(a) Time for Motion and Response. Unless the court orders otherwise, a party may move for summary judgment on all or part of a claim at any time until [the earlier of] 30 days after the close of discovery [or 60 days before the date set for trial].[1] A party opposing the

[1] This subdivision (a) replaces the time provisions in present subdivisions (a), (b), and (c) (the first two sentences). The intent is to bring Rule 56 into line with actual practice and to streamline the time provisions.

Summary-judgment deadlines commonly are set by scheduling orders. The court's authority to establish deadlines is emphasized at the beginning of subdivision (a). But it is helpful to have default provisions in the rule, particularly for motions made before a scheduling order is entered.

The "at any time" provision may seem to accelerate things too much. But the purpose is to authorize a motion for summary judgment at the beginning of the action. This practice may be useful in collection actions, harking back to the historic beginnings of summary judgment. It also may be useful in some contract actions. If the motion is served with the complaint, the draft still allows 30 days to respond. That may afford greater protection than the present rule, which allows a motion 20 days after the action is commenced. A party seeking to take advantage of this rule can "commence" the action by filing, wait 20 days, and then serve the summons, complaint, and summary-judgment motion, setting the hearing 10 days later. But if 30 days seems too short in the earlier stages of the action, we could allow more time for all motions. Or we could complicate the rule a bit. We could set a different time if the motion is served with the complaint or within X days of serving the complaint. Or we could allow more time to respond if, for example, the motion is made before a responsive pleading is served.

The deadline of 30 days after the close of discovery reflects common practice in scheduling orders. A scheduling order is likely to dispel any ambiguity in identifying the close of discovery.

The brackets address the possibility that 30 days after the close of discovery may be too close to trial for comfort. The 60-day figure is simply illustrative. If trial is set for less than 30 days after the close of discovery, so the cut-off at 60 days before trial comes earlier, there may not be much time after the close of discovery to file the motion. In a fast-moving case, the close of discovery might come later than 60 days before trial, forcing the summary-judgment motion to be made before the close of discovery. The court's power to order a different schedule can solve such problems as may arise. Or it may be better to omit the complicating alternative that refers to the start of

motion may file a response within 30 days after the motion is served.

(b) Affidavits. A party may support or oppose a motion for summary judgment with affidavits. ~~A supporting or opposing~~ An affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If ~~a paper or part of a paper is referred to in~~ an affidavit refers to other material, a sworn or certified copy must be attached to or served with the affidavit.

(c) ~~Serving the~~ Motion and Response; ~~Proceedings.~~ ~~The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day.~~

(1) Without argument, the motion must:

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trial, relying on the court's scheduling authority to address cases that are not suitable for the basic deadline of 30 days after discovery closes.

(A) describe the claims, defenses, or issues as to which summary judgment is warranted;

(B) specify the judgment sought; and

(C) recite in separately numbered paragraphs the specific facts that are not genuinely in dispute, citing the particular pages or paragraphs of [stipulations <including those made for purposes of the motion only>, admissions, interrogatory answers, depositions, documents, affidavits, or other] materials supporting the facts.

(2) Without argument, a response must:

(A) specify any summary judgment that the party agrees is warranted; and

(B) (i) respond to the facts asserted under rule 56(c)(1)(C) and recite in separately numbered paragraphs any additional facts precluding summary judgment, citing the particular pages or paragraphs of [stipulations,

admissions, interrogatory answers, depositions, documents, affidavits, or other] materials supporting the response, or

(ii) — if the responding party does not have the trial burden on a fact — state that the record does not support the asserted fact;[2]

(3) A party must append to a motion or response [the pertinent parts of] any cited materials that have not been filed.

(4) The court may permit a party to supplement the materials supporting a motion or response.

(5) A party must submit its contentions as to the controlling law or the evidence respecting the facts in a

[2] Is it better to reserve this question for the Committee Note? This problem ties to the choices discussed in note 3 below. A party who does not have the trial burden should not be required to find evidence to refute an assertion made by a movant that does have the trial burden. But it seems fair to require a response that the movant's showing does not suffice to carry the trial burden.

separate memorandum filed with the motion or response or at a time the court directs.

(6)*Version 1* The court may accept the truth of a fact asserted as required by Rule 56(c)(1)(C) if a response is not made as required by Rule 56(c)(2)(B).[3] It is not required to consider

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[3] This provision takes a middling position on two central questions. What should the court do when a nonmoving party either fails to respond at all or fails to respond in the form Rule 56 requires?

It would not be difficult to justify a default rule that failure to respond at all requires that the motion be granted. Why not insist that the nonmovant assist the court by bearing the adversary responsibility of showing its case? Or, if the complexity seems worthwhile, the rule could provide that the motion must [should] be granted as to any issue on which the nonmovant would have the burden at trial.

Nor would it be difficult to justify the opposite rule that the court must examine the materials submitted to support the motion and apply the summary-judgment standard. A draft of this approach is set out as Version 2. It is not uncommon to hear the lament that in smaller and even mid-range cases a party can afford a summary-judgment motion, or a trial, but not both. Here too it would be possible to draft a rule that depends on allocation of the trial burden — the court must examine the materials only if the movant would have the burden at trial. That approach would not do much to protect the plaintiff in small-stakes litigation.

The middle ground recognizes discretion to treat the failure to respond as a default, to undertake a full analysis of the motion, or to take some indeterminate intermediate approach that examines the

72 materials outside those called to its attention under

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supporting materials without undertaking a complete analysis. The result of partial analysis might be either to grant the motion or to deny it in preference for further proceedings. This is at least approximately the same as the approach taken in the 1992 draft. "Clause" (c)(2)(B) required detailed response to the motion, and (c)(2) concluded: "To the extent a party does not timely comply with clause (B) in challenging an asserted fact, it may be treated as having admitted that fact." The Committee Note said both that a party must file a timely response and — twice — that "Failure to do so may result in the fact being deemed admitted for purposes of the pending action."

The draft takes the same approach when the nonmoving party responds in a form that does not comply with the subdivision (c)(2)(B) specificity requirements. As compared to a total failure to respond, it is easier to conclude that an inadequate attempt should not be treated as a default. It also would be easier to require the court to attempt to make up for the shortcomings in the response. The draft allows a court to do that, but does not require the attempt.

If a failure to respond at all is to be treated as a default, one drafting solution would be to add words at the end of the introduction: "A party opposing the motion may file a response within 30 days after the motion is served. The court must grant the motion if no response is filed." (c)(3) might be amended in parallel: "The court may accept the truth of a fact asserted as required by Rule 56(c)(1)(C) if the response does not comply with Rule 56(c)(2)(B).

The drafting style adopted by most local rules that address this subject commonly relies on some variation of "deemed admitted." The more punctilious efforts state that the admission is only for purposes of the motion. A good example of detailed drafting is E.D. & S.D.N.Y. Local Rule 56.1(c): "deemed [considered] admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required."

Rule 56(c)(1)-(4).[4]

(6)*Version 2* The court may grant summary judgment against a party who fails to respond to the motion or whose response does not comply with Rule 56(c)(2)[*alternative a* only after reviewing the motion and supporting materials][*alternative b* if the motion and supporting materials show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law][*alternative c* if the motion and supporting materials satisfy the standard in Rule 56(f)][*alternative d* if the movant has carried the moving burden under Rule 56(d)].[5] It is not

[4] This may go without saying. But some local rules have equivalent provisions and it may help to provide a clear — and, at least with courts, popular — statement.

[5] Version 1 gives the court discretion to accept the movant's assertions without further inquiry if the nonmovant does not respond at all or responds in a way that does not satisfy the requirements of (c)(2)(B). This Version 2 requires the court to examine the motion and moving materials. This approach seems desirable if courts in fact can muster the resources. The Committee Note would add a

required to consider materials outside those called to its attention under Rule 56(c)(1)-(4).

(d) Raised By Court. The court may consider summary judgment on its own after giving the parties notice identifying material facts that may not be genuinely at issue. The notice must allow at least 30 days for a response by a party who would have the trial burden on the identified facts and an additional 30 days for responses by other parties.[6] Each response is governed by Rule 56(c)(2)-(6).

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statement that the court's only obligation is to make sure that the motion is apparently well grounded in the supporting materials.

Drafting this version did not prove easy on the first approach. Alternative (d) makes sense only if we adopt some rule that states the Rule 56 moving burden. An illustration is provided at the end of this draft.

[6] It may be better not to include any provision for summary judgment on the court's motion. The details of this sketch illustrate reasons to hesitate. It seems desirable to include specific minimum response times, but the suggested times seem both the minimum that may be needed and, together, to threaten significant delay. Identification of who must respond first also is not easy. Probably it will not do to identify the first responder as the party who would lose the judgment the court anticipates — the court may not yet know who would lose on its tentative impressions, and in any event should not be directed to reveal tentative impressions beyond the inherent case-specific implications of the identified facts.

(fe) When Affidavits Are Unavailable. If a ~~party opposing the motion~~ nonmovant shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, [and describes the facts it hopes to support,][7] the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(f) Judgment Rendered. ~~The~~ Summary judgment ~~sought~~ should[8] be rendered if ~~the pleadings, the discovery and~~

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[7] These words are adapted from the 1992 proposal to recognize an "offer of proof."

[8] The 1992 proposal was "may." The theory was that "may" reflected actual practice, recognizing discretion to deny summary judgment even though the record supports a grant. The Committee Note suggested complications — the discretion to deny may be limited or completely disappear when summary judgment is sought on specially favored grounds such as official immunity or First Amendment rights. The Style Project "should" likely is a better choice.

~~disclosure materials on file, and any affidavits show that~~ [evidence available for use at trial shows][9] there is no genuine issue as to any material fact and ~~that the movant~~ a party is entitled to judgment as a matter of law. [An order rendering summary judgment must {specify}{identify} material facts that are not genuinely at issue and that require judgment as a matter of law {and must separately state conclusions of law <on those facts>}.[10]

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[9] This phrase was adapted from the 1992 proposal. The purpose then was to dispel any implication from present 56(e)(1) that it is only an affidavit that must show facts that would be admissible in evidence. The proposed revisions may reduce whatever need there may have been for this addition.

[10] Any requirement of specifying facts established beyond genuine issue may impose undue burdens on district courts. This illustration is included only to ensure consideration of the idea. The reference to material facts not genuinely in dispute that require judgment as a matter of law is intended to avoid any need to survey all the facts not admitted by the parties. The Committee Note would say so, with an example: A finding that there is no genuine dispute as to the fact that the defendant did not drive the car involved in the accident warrants summary judgment for the defendant, obviating any need to consider the color of the traffic signal or any other fact issue.

The 1992 proposal included a more open-ended direction: "In its order, or by separate opinion, the court shall recite the law and facts on which the summary adjudication is based." Some circuits announce similar ideas. E.g., *Hubbard v. Taylor*, 3d Cir.2005, 399

(dg) ~~Case Not Fully Adjudicated on the Motion~~ Partial Summary Judgment.[11]

(1) Establishing Facts. If summary judgment is not rendered on the whole action, the court

(A) may enter an order specifying any material fact — including an item of damages or other relief — that is ~~should, to the extent practicable, determine what material facts are~~ not genuinely at issue, treating. ~~The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue~~

F.3d 150, 168: "'[W]e will exercise our supervisory power to require the district courts in this circuit to accompany grants of summary judgment hereafter with an explanation sufficient to permit the parties and this court to understand the legal premise for the court's order.'" The same passage from a 1990 decision is quoted in *Caprio v. Bell Atlantic Sickness & Accident Plan*, 3d Cir.2004, 374 F.3d 217, 220.

[11] Should we use the familiar "partial summary judgment" term? People use the term constantly. Purists wax proud in pointing out that the rule does not use it. The 1992 proposal distinguished between three concepts. "Summary adjudication" covered both "summary judgment" disposing of a whole claim and "summary determination" disposing of a defense or issue. It is a fair question whether these distinctions would be more helpful than confusing.

~~an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The~~ a facts so specified ~~must be treated~~ as established in the action, and

(B) may specify facts that are genuinely at issue.[12]

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[12] This provision is a compromise. One purpose of an order identifying facts in dispute may be to focus the parties. But the question seems to be addressed most frequently on collateral-order appeals from orders denying summary judgment on an official-immunity defense. The appeal is not supposed to permit review of the determination whether there is a genuine issue of material fact. Instead the appellate court is only to determine the immunity issues on the basis of the facts assumed by the district court in denying summary judgment. The appellate court's task is often much easier if the district court identifies the facts assumed. If we include this provision, the Committee Note could say that a statement of facts genuinely in issue is useful when there an appeal seems likely, using official immunity as an example.

An alternative would be to suggest — or even require — a statement of facts in dispute when the denial is appealable. It seems awkward to turn a "findings" requirement on the uncertain guess whether an appeal will be taken, and at times also on an uncertain guess whether a denial is appealable. One way out of the dilemma would be to provide that the district court may (or must) identify issues it finds in genuine dispute no later than [30] days after a notice of appeal is filed.

(2) Establishing Liability. An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.[13]

(e)[14] ~~**Affidavits; Further Testimony.**~~

~~**(1) In General.** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to~~

[13] What does this add to (1)? Rule 54(b) clearly does not allow entry of a partial final judgment when liability is determined without also determining the remedy. Referring to this event as an "interlocutory" summary judgment is not necessary.

[14] All of former subdivision (e) is relocated to other subdivisions, subject to the question whether we still need to say explicitly that pleadings do not count as summary-judgment evidence. Former (e)(2) — adopted more than 20 years before the Celotex decision — continues to generate some confusion as to application of the Celotex moving burdens. The emphasis is on a motion "properly made and supported," but that is a cryptic way to state a proposition that was not contemplated at the time.

~~be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.~~

~~**(2) Opposing Party's Obligation to Respond.** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.~~

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

Alternatives

(1) An attempt to identify the moving burden

(d) Moving Burden. A motion for summary judgment must show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(1) Movant Has Trial Burden. A movant who has the trial burden [of persuasion][15] must show

[15] There are several choices here: has "the trial burden," "the [initial] trial burden of production," "the trial burden of persuasion," or "the trial burdens of production and persuasion." The difficulty with any of these formulas is that the burden of production may shift, and may not always couple with the burden of persuasion. Particular confusion may be encountered with "prima facie case" concepts that call for articulated explanation. Conceptually, the best answer may be to refer to the burden of persuasion. The burden of persuasion is relevant when all the evidence is in. At that point the burden of "production" is simply a short-hand description of the directed-verdict standard — it expresses one of three conclusions: the party with the burden of persuasion has not produced sufficient evidence to permit a jury to be persuaded; has produced sufficient evidence to permit persuasion; or has produced so much evidence that the jury must be persuaded because the opposing party has not carried the burden of producing evidence that makes a case for jury decision. Ultimately, that is what the summary-judgment standard attempts to predict.

affirmatively that it is entitled to judgment as a matter of law.

(2) Movant Does Not Have Trial Burden. A movant who does not have the trial burden [of persuasion] must:

(A) show affirmatively that it is entitled to judgment as a matter of law, or

(B) show that the nonmovant does not have sufficient evidence to carry its burden at trial.

7-C

Summary Judgment — Rule 56
(Excerpt Minutes from the October 2005 Meeting)

Judge Rosenthal introduced the discussion of summary judgment by noting that there are well-known problems with the language of Rule 56. The problems proved frustrating in the Style Project. Every struggle with the language revealed ambiguities and flaws. Present Rule 56 does not describe what parties and courts do in pursuing summary judgment.

The timing provisions are clearly inadequate and divorced from the practice. Everyone ignores them. "Partial summary judgment" is a well-known practice, but it is not mentioned in the rule. There may be many other opportunities for improvement, whether to make the rule express what happens in practice or to alleviate problems it causes in practice.

The Time Project will require consideration of the time periods in Rule 56. That may be an added incentive to take on other parts of the rule as well. But the project will be very difficult.

The Reporter provided an introduction summarizing half a dozen of the more important questions raised by the failed 1991 proposals to revise Rule 56. The description was assisted by distribution of the 1991 rule text and Committee Note.

The first question is raised by the first paragraph of the 1991 Committee Note. The purpose of the revision appears to have been to encourage greater use of summary judgment — "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 * * * can have but one outcome." The Note, however, also continues with a cautionary note: "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." This caution suggests a different possible purpose — to rein in unwarranted overuse of summary judgment. A third possible purpose might be to combine the first two, reflecting a determination that the actual implementation of summary-judgment procedures varies among different courts and that it would be good to encourage greater use by reluctant courts while discouraging overuse by over-eager courts.

A second question would address the standard for granting summary judgment. Long before the 1991 amendment of Rule 50, the standard for summary judgment called for a determination whether the moving party was entitled to judgment as a matter of law. The 1991 Rule 50 amendments discarded the traditional references to directed verdicts and judgments notwithstanding the verdict in favor of judgment as a matter of law and renewed motions for judgment as a matter of law. The change of vocabulary was intended to emphasize the continuity of a single standard for measuring the sufficiency of the evidence. The same standard applies whether the eventual trial would be to a jury or to the court. The 1991 version of Rule 56 discarded the familiar "genuine issue of material fact" language in favor of determining whether summary adjudication is warranted "because of facts not genuinely in dispute," so that "a party would be entitled at trial to a favorable judgment or determination * * * as a matter of law under Rule 50." Some such approach might make more clear than the rule now does that the directed verdict standard controls. It would be possible to go further in at least two directions. One would be to emphasize the efficiency advantages of summary judgment to argue that summary judgment might be governed by a standard less demanding than the directed verdict standard at trial. A closely related change would be to adopt a less demanding standard for cases to be tried without a jury. But neither of those changes seems likely to deserve serious consideration. Obvious Seventh Amendment concerns would arise from any attempt to defeat the right to jury trial on a fact record that — if duplicated at trial — would require submission to the jury. And even for bench trials, it seems better to require the judge to hear

live witnesses if any party is unwilling to submit to trial on a paper record; it might prove too tempting to allow avoidance of trial on a lesser standard than applies in jury cases.

A third question is whether Rule 56 should be rewritten to express the practices established by the decisions in *Celotex Corp. v. Catrett*, 1986, 477 U.S. 317, and *Anderson v. Liberty Lobby, Inc.*, 1986, 477 U.S. 242. The *Celotex* decision defined the summary-judgment burden for a movant who would not have the burden of production at trial. The movant can carry the burden in either of two ways — it can undertake to disprove an essential element of the nonmoving party"s case, or it can "show" by reference to affidavits and discovery materials that the nonmoving party cannot produce evidence sufficient to carry the trial burden. The *Liberty Lobby* decision ruled that when the standard of persuasion requires clear and convincing evidence the directed-verdict standard — and by reflection the summary-judgment standard — requires more proof to defeat judgment as a matter of law than when the standard requires only a preponderance of the evidence. The 1991 draft sought to incorporate both rulings by providing that "A fact is not genuinely in dispute * * * 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 draft illustrates the challenge that any draft must face: it is intelligible to someone who understands the *Celotex* and *Liberty Lobby* decisions, but must prove challenging to anyone who does not. It also illustrates the question whether at least the *Celotex* decision should be enshrined in the rule. The lore of 1991 is that the Rule 56 proposal was rejected on two divergent responses to the proposition that it expressed current practice. One response was that there is no need to amend a rule simply to reflect what everyone understands in any event. The other response was that it is undesirable to amend a rule to freeze undesirable current practices. It would be possible to remain faithful to the directed-verdict analogy, and in some ways to perfect it, while rejecting the *Celotex* decision. At trial the party with the burden of production loses unless it produces sufficient evidence to carry the burden. The same approach could be taken on summary judgment — a party who does not have the trial burden of production is entitled to summary judgment on request unless the nonmoving party comes forward with sufficient evidence to carry the trial burden. Or, perhaps more plausibly, it could be argued that the *Celotex* approach makes it too easy to win summary judgment. Before 1986, many courts and lawyers had believed that a party who does not have the trial burden of production could win summary judgment only by offering evidence to negate the nonmoving party's case. That approach could be restored.

A fourth question reflects on the imminent need to reconsider Rule 56's timing provisions in conjunction with the time-computing project. Rather than adopt time limits expressed in days, the 1991 draft allowed a motion to be made "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." A functional approach such as this has an obvious charm, but it might generate numerous disputes over what is a "reasonable opportunity" in a way that application of present Rule 56(f) does not so much encourage. It also seems to foreclose consideration of a procedure that would enable a motion for summary judgment — perhaps under a different name — to be filed with the complaint in actions to collect a "sum certain." Federal courts regularly encounter actions to recover overpayments of government benefits or defaulted government loans, and also encounter similar private actions. Modern summary judgment has roots in summary collection procedures that might well be restored by crafting a special timing provision in Rule 56.

A fifth set of questions has held a place on the agenda since a time only a few years after rejection of the 1991 attempt. Many districts have local rules that establish detailed requirements for summary-judgment practice. The common thread is a requirement that the moving party specify

the facts that appear beyond genuine issue and point to materials on file that support its position. The nonmoving party must state whether it accepts any of the asserted facts, identify other facts as to which it asserts a genuine issue, and likewise support its positions by pointing to specific record materials. Such widespread elaboration of Rule 56 suggests that it may be useful to synthesize a uniform procedure from the best developed local procedures.

A sixth major set of issues relates to the fifth. In two different places the 1991 draft seemed to authorize summary judgment for default of response by the nonmoving party. The provision requiring a nonmoving party to respond by citing record support for its position concluded by providing that failure to timely comply "in challenging an asserted fact" "may be treated as having admitted that fact," draft Rule 56(c)(2). And draft 56(e) on "matters to be considered" provided that "the court is required to consider only those evidentiary materials called to its attention" by the moving and nonmoving parties. This provision spares the court any obligation to search the record for relevant information omitted by the parties' submissions. But, as compared to the "may be treated as having admitted" provision, it may imply that the court is required to consider the matters pointed to by the moving party. This possible internal tension reflects a tension in reported cases. At least some circuits have clearly ruled that a court cannot grant a motion for want of response without examining the materials submitted by the movant to determine whether the movant has carried the summary-judgment burden. This question goes to the core of what summary-judgment practice should be. As compared to failure to answer a claim, it may be argued that summary judgment is a shortcut that cannot be taken to defeat a right to trial without examining the moving party's showing. There is an analogy to failure to appear for trial — a defendant who has answered, denying the allegations, may (at least in some courts) be entitled to require that the plaintiff put on a case. Even apart from that analogy, summary judgment may be disfavored as an expedient that should defeat the right to trial only if the court accepts the responsibility of examining the summary-judgment showing.

Discussion began with the observation that there is a large body of learning on summary judgment. Many are skeptical of change. They argue that change will put a thumb on the scale, to make it either easier or more difficult to win summary judgment. But that seems wrong. It should be possible to reform the procedure of summary judgment without changing the standards.

The next two voices differed. The first thought the project of revising Rule 56 an excellent idea. The second thought the project should not be attempted. In a practical sense, there are no problems. The problem with the timing provisions is met by routine extensions. The practicing bar has a good grasp of current practice. Even if a motion is unopposed, trial judges review the supporting materials to determine whether the motion should be granted.

As to the timing provisions, it was noted that they must in any event be considered as part of the time-counting project.

A third view, from a practicing lawyer's perspective, was that "the rule is a wreck." It is unusual that the text of a rule that plays so dominant a role in the administration of cases is so far divorced from practice. The rule is very important. Practice in federal courts, moreover, is increasingly national; it would help national practitioners to have a uniform approach expressed in the national rule. The project is worth taking on.

Further support came with the observation that this is a good project, but it should be divided into separate parts. One part is the procedure of Rule 56. Here there is room for some reservations about the level of detail reflected in the draft Rule 56(c) that spells out the detailed obligations of moving and responding parties. A more fundamental question is whether the rule text should attempt to reflect the *Celotex* and *Liberty Lobby* rules.

Similar comments further supported some form of Rule 56 revision. The local rules are an important help for practitioners — those who look only to Rule 56 do the job poorly. If indeed there is a substantial gap between the rule text and actual practice, so that those who are experienced in local lore have an advantage over the inexperienced, the project is worthwhile even though it will be challenging. Rule 56 is a trap for the unwary; practitioners accustomed to state practice in Texas, for example, may fail to oppose a summary-judgment motion in federal court because they expect there will be a live hearing. The proliferation of local rules shows there is a need to consider the procedures that surround summary judgment; it may be better to avoid the standards that control the decision.

A different thought was expressed by observing that summary-judgment procedure imposes costs that may drive out smaller claims. A claim for less than perhaps $100,000 may not be sufficient to sustain the costs both of opposing summary judgment and also of actually trying the case. Perhaps there should be a simplified practice for some types of cases that omits summary judgment. At the same time, another participant recalled the suggestion that perhaps summary disposition is particularly useful in some categories of low-dollar cases, especially simple collection cases. At the same time, the question of simplified procedure has never disappeared from the agenda; development of any simplified system will include consideration of the proper role of summary procedures.

It was suggested that it would be a useful preliminary project to compile a set of local rules to illuminate the approaches that might be taken and to facilitate development of a uniform procedure that will be familiar to many courts and lawyers. It also would be useful to gather at least a few standing orders from districts that do not have local rules.

Yet another member suggested that developing a national rule that conforms to practice in procedural matters is a worthy goal, while it may be better to avoid attempts to define summary-judgment standards.

Another brief statement about standards was that reasonably uniform pronouncements may mask substantial differences in application. Many lawyers and judges believe that some courts are more receptive to summary judgments than are other courts. The Fifth Circuit, for example, seems receptive.

It was noted that Joe Cecil at the Federal Judicial Center has collected a lot of empirical data on the working of summary judgment and is working on it. This work may be useful in determining whether there is any reason to pursue the standards question.

A particular issue of standards was noted. Many courts have ruled that a trial judge may refuse to allow an interested person to defeat summary judgment by submitting a "self-serving, self-contradicting" affidavit that seeks to retract damaging testimony at an earlier deposition. The underlying purpose is clear. It would be all too easy to defeat the purposes of summary judgment if a party need do no more than this. But the conceptual foundation for the practice is shaky. A party may, at trial, avert judgment as a matter of law by retracting unfavorable trial testimony. If summary judgment is controlled by directed-verdict standards, it is difficult to understand why a similar practice should not apply. To be sure, the district court has discretion to accept the affidavit and deny summary judgment; the most common formulation seeks a plausible explanation for the changed testimony. This approach might be refined into a rule that a self-serving affidavit need not be accepted to defeat summary judgment because an affidavit is too far removed from the nature of testimony in open court, while retraction at a new deposition following proper notice will defeat summary judgment because the moving party has a better opportunity to test the retraction. But there was no apparent interest in attempting to transform any such approach into Rule 56 text.

The theme of discretion was noted from the more general proposition that, unlike judgment as a matter of law at or after trial, a district judge has discretion to deny summary judgment even though a verdict would have to be directed if the trial produced the same record as is presented on summary judgment. This practice is supported by a variety of concerns. The most obvious is the prospect that even though no sufficient Rule 56(f) showing of a need for further discovery can be made, a better record may emerge at trial. In related fashion, it may prove more efficient simply to try the case than to agonize over the often diffuse summary-judgment record. And it is proper to seek the reassurance of an actual trial record when a case presents issues of general public importance or a need to develop the law in light of the inspiration provided by a sure grasp of particular facts.

These comments renewed the question whether it is appropriate to define a project that seeks to clarify and improve the procedures that govern summary judgment without attempting to express Rule 56 standards in new language. Any form of Rule 56 project will be "interesting" in the senses of importance, difficulty, and potential controversy. But, this comment suggested, it remains worthwhile.

The bar groups that suggest many procedure reforms have not sought Rule 56 amendments. But no one has asked for advice, and committee members believe that the American College of Trial Lawyers would be interested.

Reluctance was expressed with the thought that any Rule 56 project, however defined, will "elicit neurotic responses from the bar." All of the sensitive issues will be raised despite careful efforts to address only more narrowly "procedural" problems. Any project must be long-term. Absent any emergent concern in the bar, it may not be worth it.

Discussion turned to Rule 56(f) with the observation that this part of the practice is very important. What is so important is that Rule 56(f) orders become the focus of regulating and narrowing further discovery. It may be desirable to consider changes here. This suggestion was echoed with agreement that the practice is very important, yet many lawyers do not seem to be aware of it while those who are aware do not know how to use it well. One of the suggestions made with the 1991 draft was that it would be useful to regularize an "offer of proof" procedure that requires a party to justify the need for further discovery by describing the facts it hopes to support by admissible evidence and — if possible — by pointing to inadmissible information that supports the hope that admissible evidence can be found.

Rule 56(d) also was noted with the thought that it is little used, but perhaps should be encouraged because taking issues off the table by "partial summary judgment" can simplify the remaining litigation and make it more affordable. The 1991 draft seemed to encourage this, in part by splitting a general concept of "summary adjudication" into separate categories of "summary judgment" disposing of a claim and "summary determination" that resolves important issues or defenses.

The conclusion was that the next step will be to gather local rules and a few illustrative standing orders. The Federal Judicial Center will be asked to lend such support as it can within the many competing demands on its resources. The spring meeting will afford an opportunity to decide how to go forward "without sinking into a morass of substantive issues."

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.

7-D

Materials from May 2006 Agenda Book

Rule 56 and Local Summary-Judgment Rules

RULE 56: INTERIM REPORT

Revisions of Rule 56 have been considered intermittently in the years following the 1986 Supreme Court decisions that set the basic standards for present practice. The first focused effort produced a dramatically revised rule that was rejected by the Judicial Conference in 1992.

The October 2005 agenda included extensive materials illustrating possible approaches to revising Rule 56, some modest and some more ambitious. The Minutes reflect a good discussion, pointing toward further active work in the short-term future. More detailed proposals will be presented at the fall meeting.

A survey of local summary-judgment rules has been undertaken since the October meeting. The attachments reflect this work. One, prepared by James Ishida, provides a disciplined review of the topics commonly addressed by local rules. The second provides a more eclectic selection of local-rules provisions divided into categories that correspond to the possibility of adopting corresponding provisions in Rule 56. Some of the provisions bear directly on questions that must be considered in any revision. Others seem interesting but do not seem likely candidates for incorporation in the national rule. Still others are rather clearly unsuited for incorporation in the national rule. If time allows, it would be useful to consider at this meeting some of the questions suggested by these local-rule materials.

The Rule 56 project has ties to two other projects. The time periods provided in Rule 56 will be reconsidered with the Time-Counting Project, and in any event are sufficiently troubling to command reconsideration on their own. And the interdependence of notice pleading, sweeping discovery, and summary judgment links Rule 56 directly to the notice pleading project. Both will proceed in tandem, at least at the outset.

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.

Appendix: Local Rules

Introduction

Almost everything about this selection and arrangement of local summary-judgment rules is in some measure random or even aribtrary. James Ishida compiled a rigorous collection of local rules provisions clearly organized around specific topics. The description of time provisions, for example, is much more comprehensive than the selection used here to illustrate the range of approaches to be found.

Part I, "topics to consider," compiles provisions that bear on the topics that should be discussed in deciding how far to revise present Rule 56. Some of the summaries are quite brief because the questions are plain and the current tentative draft provides an adequate foundation for improvement. Others are long, and at times suggest distinctions that may be artifacts of drafting, not any actual differences in practice. The most extensive summaries address a two-part problem that might well be answered by Rule 56 itself: What should the court do when a motion is not opposed at all? When the motion is opposed but the nonmovant does not do an adequate job of sorting through contested and uncontested facts?

Part II lists a number of "interesting" topics suggested by local rules. They are separated out because they are not obviously suitable for consideration in Rule 56 itself. Many of these topics may well belong in Part III.

Part III describes a few provisions that do not seem suitable for consideration in Rule 56. To the extent that there are good ideas, they are ideas that demonstrate the value of having local rules.

Part IV, finally, is a nonrepresentative sample of time provisions chosen as examples, no more.

It is important to begin with an expression of caution. Actual practice under a local rule may be quite different from the impressions created by simple reading. Often enough ambiguity appears on a rule's face. But seemingly clear rules may not be so clear in practice.

I Topics To Consider For Rule 56

Specific Identification of Facts

Many rules, in various terms, require "a concise statement of each material fact as to which the moving party contends there is no genuine issue," D.Conn. Rule 56(a)(1). D.Neb. Rule 56.1(a)(2) calls for "pinpoint references" to supporting materials.

D.Me. Rule 56(b) requires "a separate, short, and concise statement of facts * * * stated in narrative." Compare D.Mont. Rule 56.1(a): "facts set forth in serial fashion and not in narrative form "; E.D.Wash. LR 56.1(a): "the specific facts shall be set forth in serial fashion and not in narrative form."

Specific Record Support

In addition to a specific statement of facts, many local rules require specific citations to record support. D.Conn. Rule 56(a)(3), for example, requires "specific citation" to "specific paragraphs when citing affidavits or responses to discovery requests and to cite specific pages when citing to deposition or other transcripts or to documents longer than a single page in length."

A local rule may take the tack of identifying things that will not be considered. N.D.Ga. LR 56.1(B)(1) says the court will not consider any fact not supported by a citation to evidence, or supported by a citation to a pleading, or set out in the brief but not the statement of facts.

"Default — No Response"

Two approaches might be taken when the nonmovant fails to respond to a summary-judgment motion. The failure could be treated by analogy to a pleading default — the movant prevails without requiring the court to determine whether the movant has carried the summary-judgment moving burden. The failure instead could be treated by analogy to trial — if the motion is made by a party who would have the burden of production at trial, the court must determine whether the burden has been carried even if the nonmovant does not respond to the trial evidence. If the motion is made by a party who would not have the trial burden, on the other hand, failure to respond is equivalent to the nonmovant's failure to offer any evidence at trial — the movant wins. Local rules provide no more than ambiguous help in choosing between these perspectives.

Some local rules clearly require the court to decide an unopposed motion on the merits. D. Alaska is particularly clear: "No unopposed motion * * * will be granted unless the court is satisfied that there are no disputed issues of material fact and that the moving party is entitled to the decision as a matter of law." S.D.Ala. 7.2(b) says that failure to respond, pointing out disputed facts appropriately referenced to supporting documents, "will be considered an admission that no material factual dispute exists; provided, that nothing in this rule shall be construed to require the non-movant to respond in actions where the movant has not borne its burden of establishing that there is no dispute as to any material fact." This seems to mean that even if there is no response at all, the court still must determine whether the movant carried the Rule 56 burden.

Other rules seem to provide that a motion will be granted if there is no response. C.D.Ill. Rule 7.1(D)(2): "A failure to respond shall be deemed an admission of the motion."

Yet other rules openly recognize discretion. S.D.Ill. Rule 7.1(c) — which covers a variety of motions, including summary-judgment motions — says: "Failure to timely file an answering brief to a motion may, in the court's discretion, be considered an admission of the merits of the motion." N.D.&S.D.Iowa L.R.56.1(c) says that if there is no timely resistance the court "may" grant the motion without prior notice, and encourages a party who does not intend to resist the motion to file a statement that it does not resist. D.Neb. Rule 56.1(b)(2) is unique: "Failure to file an opposing brief *alone* shall not be considered to be a confession of the motion; however, nothing in this rule shall excuse a party opposing a motion for summary judgment from meeting the party's burden under" Rule 56. D.Vt.DUCiv 56-1(f): "Failure to respond timely to a motion for summary judgment may result in the court's granting the motion without further notice."

Inadequate Response

The proper approach to an attempted but inadequate response presents questions similar to those raised by failure to respond at all. Many local rules provide that an inadequate response may be deemed an admission, with variations that at times are interesting. Often it is unclear whether the deemed admission follows automatically or whether the court may still determine whether the motion itself carries the moving party's burden.

Rules that seem to treat the deemed admission as automatic tend to look like E.D. & W.D.Ark. Local Rule 56.1(c): facts set forth in the movant's short and concise statement "shall be deemed admitted unless controverted by the statement filed by the non-moving party." N.D.&S.D.Iowa L.R.56.1(b) and (d): "failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact." D.Kan.LBR 7056.1(b): "all material facts set forth in the statement of the movant will be deemed admitted for purposes of summary judgment unless specifically controverted by the statement of the opposing party." D.Mass.Rule 56.1: deemed for purposes of the motion to be admitted unless controverted.

E.D.Mo. is similar. E.D.&S.D.N.Y. Local Rule 56.1(c) "deemed admitted *for purposes of the motion* unless *specifically* controverted by *a correspondingly numbered paragraph in* the statement required". N.D.N.Y.: "deemed admitted unless specifically controverted." W.D.N.Y."deemed to be admitted unless controverted." E.D.Okla. L.R. 56.1(b): "deemed admitted for the purpose of summary judgment, unless specifically controverted"; N.D.Okla.LCvR56.1(c), W.D.Okla.LCvR56.1(c) are the same. D.Or. LR 56.1(f): "deemed admitted unless specifically denied, or otherwise controverted". M.D.Pa. LR56.1: "deemed to be admitted unless controverted." D.S.D. LR 56.1(D): "deemed to be admitted unless controverted." See also N.D.Ga. LR 56.1 B.(2)a.(2), which adds "[t]he court will deem the movant's citations supportive of its facts unless the respondent specifically informs the court to the contrary in the response."

W.D.Pa.LR 56.1 introduces a wrinkle — the motion may include a statement of facts the movant contends are "undisputed and material, including any facts which for purposes of the summary judgment motion only are assumed to be true." This seems to contemplate a conditional concession by the movant, rather than an assertion. Eventually the rule states that statements "which are claimed to be undisputed, will for the purpose of deciding the motion * * * be deemed admitted unless specifically denied or otherwise controverted."

Discretion is apparent on the face of other rules. M.D.Ga. LR 56, for example, says that facts in the moving statement that are not specifically controverted "shall be deemed to have been admitted, unless otherwise inappropriate."

Ambiguous advice is provided by rules that deem admitted facts that are "supported" in one way or another. D.Conn. Rule 56(a)(1) and (3): Facts in a Rule 56 Statement "and supported by the evidence will be deemed admitted" unless controverted by the opposing party's statement, and also if the opposing statement fails to provide specific citations to evidence in the record. "[S]upported by the evidence" may imply that the court must find that the evidence cited to establish the fact at least supports the fact, whether or not it shows there is no genuine issue. N.D.Ind. L.R.56.1(b) is similar: "the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy,except to the extent that such facts are controverted * * * in opposition to the motion, as supported by the depositions, discovery responses, affidavits and other admissible evidence on file." S.D.Ind. LR 56.1(e) is similar, but also recognizes opposition by showing that the claimed facts are not supported by admissible evidence "or, alone, or in conjunction with other admissible evidence, allow reasonable inferences to be drawn in the opposing party's favor which preclude summary judgment. {then, somewhat puzzlingly:} The Court will also assume for purposes of deciding the motion that any facts asserted by the opposing party are true to the extent they are supported by admissible evidence." D.Me.Rule 56(f): "Facts * * * if supported by record citations * * * shall be deemed admitted unless properly controverted. * * * The court may disregard any statement of fact not supported by specific citation to record material * * *." D.Neb. Rule 56.1(b)(1): "Properly referenced material facts in the movant's statement will be deemed admitted unless controverted * * *." D.P.R. Rule 56(e): "if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." E.D.Tex. LR CV-56(c): "the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted" in the opposing statement. D.Vt.DUCiv 56.1(c): "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." W.D.Wash. LR 56.1(d): "the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by the record set forth" in opposing the motion.

Other rules seem to imply discretion. D.D.C.LCvR7(h) and 56.1, for example, says "the court *may* assume that facts identified by the moving party in its statement of material fats are admitted, unless such a fact is controverted * * *." E.D.Va. Local Civil Rule 56(b): "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."

Materials Considered

Local rules use a variety of terms to identify the materials that may be considered. Among them are "admissions"(surprisingly rare), "affidavit," "answer," "answers to interrogatories," "deposition," "discovery responses," "document," "documentary evidence," "exhibits," "interrogatory," "other admissible evidence [on file]," "other documentation," "other supporting materials," "parts of the record," "pleadings,"

D.Hawaii LR56.1 requires a separate concise statement detailing each material fact, but limits the statement to a maximum of five pages or 1,500 words.

"Cannot Admit or Deny"

Some local rules state that a party cannot respond by asserting that it is unable to admit or deny a fact stated in a summary-judgment motion unless the party simultaneously complies with Rule 56(f). E.g., Md.Ga.LR 56; N.D.Ga. LR 56.1 B(2)a.(4). This approach is questionable if the motion is made by a party who has the trial burden. The nonmovant should be able to insist that the movant establish the asserted facts, and with that to avoid making any showing of its own. If the nonmovant need make no showing, it should be permitted to state that it simply does not know.

A variation is introduced by C.D.Cal.L.R. 56-3. An opposing party must controvert the movant's stated fact by identifying it in the concise statement of genuine issues and also controverting it "by declaration or other written evidence filed in opposition to the motion." "Declaration" may refer to a sworn statement — an affidavit by a more modern name. If it means something more general, then there is an opportunity to oppose that at least comes close to seeking delay without offering admissible evidence to support the position.

Agree (Stipulate) for Rule 56 Only

D.Ariz. LRCiv 56.1(a) provides that the parties may jointly file a statement of stipulated facts, and "may state that their stipulations are entered into only for the purposes of the motion for summary judgment and are not intended to be otherwise binding." See also E.D.Cal. 56-260(b); D.Mont. Rule 56.1(c)

D.Tenn. Rule [??]c. recognizes a response that a stated fact "is undisputed for the purpose of ruling on the motion for summary judgment."

A different approach is taken in N.D.Cal. 56-2(a): a separate statement of undisputed facts or joint statement of undisputed facts is not permitted unless required by the judge.

Contest Admissibility

Some rules provide specifically for resistance by contesting admissibility of the supporting evidence. E.g., S.D.Ind. L.R.56.1(e).

II Topics Possible For Rule 56

Court Has No Duty To Search Record

Some local rules emphasize that the court has no duty to search the record to consider parts not cited by the parties. See D.Haw. 56.1(f); D.Me.Rule 56(f); D.Ore. LR 56.1(e); D.P.R. Rule 56(e);

E.D.Tex. LR CV-56(c): "The court will not scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact for trial."

Successive Stages

Many local rules provide for a reply by the movant to the nonmovant's response. A few provide for a surreply. D.Mont.Rul 56.1(d), on the other hand, requires leave of court to file "further factual materials" after the statement of uncontroverted facts and the statement of genuine issues.

Record Support for Negative

W.D. Tenn. 7.2(d)(2) nicely demonstrates the difficulty of articulating the nature of the summary-judgment burden imposed on a movant who does not have the burden at trial: "If the proponent contends that the opponent of the motion cannot produce evidence to create a genuine issue of material fact, the proponent shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of this assertion."

Rule 56(f)

E.D.Cal. Rule 56-260(b) fleshes out Rule 56(f) a bit — a party resisting summary judgment by asserting a need for more discovery must specify the particular facts or issues that need discovery.

Partial Summary Judgment

E.D.Cal. Rule 56-260(a) and (f) seem to pick up the distinctions of the 1990s attempted revision, speaking of "summary adjudication" as a motion for an order "specifying material facts that appear without substantial controversy pursuant to Fed.R.Civ.P. 56(d)."

N.D.Cal. 56-3 sounds a caution: statements in an order denying summary judgment "shall not constitute issues deemed established for purposes of the trial of the case, unless the Court so specifies."

D. Guam LTR 9(b)(2) provides for summary adjudication on all or any part of the legal issues; supporting affidavits are permitted but not required. LTR 10 is more interesting, providing for submission of a case by motion if it does not "require[] a trial for the submission of evidence"; this provision resembles the "trial on a paper record" proposal considered and abandoned a few years ago.

N.D.Tex. LR 56.3c: "If a moving party seeks summary judgment on fewer than all claims or defenses, the motion must be a motion for partial summary judgment."

Responses Beyond Denial

Some rules specifically recognize objections to the admissibility of evidence relied upon by another party. E.D.Wash. LR 56.1(b) adds that a party may "clarify" a fact.

III Interesting Topics Probably Not For Rule 56

Appendix

Some courts require an appendix of materials. E.g., N.D.&S.D.Iowa L.R.56.1(e), which is supported by elaborate provisions for paper appendixes and for those served and filed electronically. W.D.N.Y. Rule 56.1(d) is simpler. N.D.Tex. LR 56.6 requires an appendix if a party relies on affidavits, depositions, answers to interrogatories, or admissions; it includes directions on such matters as oversized exhibits.

An appendix may be required by another name. W.D.Tenn. LR 7.2(d)(2), for example, requires "copies of the precise portions of the record relied upon as evidence of each material fact." "Highlighting" is encouraged. E.D.Tex. LR CV-56(a): "Proper summary judgment evidence" should be attached to motion and response. That means "excerpted copies of" the materials cited, referring to them by page and, if possible, by line. Highlighting and underlining are encouraged; the page preceding and following a highlighted page may be submitted if necessary to establish the proper context.

"Highlighting"

Several local rules direct the parties to "highlight" (or underline) the specific portions of the record relied upon.

Room for response

A few local rules direct that a motion leave space for a response. As electronic filing takes over this will be increasingly easy, and convenient. Rather than two separate lists of numbered facts, the facts set out in the motion will each be followed directly by the response; new facts set out in the response will be immediately followed by the reply. This exchange would include objections to the "admissibility" of the supporting materials relied upon.

A variation appears in E.D.Cal. Rule 56-260(b): the nonmovant "shall reproduce the itemized facts" in the movant's statement and admit or deny.

Notice by Moving Party to Pro Se Litigant

Several courts require an attorney to explain the requirements of Rule 56 to a nonmovant appearing pro se. Some of the rules include a specific form of notice. See D.Conn. Rule 56; D.Haw.LR 56.2; N.D.Ill. LR56.2; S.D.Ind. LR 56.1(h); D.Mont.Rule 56.2; E.D.&S.D.N.Y. Local Rule 56.2; W.D.N.Y. Rule 56.2; C.D.Ill. Rule 7.1(D) on summary judgment "does not apply to pro se litigants."

Review on Agency Record

Alaska local rules provide that the brief in a proceeding to review action on an agency record must be filed "in the form of a motion for summary judgment"; the brief in opposition "will be deemed a cross-motion for summary judgment."

E.D.Mo.Rule 56-9.02 requires leave of court to file a motion for summary judgment in a case seeking review of a denial of social security benefits.

Cross-Motions

D.Colo. LCivR 56.1(B) says that a cross motion must be made in a separate motion, not in a reply brief.

D.Md. rule [??7?]c directs that in a two-party case in which both parties intend to file summary-judgment motions, counsel are to agree which party is to file the initial motion. If more than two parties intend to file, counsel shall submit a proposed briefing schedule with the status report.

Multiple Motions

N.D.Okla. LCvR56.1(a): "Absent leave of Court, each party may file only one motion under Fed.R.Civ.P.56." W.D.Okla. LCvR56.1(a) is the same.

Motion to Strike

D.Me. Rule 56(e) prohibits a motion to strike, but allows an argument in the response that a statement of fact "should be stricken." D.N.H. Rule 7.2(c) allows a motion to strike material offered to support or oppose a motion, to be filed within 10 days after service of the motion.

IV Time

Many local rules increase or finesse the time limits provided by Rule 56.

A particularly neat example is provided by N.D.Cal. 56-1 and commentary. If the parties serve papers in accordance with Rule 56 time limits, the court may sua sponte reschedule the hearing to allow more time. The commentary: "While the Court may not preclude a party from proceeding in accordance with the Federal Rules, it may reschedule the hearing to allow a party an opportunity to respond in the time and manner provided by" local motion rules.

S.D.Cal. has complex time rules. In part, 7.1e.1 sets "a minimum filing date of 28 calendar days prior to the Monday for which the matter is noticed"; .2 sets 14 days before the noticed hearing to file an opposition; and .3 sets 5 days before the hearing for a reply.

N.D.Ga. LR 56.1 D. sets the time limit at 20 days after the close of discovery, stating how to measure the close of discovery.

S.D.Ill. Rule 7.1(c), which applies to a number of motions including summary judgment, allows 30 days after service of the motion to serve and file an answering brief.

A deft response to time-counting conventions appears in D.Kan.LBR56.1(d), which provides 23-day days to respond and then 23 days to reply to the response, adding that "these time periods include the additional 3 day period allowed under Fed.R.Civ.P. 6(e) and, therefore, apply regardless of the method of service."

D.N.M. requires the motion to be filed within the deadline set in the initial pretrial report.

M.D.Tenn. R[7?](7)a. is blunt: Motions "shall be in accordance with [Rule 56] except that the party opposing the motion shall have twenty (20) days after service of the motion in which to serve a response."

W.D.Tenn. LR 7.2(d)(1) sets the deadline at 45 days before the trial setting. N.D.Tex. LR 56.2a is 90 days of the trial setting.

D.Vt. DUCivR 56-1 allows 30 days to oppose and 10 days to reply.

8

Rule 62.1: Location and Caption

At the May 2006 meeting the Committee voted to recommend publication of a new Rule 62.1, set out below. It was decided that publication of this and other proposals should be recommended for August 2007 to provide some respite from the constant flow of Civil Rules amendments during the period when the Style Rules should be moving toward taking effect. The proposal was presented to the Standing Committee June meeting only as an information item. Brief discussion indicated a favorable reaction, but our invitation for questions and suggestions in advance of the January or June 2007 Standing Committee meeting – when we will present it as an action item – raised two questions: Why is it Rule 62.1, not some other number? And can we find a caption better than "Indicative Rulings," a term used only by hard-core appellate practitioners?

First, as a reminder, the Rule text approved last May, with Style revisions:

Rule 62.1 Indicative Rulings

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer consideration of the motion;

(2) deny the motion; or

(3) indicate that it [might][would] grant the motion if the appellate court should remand for that purpose.

(b) Notice to Appellate Court. The movant must notify the clerk of the appellate court when the motion is filed and when the district court acts on the motion.

(c) Remand. If the district court indicates that it [might][would] grant the motion, the appellate court may remand the action to the district court.

Location in the Rules

Situating this new rule in the sequence of the Civil Rules is not easy. The practice that it adapts has grown up primarily with Rule 60(b) motions to vacate. Although the new rule generalizes that practice to any setting in which a pending appeal ousts district-court authority to grant a motion, the affinity with Rule 60 may suggest that the Rule be designated as Rule 60.1.

The arguments for carrying ahead with the Rule 62.1 designation, however, are persuasive. Rule 59 governs new trials. Rule 60 governs correction of clerical errors and delayed relief by motion to vacate after the time for Rule 59 relief has passed. Those two rules follow in natural sequence. Rule 61 expresses the harmless error rule, and explicitly addresses both Rule 59 and Rule 60 motions. Rule 62 governs stays pending appeal and also suspension, modification, restoration, or grant of an injunction pending appeal. This seems the next step in the sequence of judgment, post-judgment relief, and appeal. Rule 63 changes direction entirely, addressing a judge's inability to proceed.

Given this sequence of rule provisions, sandwiching the new rule as Rule 62.1 between Rules 62 and 63 seems more appropriate than any apparent alternative. It addresses questions that arise less frequently than the stay questions addressed by Rule 62, and that usually will arise after the time when stay questions are likely to be addressed. In all, the Rule 62.1 choice still seems best.

It must be conceded that "Indicative Rulings" will not guide many readers to quickly understand what Rule 62.1 addresses. The question is what substitute will work best.

A clear alternative would be "Relief From Judgment Pending Appeal." "From Judgment" does not appear in the rule text, but that may not be a problem. The question seems to arise only with respect to acting on the order that is the subject of the appeal; Rule 54(a) defines any order from which an appeal lies as a "judgment."

A different alternative would draw from the rule text: "Authority to Grant Relief Pending Appeal."

Creative suggestions are invited.

9

Rule 68: A Suggestion From the Second Circuit

On occasion, we receive suggestions from courts in the form of opinions. *Reiter v. MTA New York City Transit Authority*, 2d Cir. July 20, 2006, Docket No. 04-5420-cv, is the latest. In *Reiter*, the Second Circuit recommended to the Standing and Advisory Committees that the Advisory Committee examine the offer-of-judgment provisions of Rule 68 to "address the question of how an offer and judgment should be compared when non-pecuniary relief is involved."

Rule 68 has provoked regular suggestions for reform. Substantial efforts early in the 1980s and again a decade later in the early 1990s came to naught. More modest "mail box" suggestions have been made since then. This memorandum begins the discussion over whether the time has come to reopen Rule 68, either for the narrow question raised by the Second Circuit or for more general consideration.

The *Reiter* case offers a relatively straightforward illustration of the questions raised by demands for specific relief and offers of judgment. The plaintiff, a high-ranking official in the New York City Transit Authority, won a jury verdict finding that he had been demoted in violation of Title VII in retaliation for filing a charge with the EEOC. His complaint requested both money damages and equitable relief returning him "to his prior position, along with all the benefits of that position." The Rule 68 offer was for $20,001; it said nothing about specific relief. The verdict awarded $140,000 for emotional suffering. The court ordered a remittitur to $10,000, which the plaintiff accepted. The court also granted an injunction restoring the plaintiff to his former position with all of its perquisites, including an office, confidential secretary, and "Hay points" indicating the importance of the position. The parties agreed that a magistrate judge would decide the plaintiff's motion for attorney fees. The magistrate judge concluded that the right to fees terminated at the time the plaintiff rejected the Rule 68 offer because the reinstatement order was "of limited value."

The Second Circuit reversed the conclusion that the Rule 68 offer of $20,001 was better than the judgment for $10,000 and reinstatement. It accepted the basic approach taken by the magistrate judge — the question was whether the equitable relief was worth more than the $10,001 difference between the Rule 68 offer and the judgment damages. This question was approached as one of fact, reviewed only for clear error. But the court also noted that the offeror, who "alone determines the provisions of the offer," "bears the burden of showing that the Rule 68 offer was more favorable than the judgment." For this case, the court began by observing that "equitable relief lies at the core of Title VII." Then it compared the great importance of the plaintiff's former job to the demotion job. Apparently the pay was the same for both jobs. But in the former job the plaintiff headed a department with a budget that "exceeded one billion dollars, eight senior executives reported directly to him, and he headed a staff of more than 900 employees. After his demotion * * *, he had no staff, no direct reports, no corner office, no Hay Points and found himself in one of the NYCTA's smallest departments with ten employees." The court readily concluded that the differences between the jobs made reinstatement more valuable than the $10,001 difference between offer and judgment damages.

The Second Circuit's conclusion is persuasive. The approach, however, is a self-fulfilling demonstration of the difficulty of comparing specific relief to dollars. It is easy to imagine ever finer distinctions between original job and demoted job, blurring the comparison. Beyond that, the opinion seems to imply that the comparison is made by considering broader social values — specific relief is specially valued in Title VII cases "because this accomplishes the dual goals of providing make-whole relief for a prevailing plaintiff and deterring future unlawful conduct." The comparison might come out differently if the claim were only for breach of contract.

Other specific-relief cases compare Rule 68 offers to judgments in a variety of settings. See 12 Federal Practice & Procedure: Civil 2d, § 3006.1. Comparison of an offer for specific relief with the judgment may be easy. The offer is for a one-year injunction; the judgment is a two-year injunction, clearly more favorable, or a one-year injunction on the same terms, clearly not more

favorable. The comparison may be muddled, however, if the offer does not spell out the full terms of the injunction. *Andretti v. Borla Performance Indus., Inc.*, 6th Cir.2005, 426 F.3d 824, 837-838, is an example. The offer was for an injunction forever barring the defendant from disseminating any advertisement or promotional material containing a specific quotation from the plaintiff. The actual injunction was broader, barring any act to pass off any good or service as authorized or sponsored by the plaintiff. The court, however, concluded that the offer was understood by the plaintiff to embrace all of the terms of the outstanding preliminary injunction that was simply transformed by the judgment into a permanent injunction. It may be wondered whether Rule 68 offers of injunctive or declaratory relief commonly include full decrees, and whether arguments about the framing of an eventual decree should be shaped by the parties' concerns for the Rule 68 consequences.

But what if an offer of a one-year injunction is followed by a two-year injunction that is not [quite] as broad? An offer that the defendant will put five named customers off limits to an employee hired away from the plaintiff is followed by an injunction barring two of those customers and three or four others? Should courts be forced to the work of evaluating these differences?

Yet another complication can arise if an offer for specific relief is followed by self-correction in circumstances that persuade the court to deny specific relief as unnecessary or even moot. The defendant offers to submit to an injunction limiting the activities of the plaintiff's former employee. As the case approaches trial and the defendant views its prospects with alarm, the defendant fires the employee, who goes to work elsewhere. There is no occasion for a "judgment" dealing with this element of the demand for relief or the offer. Surely the practical outcome should be factored into the assessment.

The comparison of specific relief to dollars aggravates the difficulties. The offer in the Second Circuit *Reiter* case provided no specific relief at all. Why should the defendant — who predicted completely wrong in this dimension — be allowed to force the court through the comparison, even by saddling the defendant with the burden of showing that the judgment is not more favorable than the offer?

The question raised by the Second Circuit would arise in many cases if Rule 68 were used extensively. The Federal Judicial Center undertook a study of Rule 68 practice to support the Advisory Committee's most recent undertaking. See John E. Shapard, Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure (FJC 1995). The survey included a question asking what type of relief was sought, anticipating the very question addressed by the Second Circuit: "The problem is illustrated by trying to compare an offer to settle for $100,000 with a judgment awarding reinstatement and back pay of $40,000. The percentage of cases involving exclusively monetary relief varied from 95% in tort cases to 47% in the 'other' category, and the percentage of cases involving 'significant' nonmonetary relief varied from 35% in the 'other' category to 3% in tort cases." Id., p. 24.

Honoring the Second Circuit's suggestion to consider revising Rule 68 will require specific alternative drafts. The approach taken in the 1990s draft was fairly direct:

Excerpts from 1992-1994 Rule 68 Drafts

Rule 68(e)(4)

(4)(A) A judgment for a party demanding relief is more favorable than an offer to it:

(i) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served}[expired] — exceeds the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment includes all the nonmonetary relief offered, or substantially all the nonmonetary relief offered and additional relief.

(B) A judgment is more favorable to a party opposing relief than an offer to it:

(i) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] is less than the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment does not include [substantially] all the nonmonetary relief offered.

Committee Note

Nonmonetary relief further complicates the comparison between offer and judgment. A judgment can be more favorable to the offeree even though it fails to include every item of nonmonetary relief specified in the offer. In an action to enforce a covenant not to compete, for example, the defendant might offer to submit to a judgment enjoining sale of 30 specified items in a two-state area for 15 months. A judgment enjoining sale of 29 of the 30 specified items in a five-state area for 24 months is more favorable to the plaintiff if the omitted item has little importance to the plaintiff. Any attempt to undertake a careful evaluation of significant differences between offer and judgment, on the other hand, would impose substantial burdens and often would prove fruitless. The standard of comparison adopted by subdivision (e)(4)(A)(ii) reduces these difficulties by requiring that the judgment include substantially all the nonmonetary relief in the offer and additional relief as well. The determination whether a judgment awards substantially all the offered nonmonetary relief is a matter of trial court discretion entitled to substantial deference on appeal.

The tests comparing the money component of an offer with the money component of the judgment and comparing the nonmonetary component of the offer with the nonmonetary component of the judgment both must be satisfied to support awards in actions for both monetary and nonmonetary relief. Gains in one dimension cannot be compared to losses in another dimension.

The same process is followed, in converse fashion, to determine whether a judgment is more favorable to a party opposing relief.

This provision was included in a rule that was far more complicated than present Rule 68. The rule authorized offers by claimants as well as defendants, and explicitly authorized successive offers by the same party. It provided attorney-fee sanctions, subject to complicated offsets and limits. But even then, the Committee Note — after providing a dizzying series of illustrations of increasingly complex calculations involving successive offers by both parties — did not address successive offers for specific relief.

The standard of comparison suggested in this draft was simpler than the approach taken by the Second Circuit in the *Reiter* case. If nonmonetary relief is demanded, the judgment is more favorable than the offer if it either includes all of the nonmonetary relief offered or includes substantially all the nonmonetary relief offered and additional relief. The drafting should be improved, but the intended answer for the *Reiter* case is clear: There is no Rule 68 sanction because

the offer included no nonmonetary relief, while the judgment awarded nonmonetary relief. There is no occasion to compare the difference between the money judgment and the money offer with the judgment's nonmonetary relief.

Among many possible alternatives, the simplest would be a rule that explicitly requires the offeror to prove that the judgment was not more favorable than the offer. The Committee Note could note the difficulties presented by demands, offers, and judgments for specific relief.

Other alternatives would expressly authorize one or both of two weighing approaches. Comparison of the offer and judgment for specific relief could be addressed in open-ended terms that direct the court to determine whether the overall effect of the judgment is more favorable than the offer. This comparison could be made without reference to the money elements of offer and judgment. Or the comparison could be complicated by adding a second dimension: if the claimant wins more money than the offer, the court weighs a shortfall in specific relief against the gain in money, while a judgment for less money than the offer would require the court to weigh the money shortfall against the gain in specific relief.

How much complication is appropriate depends on the overall value of Rule 68 offers of judgment. This assessment can be made either in the context of the present rule, otherwise unchanged, or in the quite different context of imagining a thoroughly revised Rule 68. Limited revision of the present rule will not be easy, but it may not be a major undertaking. Thorough-going reconsideration of Rule 68, however, will be a major undertaking.

The Rule 68 work in the 1990s was stimulated by Judge Schwarzer's proposal to encourage more offers of judgment. The project was abandoned, in part because of the growing complexity of attempts to implement the limited "benefit-of-the-judgment" approach and — at least to some participants — because of growing doubts about the value of Rule 68. The Minutes reflecting Committee discussions are attached. The time may have come to dive once again into these murky waters. There is a persuasive argument that it would be close to rulemaking malpractice to revise Rule 68 without at least addressing the bizarre interpretation that a successful offer cuts off a prevailing plaintiff's right to statutory attorney fees if the statute refers to the fee award as "costs," but not if the statute does not characterize the award as "costs." Even that specific question will reopen the Enabling Act question that divided the Supreme Court when it adopted this interpretation — it is not at all apparent why a rule that cuts off a statutory fee right does not abridge a "substantive" right. And of course broader questions are nearly unavoidable: why should plaintiffs not be enabled to make Rule 68 offers — is it only because of reluctance to provide sanctions greater than statutory costs, which a prevailing plaintiff ordinarily wins without regard to Rule 68? If some meaningful sanction is created to facilitate a rule that allows plaintiff offers, should a similar sanction be provided so that a judgment for the defendant after the defendant has made a Rule 68 offer triggers Rule 68 consequences — overruling another Supreme Court decision?

Apart from such large questions, the *Reiter* case itself illustrates an interesting wrinkle. The plaintiff's rejection of the $20,001 offer proved an accurate anticipation of the jury verdict for $140,000. The Rule 68 comparison, however, is not to the verdict but to the judgment. Should the plaintiff's decision whether to accept a remittitur to $10,000 be complicated by the Rule 68 consequences — here loss of the right to statutory fees after the offer? For that matter, is it right that Rule 68 sanctions should apply at all in an area as indeterminate as a court's estimate of the maximum reasonable jury award for emotional distress? Remember that the court of appeals found reinstatement clearly worth more than $10,001, the plaintiff faced a retrial if the remittitur were rejected, and acceptance of the remittitur waives the right to appeal the money award. Thorough reconsideration of Rule 68 will involve a great deal of work.

August 8, 2006

If Rule 68 is to be taken on again, some help is on the way. Professors Thomas A. Eaton and Harold S. Lewis, Jr., have completed an invaluable interview survey of practicing lawyers, reflected in part in the Symposium transcript and papers, *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases?*, 2006, 57 Mercer L. Rev. 717-855. An article proposing Rule 68 provisions is forthcoming. The FJC survey was valuable a decade ago, and this exploration of current practice will provide valuable support today.

August 8, 2006

Rule 68 Minutes

[Insert Minutes for May 1993 meeting, pp.13-15 in the version from the October 1993 agenda book]

August 8, 2006

Excerpts from April 28-29, 1994 Minutes

Rule 68

Discussion of Rule 68 began with presentation by John Shapard of the preliminary results of the Federal Judicial Center survey of settlement experience. The survey was divided into two parts. The first part drew from 4 matched sets of 200 cases each, 100 of which settled and 100 of which went to trial. The effort was in part an attempt to learn more about the factors that foster or thwart settlement, and in part to learn the reactions of practicing attorneys to possible changes in Rule 68. The questions to be tested were whether there is reason to cling to the hope that strengthened consequences might make Rule 68 an effective tool to increase the number of cases to settle, to advance the time at which cases settle, and to reduce misuse of pretrial procedures lest the misuser be forced to pay attorney fees incurred by the adversary. The concerns about strengthened consequences also were tested in an effort to determine whether the rule might force unfair settlements on financially weak parties or might cause trial of some cases that now settle. The second part of the survey used a different questionnaire for 200 civil rights cases, in which present Rule 68 has real teeth because of its effect on recovery of statutory attorney fees.

The questionnaire used in the general survey took two approaches. One, and likely the more useful, was to ask counsel about what happened and what might have happened in their actual cases. The second was to ask counsel for general opinions. It is an important caution that only first-round responses are available, with a 30-35% response rate. As an illustration of a strengthened Rule 68, the questionnaire posited a sanction of one-half of post-offer attorney fees. At this stage of response, there is evidence that approximately 25% of the attorneys responding for cases that went to trial believed that a strengthened Rule 68 might have led to settlement, and approximately 25% of the attorneys responding for cases that settled believed that a strengthened Rule 68 might have led to earlier settlement.

In specific cases, there was a wide variation of plaintiff and defendant settlement demands. In tried cases in which counsel for both sides responded — a total of 22 cases — there were three that apparently should have settled because of overlap between the demands of plaintiff and defendant. The problem may have been failure of communication-negotiation, or it may have been divergence between the settlement views of counsel and clients.

The answers for the civil rights cases were comparable to other cases on many questions. But there was polarization on some questions. Defendants want Rule 68 strengthened, and plaintiffs would be happy to abolish it. These answers reflect the fact that defendants and plaintiffs both understand the way Rule 68 works today in litigation under attorney fee-shifting statutes.

The information about expenses incurred in responding to pretrial requests is one important result of the survey.

Mr. Shapard responded to a question by stating that if he were writing the rule, he would try to give it teeth for both sides, without upsetting the fee-shifting statutes. He would be encouraged by the survey responses to proceed on a moderate basis to allow offers by both plaintiffs and defendants, with greater consequences such as shifting 50% of post-offer attorney fees. Although it would be more effective to avoid any cap on fee-shifting, it is a political necessity to adopt a cap that protects a plaintiff against any actual out-of-pocket liability for an adversary's attorney fees.

Another question asked about the element of gamesmanship that might be introduced by increasing Rule 68 consequences, leading to strategic moves designed to control or exploit this new element of risk rather than to produce settlement. Mr. Shapard recognized the risk, but observed that

we can create a new set of game rules. Although there are cases that the parties do not wish to compromise, most cases settle because of the economics of the situation. A changed game will only lead to getting better offers on the table.

Mr. Shapard also suggested that this survey will provide about 90% of what might be learned by empirical research. There is a growing body of theoretical research as well. Some states have rules that might be considered in the effort to gain additional empirical evidence of the effects of enhanced consequences.

It was asked what might be done to generate positive incentives for plaintiffs in fee-shifting cases, since they get fees if they win without regard to Rule 68. Mr. Shapard replied that this was uncertain, although expert witness fees might be used as a consequence if they are not reached by the fee-shifting statute. Another possibility would be to allow an increment above the statutory fee.

It was observed that some lawyers would like to abolish Rule 68. Mr. Shapard suggested that this would be of little consequence in comparison to present practice, apart from statutory fee-shifting cases, since Rule 68 is little used. In civil rights fee-shifting cases, on the other hand, the survey shows that Rule 68 was used or had an effect in about 20% of the cases.

Mr. Shapard also noted that it may be possible to correlate the answers on the reasons for not settling with other answers about the nonsettling cases to learn more about the possible consequences of strengthening Rule 68. There still are cases that go to trial, and they are not all contract litigation between large enterprises.

Discussion turned to the relationships between Rule 68 and attorney-fee arrangements. The "cap" in the current draft would avoid the problem of liability for defense attorney fees in an action brought by a plaintiff under a contingent-fee arrangement. Without the cap, it would be necessary to determine whether the plaintiff or the attorney should be responsible for this out-of-pocket cost. Plaintiff liability would have a dramatic effect on the character of contingent-fee representation. The effect on fee-shifting statutes also was noted. This effect extends beyond "civil rights" litigation to reach any fee-shifting statute characterized in terms of "costs." The view was expressed that using Rule 68 to cut off the right to post-offer statutory fees violates the Rules Enabling Act, notwithstanding the contrary ruling in Marek v. Chesny, and that the violation cannot be cured by the semantic device of referring to the result as a "sanction." There is no preexisting procedural duty to settle that supports denial of a fee award. We should not continue the violation of the Enabling Act in an amended Rule 68. Similar doubts were expressed about Enabling Act authority to adopt attorney-fee shifting as a sanction in more general terms.

More general discussion followed. One view was that there is little reason to suppose that it is desirable to foster earlier and more frequent settlements by means of Rule 68. Litigants with vast resources have too many advantages in our system, and their advantages would be entrenched and exacerbated by strengthening Rule 68. A supporting view was that the Judicial Center survey does not change the case against expanding the rule. On the other hand, it might be an undesirable symbol to abrogate the rule.

One possible problem with the survey was suggested: many of those who did not respond may have been worried about their freedom to answer the questions. Even with pledges of anonymity, client permission should be sought, and there is still some concern about loss of confidentiality. Another concern is that the first question about alternative sanction systems did not provide for indicating second choices.

Experience with the California practice was again recalled. California includes "costs" in the offer-of-judgment sanctions, and costs commonly include expert witness fees. The rule seems to exert a real influence on settlement. It also is helpful in effecting settlement pending appeal because the cost award is a useful bargaining item. One conclusion was that the Committee should find out more about the actual operation of the California practice as a more modest means of encouraging acceptance of offers.

Mr. Sherk was asked to describe experience with Arizona Rule 68. Starting with a rule like Federal Rule 68, the Arizona rule was first amended to make it bilateral. Then, noting that an award of costs does not provide a meaningful benefit to a plaintiff who has prevailed to the extent of doing better than its offer of judgment, stiffer sanctions were adopted. The rule has become more complicated, and is difficult to administer.

Professor Rowe described his ongoing research of the effects of different attorney fee sanctions by means of a computer simulation exercise sent to practicing attorneys. One of the hypotheses is that significant sanctions will smoke out more realistic offers, which will ease the path to settlement. Another concern to be tested is the effect of "low-ball" offers on risk-averse and poorly financed parties. One preliminary result of the research is that in a significant minority of cases there also can be a "high-ball" effect in which significant sanctions encourage defense attorneys to accept high plaintiff demands. The explanation may be that a defending lawyer hates to have to tell the client that the client must pay the plaintiff's attorney fees. Another effect is that substantial sanctions give poor plaintiffs the means to bring claims that are strong on the merits for relatively small amounts.

The observation that present Rule 68 can operate to distort relations between attorneys and clients in statutory fee-shifting cases led to the question whether a system that allows for offers by plaintiffs as well as by defendants might lead to arrangements in which clients insist that lawyers bear the cost of Rule 68 sanctions.

Note was made of a quite different sanction possibility. Founded on the premise that many contingent-fee cases do not involve any significant risk that the plaintiff will take nothing, this suggestion would limit plaintiffs' attorneys to hourly rates for post-offer work that leads to recovery of less than a Rule 68 offer.

The conclusions reached after this discussion were, first, that the current draft proposal should not now be presented to the Standing Committee. Second, Rule 68 should remain under consideration, including study of the effects on fee-shifting statutes, alternative sanctions such as awards of expert witness fees or restrictions on contingent fees, and abrogation of Rule 68. The Federal Judicial Center study will be completed and considered further. The Committee expressed its great appreciation for the work and help of the Judicial Center.

Excerpts from October 20-21, 1994 Minutes

Rule 68

Rule 68 has been before the Committee for some time. At the April, 1994 meeting, it was concluded that further action should await completion of the Federal Judicial Center study of Rule 68. John Shapard, who is in charge of the study, put it aside over the summer for the purpose of completing the survey of practices surrounding attorney participation in voir dire examination of prospective jurors. See the discussion of Rule 47(a) above.

An informal survey of California practice was described. California "section 998" uses costs as an offer-of-judgment sanction, but costs commonly include expert witness fees in addition to the more routine items of costs taxed in federal courts. Generally this sanction is seen as desirable, although respondents generally would like more significant sanctions. Most thought the state practice was more satisfactory than Rule 68. There was no strong feeling against the state practice. One lawyer thought the state practice restricts his freedom in negotiating for plaintiffs. This state practice seems preferable to the complicated "capped benefit-of-the-judgment" approach embodied in the current Rule 68 draft.

Another comment was that Rule 68 becomes an element of gamesmanship in fee-shifting cases. It is like a chess game — an extra shield and tool in civil-rights litigation. It is working close to a casino mentality. But Rule 68 has meaning only in cases where attorney fees are thus at stake. It would be better to abandon it.

Professor Rowe described his ongoing empirical work with Rule 68, investigating the consequences of adding attorney-fee sanctions. The work does not answer all possible questions. An offer-of-judgment rule may have the effect of encouraging strong small claims that otherwise would not support the costs of suit; this hypothesis has not yet been subjected to effective testing. There does seem to be an effect on willingness to recommend acceptance of settlement offers, and perhaps to smoke out earlier offers. Results are mixed on the question whether such a rule may moderate demands or, once an offer is made, encourage the offeror to "dig in" and resist further settlement efforts in hopes of winning sanctions based on the offer. And there is a possible "high-ball" effect that encourages defendants to settle for more, just as there may be a "low-ball" effect that encourages plaintiffs to settle for less.

John Frank reminded the Committee of the reactions that met the efforts in 1983 and 1984 to increase Rule 68 sanctions. At the time, he had feared that efforts to pursue those proposals further might meet such protest as to bring down the Enabling Act itself. He also noted that there are other means of encouraging settlement, and imposing sanctions, that involve less gamesmanship and more neutral control. "Michigan mediation," which was recognized as a form of court-annexed arbitration with fee-shifting consequences for a rejecting party who fails to do almost as well as the mediation award, was described. The view was expressed that this and other alternate dispute resolution techniques have made Rule 68 antique in comparison.

Some members of the Committee suggested that the best approach would be to rescind Rule 68. It might work well between litigants of equal sophistication and resources, but it is not fair in other cases, even if it is made two-way. A motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view, but also support for an attempt to provide more effective sanctions in a form less complicated than the present draft.

Alfred Cortese noted that Rule 68 has been "studied to death." An ABA committee looked at it but could not reach any consensus. Most lawyers are adamantly opposed to fee-shifting sanctions.

After further discussion, it was concluded that the time has not come for final decisions on Rule 68. It has significant effect in actions brought under attorney fee-shifting statutes that characterize fees as costs. Repeal would have a correspondingly significant effect on such litigation. Even if the present rule seems hurtful, there should be a better idea of the consequences of repeal. It was agreed that the motion to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices.

August 8, 2006

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TECHNICAL AMENDMENT: SUPPLEMENTAL RULE C(6)(a)

West Publishing Company has brought to our attention a minor typographical error in amended Supplemental Rule C(6)(a), which is now pending in Congress and, if not disapproved, will become effective on December 1, 2006. In amending the Rule, the Committee deleted the opening clause but did not capitalize what became the first word in the first sentence. This is easily done as a technical matter. A few other similar minor technical adjustments for the lack of the opening clause are set out below. It is recommended that these changes be transmitted to the Standing Committee with a recommendation to send them to the Judicial Conference for approval in September 2007.

Supplemental Rule C(6) as amended reflects adoption of new Rule G for civil forfeiture actions by deleting all of former paragraph (a), which applied to civil forfeiture actions. Former paragraph (b) became amended paragraph (a), as follows:

(b~~a~~) *Maritime Arrests and Other Proceedings.* ~~In an in rem action not governed by Rule C(6)(a):~~

(i) a person who asserts a right of possession * * *.

West Publishing Company called the Rules Committee Support Office to ask whether the article "a" should be capitalized as the first word in the paragraph. So it should. A few more changes to adjust for the lack of the former opening paragraph are appropriately made. The easiest is to restore the parallel to paragraphs (1), (2), and (5), and also to provide a better caption:

(a) *Statement of Interest; Answer* ~~*Maritime Arrests and Other Proceedings.*~~ In an in rem action:

(i) a person who asserts a right of possession * * *.

All of Rule C applies to in rem actions. The former caption reflected a distinction from former paragraph (a) that no longer applies. What now is paragraph (a) governs the statement of interest and answer. So the new caption makes sense. Restoring "in an in rem action" establishes a parallel with C(1)("An action in rem may be brought"); C(2)("In an action in rem the complaint must * * *); and C(5)("In any action in rem * * *). For that matter, it also reflects what has become paragraph (b): "Interrogatories may be served with the complaint in an in rem action * * *."

An alternative would be to have no introduction, but simply a series of four items. On that approach it might be best to make each item a separate sentence, each introduced by a capital letter: "(i) A person who * * * . (ii) The statement * * *." And so on through (iv).

Either change is as narrowly technical as can be imagined. It is not presumptuous to recommend that the Standing Committee forward the proposed change to the September 2007 meeting of the Judicial Conference for prompt transmission to the Supreme Court, identifying the change as a technical amendment that can be recommended for adoption without publication.

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