

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**Washington, D.C.
November 8-9, 2007**

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
NOVEMBER 8-9, 2007

1. Introductory remarks by the Chair and Reporter
 - (a) Report on the June Standing Committee and September Judicial Conference Meetings
 - (b) Comprehensive style and substantive amendment to become effective December 1, 2007
2. **ACTION** – Approve minutes of April 19-20, 2007, Advisory Rules Committee meeting
3. Report on pending rules and projects
 - (a) January hearings on time-computation and other rules
 - (b) Status of study on sealing cases by Standing Committee's Subcommittee
4. Report of the Rule 26 Subcommittee
 - (a) Report on the work of the Subcommittee
 - (b) Discussion of status of possible rule amendments and associated issues
 - (c) Discussion of Standing Committee presentation in June
5. Report of the Rule 56 Subcommittee
 - (a) Report on the results of the mini-conference
 - (b) Report by the FJC on results of further research
 - (c) Discussion of proposed amendments
 - (d) Discussion of Standing Committee presentation in June
6. Reporter Memorandum on *Twombly v. Bell Atlantic*, 127 S.Ct. 1955, __ U.S. __ (2007).
7. Report by the Federal Judicial Center on its Class Action Fairness Act study
8. Report on Rule 68
9. Dates of next meeting to be announced

ADVISORY COMMITTEE ON CIVIL RULES

Chair:

Honorable Mark R. Kravitz
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Members:

Honorable Vaughn R. Walker
Chief Judge
United States District Court
Philip Burton United States Courthouse
450 Golden Gate Avenue, 17th Floor
San Francisco, CA 94102-3434

Honorable Michael M. Baylson
United States District Judge
United States District Court
4001 James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106

Honorable David G. Campbell
United States District Judge
United States District Court
623 Sandra Day O'Connor
United States Courthouse
401 West Washington Street
Phoenix, AZ 85003-2146

Honorable Mark Filip
United States District Court
1978 Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street
Chicago, IL 60604

Honorable John G. Koeltl
United States District Court
1030 Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Honorable C. Christopher Hagy
United States Magistrate Judge
United States District Court
1756 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W. - Suite 1885
Atlanta, GA 30303-3361

Honorable Randall T. Shepard
Chief Justice
Indiana Supreme Court
200 West Washington Street
State House, Room 304
Indianapolis, IN 46204

Professor Steven S. Gensler
University of Oklahoma Law Center
300 Timberdell Road
Norman, OK 73019-5081

Robert C. Heim, Esquire
Dechert LLP
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

Chilton Davis Varner, Esquire
King & Spalding LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309-3521

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Daniel C. Girard, Esquire
Girard Gibbs LLP
601 California Street, Suite 1400
San Francisco, CA 94108

Anton R. Valukas, Esquire
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611

Principal Deputy Assistant Attorney General
Civil Division (ex officio)
Honorable Jeffrey Bucholtz
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Ted Hirt, Assistant Director
Federal Programs Branch
Civil Division
U.S. Department of Justice
20 Massachusetts Avenue, N.W.
Room 7106
Washington, DC 20530

Liaison Member:

Honorable Eugene R. Wedoff
Chief Judge
United States Bankruptcy Court
Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street
Chicago, IL 60604

Reporter:

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Advisors and Consultants:

Professor Richard L. Marcus
University of California
Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102-4978

Professor Thomas D. Rowe, Jr.
Duke University School of Law
Science Drive at Towerview Road
Durham, NC 27708-0360

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON CIVIL RULES

SUBCOMMITTEES

Subcommittee on Rules 26(a) and 30(b)(6)

Judge David G. Campbell, Chair
Chilton Davis Varner, Esquire
Daniel C. Girard, Esquire
Anton R. Valukas, Esquire
Professor Richard L. Marcus, Special Reporter
DOJ Representative

Subcommittee on Rule 56 – Pleading

Judge Michael M. Baylson, Chair
Judge Vaughn R. Walker
Judge C. Christopher Hagy
Justice Randall T. Shepard
Robert C. Heim, Esquire
Anton R. Valukas, Esquire
DOJ Representative

Subcommittee on Time Counting

Subcommittee A

Judge David G. Campbell, Chair
Judge C. Christopher Hagy
Professor Steven S. Gensler
Daniel C. Girard, Esquire
Anton R. Valukas, Esquire

Subcommittee B

Judge Michael M. Baylson, Chair
Judge Vaughn R. Walker
Chilton Davis Varner, Esquire
Robert C. Heim, Esquire

JUDICIAL CONFERENCE RULES COMMITTEES

October 1, 2007

Chairs

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2600

Honorable Carl E. Stewart
United States Circuit Judge
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101-3074

Honorable Laura Taylor Swain
United States District Judge
United States District Court
Thurgood Marshall United States
Courthouse, Room 1205
40 Foley Square
New York, NY 10007

Honorable Mark R. Kravitz
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Honorable Richard C. Tallman
United States Circuit Judge
United States Court of Appeals
Park Place Building, 21st floor
1200 Sixth Avenue
Seattle, WA 98101

Honorable Robert L. Hinkle
Chief Judge, United States District Court
United States Courthouse
111 North Adams Street
Tallahassee, FL 32301-7717

Reporters

Professor Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02459

Professor Catherine T. Struve
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

Professor Jeffrey W. Morris
University of Dayton School of Law
300 College Park
Dayton, OH 45469-2772

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Professor Sara Sun Beale
Duke University School of Law
Science Drive and Towerview Road
Box 90360
Durham, NC 27708-0360

Professor Daniel J. Capra
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Phone 202-502-1820

Fax 202-502-1766

James N. Ishida
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544

Phone 202-502-1820

Fax 202-502-1766

Jeffrey N. Barr
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544

Phone 202-502-1820

Fax 202-502-1766

Timothy K. Dole
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544

Phone 202-502-1820

Fax 202-502-1766

Gale Mitchell
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Phone 202-502-1820

Fax 202-502-1766

Adriane Reed
Program Assistant
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Phone 202-502-1820

Fax 202-502-1766

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (CONTD.)

James H. Wannamaker III
Senior Attorney
Bankruptcy Judges Division
Administrative Office of the
United States Courts
Washington, DC 20544

Phone 202-502-1900

Fax 202-502-1988

Scott Myers
Attorney Advisor
Bankruptcy Judges Division
Administrative Office of the
United States Courts
Washington, DC 20544

Phone 202-502-1900

Fax 202-502-1988

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (CONTD.)

FEDERAL JUDICIAL CENTER

Staff:

Joe Cecil (Committee on Rules of Practice and Procedure) Phone 202-502-4084
Senior Research Associate
Research Division Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <jcecil@fjc.gov>

Marie Leary (Appellate Rules Committee) Phone 202-502-4069
Research Associate
Research Division Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <mleary@fjc.gov>

Robert J. Niemic (Bankruptcy Rules Committee) Phone 202-502-4074
Senior Research Associate
Research Division Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <bniemic@fjc.gov>

Thomas E. Willging (Civil Rules Committee) Phone 202-502-4049
Senior Research Associate
Research Division Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <twillgin@fjc.gov>

Laural L. Hooper (Criminal Rules Committee) Phone 202-502-4093
Senior Research Associate
Research Division Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <lhooper@fjc.gov>

Tim Reagan (Evidence Rules Committee) Phone 202-502-4097
Senior Research Associate
Research Division Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <treagan@fjc.gov>

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

TABLE OF CONTENTS

Attendance.....	1
Introductory Remarks.....	2
Approval of the Minutes of the Last Meeting.....	5
Report of the Administrative Office.....	5
Report of the Federal Judicial Center.....	6
Report of the Time-Computation Subcommittee..	6
Reports of the Advisory Committees:	
Appellate Rules.....	11
Bankruptcy Rules.....	16
Civil Rules.....	21
Criminal Rules.....	24
Evidence Rules.....	42
Report on Standing Orders.....	49
Report on Sealing Cases.....	50
Next Committee Meeting.....	51

ATTENDANCE

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

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

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

Providing support to the committee were:

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

Representing the advisory committees were:

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

INTRODUCTORY REMARKS

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

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

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

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

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

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

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

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

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

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

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

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

APPROVAL OF THE MINUTES OF THE LAST MEETING

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

REPORT OF THE ADMINISTRATIVE OFFICE

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

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

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

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

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

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

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

REPORT OF THE FEDERAL JUDICIAL CENTER

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

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

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

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

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

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

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

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

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

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

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

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

APPELLATE RULES TIME COMPUTATION

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

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

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

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

BANKRUPTCY RULES TIME COMPUTATION

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had agreed to publish its time-computation changes to the bankruptcy rules on the same schedule as the other rules. The advisory committee, he said, agreed with the text of the template rule and accompanying committee note, including the most recent modifications. The template would appear as FED. R. BANKR. P. 9006(a). In addition, specific time changes would be made in 39 separate bankruptcy rules. The advisory committee, he said, had agreed with all the proposed conventions adopted by the other advisory committees – such as increasing periods of fewer than 7 days to 7 days and increasing 10-day periods to 14 days – except in the case of two rules.

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

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

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

CIVIL RULES TIME COMPUTATION

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

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

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

CRIMINAL RULES TIME COMPUTATION

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

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

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

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

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

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

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

EVIDENCE RULES TIME COMPUTATION

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

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

Amendments for Publication

TIME-COMPUTATION RULES

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

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

FED. R. APP. P. 12.1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As a result, the committee considered the matter by e-mail after the April meeting and proposed two alternative formulations of proposed FED. R. APP. P. 29. Option A would be published for public comment if the Supreme Court were to reject the proposed amendment to its Rule 37.6, and Option B would be published if the Court were to approve the amendment. The difference between the two lies in paragraph (c)(7) of Option B, which adds a requirement that the amicus brief identify every person or entity – other than the amicus, its members, or its counsel – contributing money toward preparing or submitting the brief.

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

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

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

Informational Item

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

Amendments for Final Approval by the Judicial Conference

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT PACKAGE

Amendments to Existing Rules

FED. R. BANKR. P. 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019
1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002,
4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009

New Rules

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

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

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

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

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

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

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

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

Amendments to the Forms for Final Approval by the Judicial Conference

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

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

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

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

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

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

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

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

OFFICIAL FORM 1, EXHIBIT D

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

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

Amendments to the Rules for Publication

TIME-COMPUTATION RULES

FED. R. BANKR. P. 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033

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

OTHER RULES

FED. R. BANKR. P. 1017.1

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

FED. R. BANKR. P. 4008

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

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

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

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

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

New Official Forms for Publication

OFFICIAL FORM 8

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

OFFICIAL FORM 27

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

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

Informational Items

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

Amendments for Publication

TIME COMPUTATION RULES

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

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

FED. R. CIV. P. 62.1

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

Informational Items

EXPERT-WITNESS DISCOVERY

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

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

SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

Amendments for Final Approval by the Judicial Conference

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

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

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

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

FED. R. CRIM. P. 1

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

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

FED. R. CRIM. P. 12.1

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

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

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

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

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

FED. R. CRIM. P. 17

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

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

FED. R. CRIM. P. 18

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

FED. R. CRIM. P. 32

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

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

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

FED. R. CRIM. P. 60

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

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

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

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

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

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

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

FED. R. CRIM. P. 61

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

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

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

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

FED. R. CRIM. P. 41

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

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

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

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

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

FED. R. CRIM. P. 45

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

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

Amendments for Publication

FED. R. CRIM. P. 16

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FED. R. CRIM. P. 41

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

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

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

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

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

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

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

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

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

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

TIME-COMPUTATION RULES

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

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

Informational Items

FED. R. CRIM. P. 29

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

Amendment for Final Approval of the Judicial Conference

FED. R. EVID. 502

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

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

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

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

He emphasized that the rule will provide protection in state proceedings and, indeed, must do so in order to have any real meaning. But, he said, the rule does not explicitly address disclosures first made in the course of state-court proceedings. Thus, if a party seeks to use in a federal proceeding a disclosure made in a state proceeding, the federal rule will not necessarily govern. Rather, the most protective rule would apply, *i.e.*, the one most protective of the privilege.

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

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

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

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

Professor Capra pointed out that the advisory committee had not voted affirmatively for the provision, but had included it for public comment at the request of the former chairman of the House Judiciary Committee. During the comment period, he said, the provision had evoked uniform and strong opposition from the bar, largely on the grounds that it would further encourage a “culture of waiver” and weaken the attorney-

client privilege. On the other hand, he said, representatives of government regulatory agencies supported the selective waiver provision.

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

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

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

Mr. Tenpas observed, regarding selective waiver, that the Department has been told for years by parties under investigation that they would like to turn over specific documents to the government, but could not afford to do so for fear of waiving the

privilege as to everybody else. Ironically, he said, the same people now say that they are strongly opposed to a selective waiver rule.

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

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

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

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

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

she will reach an agreement with the opponent or be able to obtain a court order. He predicted that in time, few issues will arise under the language of Rule 502(b).

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

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

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

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

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

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

Mr. Tenpas stated that the main focus of the proposed rule is on litigation in court, not on dealings with federal agencies. Productions of documents to federal agencies

outside litigation, he argued, do not entail huge document productions nearly so often as in litigation.

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

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

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

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

ADAM WALSH CHILD PROTECTION ACT

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

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

Professor Capra explained that the decision is the only reported case reaching that conclusion, and it does not even appear to be controlling authority in the Tenth Circuit. Moreover, there are a number of cases from the other circuits that reached the opposite

conclusion. He said that the advisory committee had decided that there was no need to propose an amendment to the evidence rules to respond to a single case that appears to have been wrongly decided. He added that the committee had been unanimous in its decision not to recommend a rule, although the Department of Justice saw the enactment of a statute at the initiative of Congress as raising a different question.

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

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

Informational items

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

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

REPORT ON STANDING ORDERS

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

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

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

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

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

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

REPORT ON SEALING CASES

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

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

NEXT COMMITTEE MEETING

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

Respectfully submitted,

Peter G. McCabe,
Secretary



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT JUDICIAL CONFERENCE ACTIONS September 18, 2007

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

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

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

EXECUTIVE COMMITTEE

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

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

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

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

COMMITTEE ON THE BUDGET

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024, and new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

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

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

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

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

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

April 30, 2007

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 30, 2007

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein the amendments to Civil Rules 1 through 86 and new Rule 5.2.

2. That Forms 1 through 35 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended to become restyled Forms 1 through 82.

[See infra., pp. — — —.]

3. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2007, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

September Minutes

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

Rule 56

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

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

WISDOM OF REVISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The relationship to Rule 16(b) was questioned from another direction. Some lawyers might argue that a national default rule implies that a judge cannot set a deadline at all. Others may argue that the judge can set a deadline before the default deadline, but cannot set a later deadline. Apart from those arguments — which clearly will fail given the express authorization of orders in the case

— it seems likely that some judges will view the default deadline as the presumptively correct deadline.

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

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

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

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

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

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

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

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

Committee Note statements about the completion of expert-witness discovery were resisted as a potential source of confusion. Rule 26(a)(2)(B) establishes a default time for initial trial-expert

witness disclosures and reports, absent a time set by the court, at 90 days before the trial date or the date the case is to be ready for trial. The deadline is extended to 30 days after the disclosures made by another party if the evidence is intended solely to contradict or rebut expert evidence identified by the other party. An expert witness who is required to disclose a report can be deposed only after the report is provided. Working through these provisions may become confused if there is no trial date or apparent date the case is to be ready for trial.

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

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

LOCAL RULES

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

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

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

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

RULE 56(A)(2): CROSSMOTIONS

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

The crossmotion provision was suggested by several participants in the January miniconference. The purpose was described in clear terms. A party may believe that it has a strong foundation for summary judgment, but also believe that the cost and delay entailed by the motion outweigh the potential gain; it is better to go to trial than to hazard an expensive motion with an outcome that can never be quite certain. This calculation is changed completely if another party moves for summary judgment. The incremental cost and delay entailed by a crossmotion may be minor, and the crossmotion may be the most effective form of response. The situation is very much like the Appellate Rules provision for additional appeals.

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

The Committee agreed to delete the crossmotion provision.

OTHER RULE 56(a) QUESTIONS

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

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

RULE 56(b): AFFIDAVITS OR DECLARATIONS

Subdivision (b) begins with a sentence carried forward from Style Rule 56(e)(1), modified to include a “declaration” as well as an affidavit. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement, subscribed as true under penalty of perjury, to substitute for an affidavit. It seems useful to draw attention to this option in the rule text. This sentence describes the requirements that an affidavit or declaration be based on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. (The reference to a declaration was later removed from the rule text. Professor Kimble, the Style Consultant, pointed out that no other Civil Rule refers to a declaration; adding the word here might imply that only an affidavit will satisfy other rules that refer only to an affidavit.)

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

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

Deletion of the second sentence was approved.

RULE 56(c): STATEMENT OF FACTS, RESPONSE, AND REPLY

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

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

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

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

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

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

416 Judge Rosenthal noted that James Ishida and Jeffrey Barr had gathered and sorted local rules
417 embodying procedures like subdivision (c). Many local rules adopt the first step, requiring
418 identification of undisputed facts in separately numbered paragraphs. A smaller number require that
419 the response adopt the same numbers. Different judges on the Committee have had different
420 experiences with these questions. It will be important to sort through these experiences to determine
421 whether subdivision (c) is desirable.

422 Subdivision (c) was further challenged by noting that the Northern District of California had
423 a local rule similar to subdivision (c) and abandoned it. The parties did not manage to focus the fact
424 issues. The rule did not help. And lawyers at the January miniconference said that this procedure
425 simply establishes one more obstacle on the way to summary judgment.

426 It was agreed that lawyers at the miniconference who deal in complex cases had encountered
427 inappropriate uses of procedures like those embodied in subdivision (c). Statements of undisputed
428 facts have run beyond a hundred pages, and responses have met and even outstripped the statements.
429 Subdivision (c) addresses this problem primarily by recognizing the authority to establish a different
430 procedure by order in the cases that are too complex — that present too many potentially disputed

or undisputed facts — to bear the general procedure. It also attempts to address the problem by referring to “specific material facts,” with the hope that these words will inspire movants to narrow their focus. For most cases in the federal courts, however, the subdivision (c) procedure should work well. Many summary-judgment motions, for example, are made in employment cases, civil rights cases, and like cases that present a reasonably manageable universe of potential fact disputes. This procedure will enable the judge to determine more easily and rapidly whether there are disputed facts.

The next comment was that much of the opposition to subdivision (c) reflects dislike of Rule 56 in its entirety. Experience with the Northern District of Georgia local rule similar to subdivision (c) shows that it works very well. The judge can winnow the statement of undisputed facts down to a reasonable number and can readily turn to the cited record support to determine which of them are genuinely in dispute.

The tales of very long statements of undisputed facts were met by asking why lawyers do that? A good advocate should much prefer to say there is very little fact material to be considered under the law that should be recognized and applied to this case. A response was that the lengthy statements seem to come more from nonmovants’ responses than from the motions. And it was rejoined that nonmovants will do this whether we adopt subdivision (c) or not.

A different explanation was offered for long statements of undisputed facts. The statement may arise from a fear that any fact not listed will be taken as recognizedly in dispute. And so for respondents, who fear that failure to contest a fact they do not care about in the present case will come back to haunt them in some future case. It is difficult to draft a rule that makes clear the desire to focus only on the central facts; there can be no guarantee that any drafting will work as intended.

Support for subdivision (c) was found in the thought that the requirement of specifying material facts separately will discourage motions based on the vague thought that “I have the better case.” Too many motions are made without focusing on what Rule 56 requires. Both sides talk about what they think important without delineating what the facts are or focusing on why they are — or are not — in dispute. The idea of subdivision (c) is to force identification of what each party thinks is material and in dispute. An unequivocal response should be required. “This will advance the ball a lot over what I see.”

A judge observed that while a practicing lawyer he had often been told at conferences that Rule 56 is a tool to educate the judge about your position. That is an improper use of Rule 56, and it should be drafted to discourage such uses.

Another judge described subdivision (c) as directing that the motion identify the issues and then list the facts; a separate memorandum then briefs the arguments on the facts and law. The response and supporting memorandum take the same form. So for the reply. In practice, lawyers often tend to add new facts in the reply, which leads to a sur-reply and on beyond to successive steps without ready names. His court refuses to consider new facts added in a reply. The Committee Note should say explicitly that the reply can only aim at new facts stated in the response, as the rule text seems to provide. This suggestion for the Note was accepted. It was further agreed that (c)(3) should include language that had been enclosed in brackets: “reply by stating in the form required for a response * * *.”

Indiana practice was described. For 25 years it was much like present Civil Rule 56. Motions were made in ways that did not enable trial judges to figure out, in the limited time available, what might be in the record to show a genuine dispute. Grants of summary judgment were often reversed because on appeal the loser did the work that should have been done in the trial court,

476 pointing to the record materials that established a genuine issue. The Indiana rule was amended to
477 require greater specificity, although not at the level exacted by subdivision (c). The result has been
478 a decline in the rate of reversals. The amended rule has been useful. In later discussion, the Indiana
479 rule was explained further. It does require specific designation by page or similarly precise reference
480 to the facts that are relied on. It does not “look as tidy” as subdivision (c); it does not require a
481 separate statement. “But it avoids the hidden truffle” problem.

482 An interim summary suggested that subdivision (c) will face some serious challenges. It has
483 been defended as useful for the general run of cases, recognizing the need for flexible modification
484 or disregard in complex cases where it may invite self-defeating volumes of detail. But it will be
485 challenged on the ground that although there is no intent to put a thumb on the scale favoring
486 summary judgment, that will be the effect. The rule places a premium on responding in the correct
487 form. Consider civil rights and employment cases. If the price of failing to respond in proper form
488 is serious disadvantage — if a wrong-form response is treated as close to default — the rule will
489 raise new obstacles for litigants who already may be at a serious disadvantage. But if there are no
490 consequences for failures to comply, why create a new demand? Is it because many will comply,
491 even though they might survive the motion with an improperly framed response? Is it because the
492 risk of an inadequate response is the loss of the opportunity to have the nonmovant’s position
493 reviewed in its best light — a risk that will grow as courts become ever more reliant on proper-form
494 responses?

495 A judge observed that pro se cases must be treated sympathetically, “but we still can enforce
496 the rules.” Another judge agreed that all judges practice forgiveness for pro se parties. But the court
497 needs to be able to decide whether a party is entitled to summary judgment.

498 This theme was extended by pointing to the Federal Judicial Center study of activity by types
499 of cases. In the category of civil rights-jobs, summary judgment was sought in 30% of the cases
500 counted; 73% of the motions were granted in whole or in part. This is the kind of statistic that is
501 used to criticize rules changes. The criticism, however, can be met in part by pointing out that
502 subdivision (c) first increases the movant’s responsibility — when it is the defendant who moves for
503 summary judgment, the defendant must be the first to identify the supposedly controlling facts and
504 to point to the record information that supports its position. And it also must be remembered that
505 the figure for grants includes cases that are only partly resolved on summary judgment. Summary
506 judgment often is used to weed out claims that might as well not have been raised in the first place
507 — they are advanced only to be sure that nothing has been overlooked. The detailed motion, spelling
508 out facts paragraph-by-paragraph, moreover, may help the pro se litigant by providing a clear focus
509 for the response. Bankruptcy practice includes many cases with summary-judgment motions against
510 pro se parties; it is more difficult to respond to the motion when there is no clear framework to guide
511 the response.

512 (The sanction for replying in improper form is addressed by draft subdivision (c)(8), a matter
513 that came on for discussion and revision later in the meeting.)

514 The general concern about prolix motions returned. The problem was said to be general. The
515 task is to convey the message that a motion should focus only on the “key facts.” But even
516 sophisticated lawyers struggling with complex cases are unable to work free from their attention to
517 even the finest points. General advice can be given, but it is very difficult to persuade lawyers in a
518 way that elicits an effective response. Local rules provide examples. One calls for facts “that are
519 essential for the court to decide only the motion for summary judgment — not the entire case.”
520 Another describes “facts which are absolutely necessary for the court to determine the limited issues
521 presented in the motion for summary judgment (and no others).”

522 A different perspective suggested that what the lawyer wants is to be free to tell a story.
523 Facts that may not seem necessary to decide on summary judgment may in fact be persuasive on
524 matters of inference — detail counts. It is difficult to identify a tipping point that shifts the balance
525 beyond usefulness into the pit of too much detail.

526 A particular language choice was raised: (c)(1)(B) calls for “only those *specific* material facts
527 that are not genuinely in dispute and are *relied upon to support* summary judgment.” It was
528 suggested that “specific” should be deleted; it may invite too much detail, focusing on the trees rather
529 than the forest. This suggestion was picked up in later discussion. The Subcommittee labored over
530 the wording of (c)(1)(B) at length. It is difficult to define the appropriate level of detail in rule text.
531 It should be enough to improve the rule without demanding perfection. “Specific” seemed the best
532 word to focus the statement of facts. An alternative was suggested: “only those material facts not
533 genuinely in dispute essential to summary judgment.” This version struck others as “dense.” A
534 motion to strike “specific” passed by unanimous vote.

535 Similar questions were raised as to “relied upon.” Should it be “to obtain” summary
536 judgment?

537 Other words were suggested to replace “material” facts: “essential” facts? “core” facts?
538 “necessary facts”? “critical facts”? Such words as “necessary” may cause greater confusion —
539 whether a fact is necessary to decide the motion often is contingent on the disposition of other facts.
540 Whether a fact is “material” also is conditional on the disposition of other facts, but the dependency
541 may be more apparent. “Essential” may take practice off in unanticipated directions. Some
542 members thought “essential” too subjective, while another pointed out that it is used in subdivision
543 (f) in an apparently objective sense. Subdivision (f) was distinguished, however, on the ground that
544 it aims at facts a party does not have and wants time to find; subdivision (c)(1)(B) deals with fact
545 information the movant has. It is difficult to guess which of these words is most likely to discourage
546 excessive detail. A movant, for example, may include too many facts in the motion for fear they will
547 prove to be “essential” later, encouraging a response that elaborates in still greater detail. All of
548 these choices were confronted by the observation that “the purpose is to restrain excessive assertions
549 of fact. There is no penalty for throwing in too many facts. This is all hortatory.”

550 A different word choice was challenged. (c)(1)(B) directs a statement of *material* facts.
551 Should that be defined in rule text, or at least in the Committee Note? It was responded that it is
552 dangerous to attempt to define a word that for so long has been tightly bound up with the summary-
553 judgment standard. No attempt will be made to define “material.”

554 The Subcommittee will consider these word choices further, and invites other suggestions.

555 A judge suggested that the reality of the subdivision (c)(1) and (2) draft can be tested against
556 a typical employment case. Summary-judgment motions are made in all of these cases. “I spend
557 more time on Rule 56 than in trial.” The defendant says: “I did not fire the plaintiff based on race.”
558 The plaintiff says: “You did.” The plaintiff then supports the claim by comparing the treatment of
559 other named employees. “Practitioners will be prolix. They are afraid to leave things out.” Most
560 of the motions are “no-evidence” motions, pointing to the lack of evidence to support a claim. They
561 are not prolix. The response is prolix.

562 Another judge agreed that many summary-judgment motions assert “no evidence” to support
563 a claim. The responding party has to come forward with specific evidence. The movant then can
564 reply to these specific facts; it has to demonstrate that there is no genuine issue as to the facts made
565 material by local circuit law. Are comparisons to other employees alone sufficient? The use of
566 racial epithets? In dealing with these problems, a detailed motion, response, and reply are helpful.

567 This exchange continued by emphasizing the importance of supporting the competing
568 positions by citation to the record. The Committee Note provides assurance that the citation
569 requirements in subdivision (c)(4) are consistent with local rules or orders requiring an appendix.
570 That is good. But even with that help, employment cases are made difficult by the rules involving
571 a “prima facie case,” articulated nondiscriminatory motives, and “pretext.”

572 The references to “no-evidence” motions brought a reminder that the draft does not seek to
573 change the substantive Rule 56 standard or the Rule 56 moving burdens. How does a nonmovant
574 respond to a “no-evidence” motion? The first answer was that a movant who does not have the trial
575 burden can support a motion by simply showing — “pointing out” — that the nonmovant does not
576 have sufficient evidence to carry its trial burden. But this is an abiding issue of understanding
577 *Celotex*, addressed in part in draft subdivision (c)(4)(B).

578 The “no-evidence” motion problem relates to present Rule 56(f), carried forward in the draft
579 as subdivision (f). Often the defendant makes a no-evidence motion before the close of discovery,
580 asserting that the plaintiff has no evidence. The plaintiff seeks relief under Rule 56(f), pointing to
581 the need for further discovery to respond to the motion. This happens repeatedly. If subdivision
582 (c)(1) requires the motion to set out the facts in a granular way, defendants may find it harder to
583 make these motions, at least in a way that interferes with the plaintiff’s opportunity to win time for
584 more discovery under subdivision (f). But even at that, the nonmovant faced with a motion before
585 the close of discovery “has to spin facts in extremely complete ways for fear of losing the whole
586 case.”

587 A judge observed that he has encountered “35-page statements of fact” in a summary-
588 judgment brief. Separating the statement of facts from the brief may not make the package any
589 longer. In an employment case the motion must address the elements of the prima facie case; if the
590 defendant relies on a reason for its employment action, it has the burden to articulate the reason.

591 Another judge noted that his concerns about the level of detail required in subdivision (c)
592 arise from experience with a now-abandoned local rule system that was not as well developed as
593 subdivision (c) because it did not require that the response line up with the motion. One of the real
594 problems in practice is the statements of movant and nonmovant that do not match up — the
595 proverbial ships passing in the night.

596 A member renewed the suggestion that it would be better to provide for one motion and
597 memorandum. The Subcommittee considered three alternatives — everything in a single document;
598 two documents — a motion that includes a statement of specific material facts, accompanied by a
599 memorandum or brief; and three documents — a motion that identifies the issues, claims, or
600 defenses to be resolved by summary judgment, a separate statement of specific material facts, and
601 a memorandum or brief. The choice in favor of two documents reflected a decision to emphasize
602 the importance of the statement of facts without separating it artificially from the basic elements of
603 the motion. Separating the motion from the memorandum or brief will help to focus the response
604 on the statement of facts in the motion.

605 This suggestion led to the observation that it is possible to separate several elements. One
606 is the requirement of specific citations to the record to support fact positions. Another is the
607 requirement that facts be separated out into individual numbered paragraphs. Yet another is the
608 requirement that the response address the motion’s statement of facts by correspondingly numbered
609 paragraphs. Fifty-six districts have local rules requiring a separate statement of facts with the
610 motion. Only 20 have local rules that require that the response track the motion paragraphs. Even
611 in districts that do not have either requirement good lawyers point to record support for their fact

positions. Should subdivision (c) be cut back to require only specific record citations? But the citation requirement is in proposed subdivision (c)(4); it can be dealt with separately after deciding what to do about the (1), (2), and (3) provisions for motion, response, and reply.

In response to a question, it was stated that (c)(2)(A) requires a response to address each of the facts stated by the movant. But greater clarity may be possible: the words could be revised to say something like this: the response “must, by correspondingly numbered paragraphs, accept, qualify, or deny each fact in the Rule 56(c)(1)(B) statement.” Heightened specificity is desirable because this provision establishes a requirement that is not found in many of the local rules that require specific identification of facts with the motion but do not address the response. A motion to add these words, subject to editing, passed by unanimous vote.

The form of the motion was pursued further by arguing against “magnification of the process.” It was accepted that the 2-document format can be helpful. But the motion should require only a statement of issues framed by the elements of the action: (c)(1) would require that the motion “state the claims, defenses, or issues as to which summary judgment is sought and the grounds on which the motion should be granted.” (c)(2) would be similar: the response would state “the grounds on which the motion should be denied.” The (c)(4) requirement for references to the record could be brought back into the motion. In later discussion, a variation was advanced: the motion would state the facts, while the memorandum would provide the record citations and the briefing of law. This argument was supported by the observation that this seems to reflect practice under present Rule 56 in many districts. District-court practice will be made easier by requiring the movant to identify facts 1, 2, 3, and 4, and requiring the nonmovant to respond to those facts and list additional facts 5, 6, and 7.

It was observed again that these questions tie to the (c)(8) provisions for court action when the response does not comply with the requirements of (c)(2) and (c)(4).

A motion to recommend publication of a prescriptive structure like subdivision (c)(1), (2), and (3), subject to further editing, was approved, 11 yes and 1 no.

Further discussion renewed the question whether the permission to depart from (c)(1), (2), and (3) by order in the case should be expanded to permit local rules that abandon the practice in more general terms. Local rule departures are permitted from the timing provisions in subdivision (a). The response recalled the justification for local-rule departures in subdivision (a): some districts have general practices for timing motion practice that may integrate poorly with the general timing rule. Uniformity is more important on format than it is on timing. It was further observed that the Standing Committee holds divided views on local rules. One advantage of local rules is that they may encourage greater uniformity among judges of a single court — it is easier for a judge to take a nonconforming position with respect to a national rule. Allowing departure only by order in the case means that a party does not know what the practice will be until the judge announces it.

It was asked whether subdivision (c) will supersede inconsistent local rules. Both 28 U.S.C. § 2071 and Civil Rule 83 require that local rules be consistent with the Civil Rules. The Advisory Committee should be sensitive to local attachments to local rules, but it should opt for national uniformity when it thinks that is right. The draft Committee Note language addresses this problem by language included in the second paragraph for purposes of illustration, urging local rules committees to consider the consistency of their rules with the new national rule. It was urged that the authority to depart by order in the case suffices; the Committee’s determination that the requirements of subdivision (c) will enhance practice and promote uniformity should not be undermined by allowing a local-rule opt-out. Experience with the original opportunity to opt out of

initial disclosure requirements by local rule demonstrates how difficult it may be to restore uniformity after local rules become entrenched. To be sure, some judges may adopt a routine of ordering different procedures in all cases; that may be as well, since a litigant should want to know what the judge finds useful and to provide it.

A motion to omit any opportunity to opt out of subdivision (c) by local rule passed by unanimous vote.

RULE 56(C)(4): FACT CITATIONS

Subdivision (c)(4) requires record citations to support a proposition of fact stated in a motion, response, or reply. It was presented with drafting alternatives. Should it refer to a “qualification” of a fact statement? Should negation of another party’s fact statement be described as a “denial,” as in Rules 8 and 36, or should it be described as a “dispute” in keeping with other parts of Rule 56?

Discussion of (c)(4) began with the observation that there has not been much difficulty with subparagraph (A), which directs citation to particular parts of record materials to support a statement, qualification, or denial of fact. Subparagraph (B) is a response to a greater challenge. It says that a party may show that materials cited to support a fact do not establish the absence of a genuine dispute; this recognizes the opportunity to say nothing more than that the movant has not carried the summary-judgment burden. It also says that a party may show that no material can be cited to support a fact; this recognizes the opportunity of a movant who does not have the trial burdens on a fact to carry the summary-judgment burden by showing that a nonmovant who does have the trial burdens cannot carry them.

The first question renewed earlier concerns about a motion made before discovery is completed. In some types of litigation, at least, such motions are common. Should (c)(4) reflect the opportunity to respond by a Rule 56(f) showing that the nonmovant should not yet be required to respond in any of the ways listed in (c)(4)? The draft note suggests that a nonmovant seeking additional time ordinarily should ask for an extension of the time to respond, but it is not clear that the Note should address this issue at all. Another suggestion was that the nonmovant should be able both to point to the need for additional discovery and to provide such response as it can on the basis of information available without further discovery. (c)(4) could be expanded to include a specific cross-reference to subdivision (f) — by whatever letter it may come to be designated — but it was suggested that this added complication is not needed. Subdivision (f) takes care of the problem. And a specific cross-reference might imply that the court cannot grant the motion. For that matter, a cross-reference might fit better with the (a)(2) time limit for responding to the motion. For example, it could say that the response must be filed by the stated time “unless the court grants a motion under Rule 56(f).” This suggestion was resisted because it might generate an unintended sense that the time to respond always should be extended when a party seeks time for additional discovery. It will not do to extend the time to respond whenever a nonmovant requests more time for discovery. A judge agreed that the time to respond should not be qualified by a cross-reference to subdivision (f); it is better to raise the question in the briefs on the motion. Another judge observed that different cases will call for different approaches. A nonmovant may assert that it is not yet possible to make any response. The assertion instead may be that the nonmovant believes it is possible to defeat the motion with the information currently available, but also believes that further discovery will provide better support.

This discussion continued with a suggestion to add a new (c)(4)(B)(iii): or “(iii) for specified reasons it is not yet possible to present facts essential to support a response or reply.”

701 A motion to exclude any cross-reference to subdivision (f) from either subdivision (a)(2) or
702 (c)(4) passed, 10 yes, 2 no.

703 There was some discussion of subparagraph (c)(4)(B). It does not duplicate (c)(2)(C), which
704 recognizes that a response “may state that the facts asserted by the movant do not support judgment
705 as a matter of law.” (c)(2)(C) is the equivalent of a demurrer — as if it said “state that even if
706 established the facts asserted” do not support judgment. That is different from pointing out that there
707 is no support to carry the trial burden on a fact ((4)(B)(ii)), or not enough support to establish the
708 absence of a genuine dispute ((4)(B)(i)). It is important to identify for the judge the opportunity to
709 decide the motion as a matter of law alone, without need to determine whether there is a genuine
710 dispute as to facts that would not establish the right to judgment even if there were no genuine
711 dispute. A motion to add “even if established” to the rule text failed with only one yes vote. A
712 motion to delete (c)(2)(C) failed, 6 yes and 7 no.

713 Further discussion of (c)(4)(B) observed that the Committee understands the ways in which
714 it captures the necessary distinctions in the Rule 56 moving burdens. No matter who has the trial
715 burdens on a fact, a nonmovant need not cite to any additional portions of the record to argue that
716 the movant’s citations do not establish the absence of a genuine dispute. A movant who does not
717 have the trial burdens can carry the summary-judgment burden by showing that the nonmovant does
718 not have sufficient evidence to carry the trial burdens. But will the lawyer reading the rule text
719 understand these propositions? The draft was defended by pointing out that the Subcommittee had
720 considered a version that included specific rule text statements of the summary-judgment burdens.
721 This alternative was found too complicated to justify adoption. The references in (c)(4)(B) are
722 necessary to avoid misstating the available forms of response. They will enable the court and
723 practitioner to get it right. The complications are there in the Supreme Court opinions and in
724 practice. They will not disappear if the rule text ignores them. The rule cannot be a primer for
725 practitioners, but it should not, by omission, impliedly contradict the established rules on summary-
726 judgment burdens. A motion to retain (c)(4)(B) passed by unanimous vote.

727 Questions were raised about application of the rule in “shifting burden” cases, but there was
728 no further elaboration.

729 The connection between (c)(4) and the consequences of failing to satisfy (c)(4) was pointed
730 out. The more severe the sanctions, the more important (c)(4) becomes. But all agreed that
731 (c)(4)(A), requiring citation to the record, is important.

732 The reference to “qualification” of a fact was questioned: what does the response “qualify”?
733 Is this an invitation to quibble about subtle word distinctions when it is not possible to deny the fact?
734 Lawyers will find a way not to accept a part of a statement they do not agree to — we do not need
735 to invite them to engage in additional wordchopping. This word was defended as offering a useful
736 alternative to a blanket admission or denial. One party’s statement of fact may be partly true; another
737 party should be able to recognize the true part while disputing other parts. If response by
738 qualification is not permitted, the party who states the facts is put at increased risk of its own inept
739 statement — other parties will deny because the statement is only partly true as expressed. Present
740 Rule 8 and both present and Style Rules 36 provide for qualification as well as denial. A motion to
741 delete “qualification” failed, 6 yes and 7 no.

742 Brief discussion led to unanimous agreement that (c)(4) should refer to a “denial of fact”
743 rather than a “dispute as to a fact.”

744 It was agreed that (c)(4) should be edited to make it clear that it applies to a motion, response,
745 or reply.

RULE 56(C)(5): ATTACH UNFILED MATERIALS

Draft subdivision (c)(5) directs a party to “attach to a motion, response, or reply the pertinent parts of any cited materials that have not been filed.” A judge asked whether it is necessary to chase back to the files — it is better to have all of the materials assembled with the motion, in an appendix. On the other hand, if there is a large record there may be disadvantages in having a large mass of material filed a second time. It was suggested that the rule should be expanded to direct a party to file materials “that have not been filed with the motion, response, or reply.” A motion to adopt this idea was passed by unanimous vote, with permission to edit the language.

Later discussion in connection with subdivision (b) led the Committee to add another word to (c)(5): the party must attach “the pertinent parts of any cited factual materials.” This word makes it clear that a party need not file copies of cited statutes, decisions, or other legal materials.

SUBDIVISION (C)(6): SUPPLEMENTAL SUPPORTING MATERIALS

Subdivision (c)(6) would provide that the court may permit a party to supplement the materials supporting a motion, response, or reply. Fear was expressed that this language might seem to invite new motions for summary judgment, with the observation that courts have long recognized the authority to permit supplemental filings so this paragraph serves no real need. It was agreed that it should be deleted.

SUBDIVISION (C)(7)[6]: MEMORANDUM OF CONTENTIONS

Subdivision (c)(7) — to become (6) with the deletion of former (6) — was largely explored in the earlier discussion of the allocation of functions among motion, statement of facts, and memorandum of contentions. The designation of a separate memorandum for contentions was approved then. “Contentions” seems to be as good a word as any for argument. But it was suggested that there was no need to supplement the direction to file the memorandum with the motion, response, or reply with “or at a time the court directs.” It is important that the court be able to direct a different time, but if (c) is structured in a way that makes this authority clear at the outset there is no apparent need to repeat the thought here. Subject to possible deletion of these words, this subdivision was approved.

SUBDIVISION (C)(8)[d]: FAILURE TO RESPOND, OR TO RESPOND IN PROPER FORM

Subdivision (c)(8) was introduced by Judge Baylson. This subdivision addresses the consequences of a failure to respond to a motion or of a response that fails to comply with Rule 56(c). The draft includes in brackets language that would allow the court to grant summary judgment in these circumstances only if examination of the motion and supporting materials shows that the movant is entitled to summary judgment. Some circuits have announced this rule. The Subcommittee voted to omit these words, believing that adherence to the requirements of subdivision (c) will be enhanced by the ability to grant summary judgment by default if there is no response or even if there is a response that fails to comply with the requirements of subdivision (c). Omitting these words would change the law in some circuits.

The Subcommittee also considered a possible middle ground between granting the motion by default and requiring the court to determine whether the motion should be granted on the merits. Many districts have local rules that deem admitted a fact stated in a movant’s statement of undisputed facts when the response fails to satisfy the local rule’s requirements. If the response properly addresses some of the facts, only the facts not properly addressed are deemed admitted. The court then decides the motion by accepting the facts deemed admitted without further inquiry but

789 examining the record as to any facts properly denied and applying the law to the set of facts deemed
790 admitted or established beyond genuine dispute.

791 The first comment was that in the Ninth Circuit, as well as some districts in other circuits,
792 a party moving for summary judgment against a pro se litigant must notify the pro se litigant of the
793 steps required to respond to the motion.

794 The next observation was that omission of the bracketed words may not do the job if the
795 Committee intends to authorize summary judgment by default for want of a proper response or any
796 response. Circuits that do not now allow summary judgment by default may not be persuaded that
797 silence on the issue abrogates their law.

798 Support was expressed for the “deemed admitted” approach on the ground that the court
799 should not be obliged to examine the materials offered to support a fact when the nonmovant has not
800 bothered to assist the court.

801 But a question was asked: How does the “deemed admitted” approach work? Suppose a
802 prisoner says that he was beaten excessively and without reason. The defendant moves for summary
803 judgment, stating in an affidavit that “I did not beat him; it was reasonable force; and he was not
804 hurt.” The motion should be denied because there is a credibility problem. But if the plaintiff fails
805 to respond properly to the motion, can the defendant’s statements be deemed admitted?

806 A different question was asked: is the “deemed admitted” approach a substantive change in
807 the law, a denial of the substantive right to go to trial unless the Rule 56 burden is carried? It was
808 suggested that if the right to go to trial is found in interpreting Rule 56, then Rule 56 can be amended
809 to change the result. But that does not mean that the change should be made.

810 The distinction between default and “deemed admitted” approaches was noted again. The
811 deemed admission of facts does not establish a right to summary judgment if under the law the facts
812 do not support the movant’s position.

813 The situation of pro se litigants was noted again. Prisoners are in a special category. But
814 suppose a non-prisoner pro se plaintiff in a civil rights case is told what to do to respond but fails
815 to do it. Is the court obliged to go to trial? Or at least to examine the materials offered to support
816 the motion?

817 An observer asked what should be done when a response may deliberately address only part
818 of a motion. The motion, for example, might assert that there is no genuine dispute as to facts A and
819 B. The response might dispute only B. Why should the court be required to check the record
820 support cited to support the motion on A? A judge agreed that courts do encounter responses that
821 address some of the movant’s stated facts but not others.

822 Support was offered for requiring the court to examine the motion and the materials cited to
823 support it. Even with this requirement the nonmovant has a strong incentive to respond, and to
824 respond in proper form. Failure to respond properly sacrifices the right to have the court consider
825 information that conflicts with the information cited by the movant. And the failure to respond is
826 particularly dangerous when the movant does not have the trial burdens and makes the motion by
827 showing that the nonmovant does not have sufficient evidence to carry its trial burdens.

828 Further support was found in the suggestion that since several circuits require examination
829 of the materials cited to support summary judgment even when there is no response, any change
830 might seem to conflict with the avowed intent to make no change in the summary-judgment standard.

831 A reply observed that whatever choice is made on this question, it will be desirable to express it in
832 rule text. "We owe it to judges to indicate their authority."

833 Another committee member confessed to "mixed emotions." The Rule 56(c) procedure is
834 new to the national rule. Severe sanctions for failure to respond in the newly required form "do not
835 feel right." The first time summary judgment is granted without examining the materials cited in
836 support, simply as a sanction for responding in proper form, there will be an uproar of protest.

837 A similar view was expressed. Rule 56 should tell the movant that the motion must itself be
838 sufficient to support judgment if there is no response. We should not tell judges that they do not
839 even have to read the motion or — if the asserted facts would justify summary judgment on the law
840 — do not have to read the materials cited to support the motion. "Workload does not justify that."

841 It was asked whether it might be suitable to grant summary judgment as a sanction but also
842 provide for an award against an attorney who fails to respond properly to compensate the summary-
843 judgment loser's loss. But this possible substitute for a malpractice action may seem too close to
844 establishing a new substantive tort right to be comfortable under the Rules Enabling Act. It may be
845 better to refrain from saying anything about this subject either in rule text or Committee Note.

846 Further support for requiring the court to examine the motion and materials cited to support
847 it was expressed by observing that this approach does not amount to a sanction. It simply tells the
848 nonmovant that there is an opportunity to respond and that failure to seize the opportunity means that
849 "your side of the story will not be heard or considered." This view was expanded. If there is no
850 "deemed admitted" provision, the court looks only at the (c)(1) statement and the (c)(4) citations of
851 supporting materials. If the materials, unopposed, show no genuine issue, an order granting the
852 motion is not a sanction. There is no change in present summary-judgment law. The judgment is
853 based on the summary-judgment record that results from an inadequate response or from no response
854 at all. But what happens if the response says only "I dispute," without citing any supporting
855 materials? Does that lead to a deemed admission? Or is it, better, simply another variation — the
856 court still must examine the materials cited in support, albeit without the illumination that might be
857 provided by a response that explains why those materials do not establish the absence of a genuine
858 dispute.

859 This discussion led one member to suggest that the rule should say only this: The court "may
860 grant summary judgment against a party who fails to respond as required by Rule 56(c)." Courts
861 would be left to sort out on their own just what approach to take.

862 A somewhat different suggestion was that default is appropriate when there is no response
863 at all. But filing an inadequate response might lead the court to examine the motion more closely.
864 This approach might be taken indirectly by eliminating "fails to respond" from the rule text. Then
865 the rule would require examination of the motion and cited materials if there is a response, although
866 in improper form, but leave it to the courts to decide what to do when there is no response. But
867 silence as to a complete failure to respond might be read as an implication that the court can grant
868 the motion by default. It would be better to decide the matter in rule text.

869 A clear statement was suggested: the rule should cover both failure to respond and an
870 improper response, and should require examination of the motion and cited materials. Further
871 support was offered. The absence of a response should not be a basis to grant the motion without
872 any examination of the motion and supporting materials. That proposition holds even more clearly
873 when the nonmovant has attempted to respond but has failed to respond in the form required by
874 subdivision (c)(2). At the same time the rule should clearly state the consequences of failure to
875 comply, without leaving the judge at risk of being lost part way through consideration of the motion.

A judge asked about the difficulty of implementing this approach. Suppose the response fails on a single point. Should the judge simply rely on the materials cited by the movant, or should consideration of the motion be suspended to afford opportunity for a better response on that point? It was answered that the judge can do that, but also can grant the motion if the point is supported by the cited materials.

An expanded view was then offered. It is not enough to authorize the court to grant the motion after inspecting the materials cited to support the asserted facts and applying the law. Summary judgment is a more serious matter than discovery. But the Rule 37 approach to discovery sanctions requires that modest sanctions be tried before resorting to the drastic sanctions of dismissal or judgment by default. "You have to use the least severe sanction that will deter and protect." Default is too severe, at least when there is a response but the response is imperfect. The rule should list alternative sanctions, beginning with less severe sanctions and progressing to granting the motion by examining the supporting materials and applying the law.

This approach was supported with the suggestion that the list of alternative sanctions should include deemed admission of facts not properly responded to. Other sanctions were suggested: the court could strike the inadequate response, or award the movant costs — including reasonable attorney fees — caused by the inadequate response.

A motion was made to revise subdivision (c)(8) to direct the court to enter suitable orders following a failure to respond or an improper response. The orders could include granting summary judgment if consideration of the motion and materials cited to support the motion show the movant has carried the summary-judgment burden. There might be a graduated list. It may prove desirable to detach this provision from subdivision (c), making it a new subdivision (d). The motion passed, 7 yes and 6 no.

SUBDIVISION (f): ADDITIONAL TIME FOR DISCOVERY

Draft subdivision (f) adds a new element to former subdivision (f) by requiring a party who requests time for additional discovery to "describe[] the facts it intends to support." The draft Committee Note includes three sentences in brackets that attempt to illustrate a flexible approach to this requirement: "In some cases it may be appropriate to sketch a direction of inquiry without attempting to describe facts not yet known, or to state a need to depose a person who has given an affidavit or declaration."

This new element was questioned. The reference to "facts" seems too precise. The party requesting more time can describe the elements of claim or defense that will benefit from additional discovery, but cannot describe facts that it has not yet found. Some cases, of course, may involve a clear historic fact that can be described. But others involve such abstract constructs as "manipulative intent." Great masses of detailed fact may be needed to support an inference of manipulative intent. Without discovery it may not be possible to describe in detail the kinds of testimonial fact that may support the required fact inferences. "This ratchets up the heat." The present rule does refer to facts, but only in the context of explaining why they are not available.

Alternatives were suggested: "the facts it hopes to use to prove its claim." Or all reference to describing the facts the party intends to support could be deleted, relying on the requirement that the party show "specified reasons" why it cannot present facts essential to justify its opposition to the summary-judgment motion.

A motion to make one change passed, 8 yes and 4 no: "describes the facts it intends to support prove." Further changes may be submitted for Committee consideration after the meeting,

920 if suitable illumination can be provided by further research into the ways in which courts apply
921 present Rule 56(f).

922 **TIME-COMPUTATION PROJECT**

923 Judge Rosenthal introduced discussion of the Time-Computation Project by noting that it is
924 important to coordinate the work of all of the Advisory Committees to converge on
925 recommendations for publication. Changes in the time periods provided by various Civil Rules were
926 approved at the September meeting. Those changes and Committee Notes are included in the agenda
927 materials in publication format.

928 Computation Template. The core time-computation revisions are reflected in the template prepared
929 by the Standing Committee's Time-Computation Subcommittee. They graciously used Civil Rule
930 6(a) as the model, providing a specific illustration that is aimed for adoption in the Appellate,
931 Bankruptcy, and Criminal Rules as well.

932 Professor Catherine Struve, Reporter for the Appellate Rules Committee and for the Time-
933 Computation Project Subcommittee, introduced the template. She observed that the draft has
934 continued to evolve from the version considered by this Committee at the meeting last September.
935 Some of the changes were identified.

936 The template continues to provide the method for calculating time periods set by statute, but
937 now limits application to statutes that do not specify a method of computing time. Some statutes,
938 for example, specify a "business days" method. It would be confusing to attempt to supersede them
939 — practitioners and judges often would look to the statute without pausing to recognize the impact
940 of a superseding rule provision.

941 There have been style refinements. As one illustration, the paragraph on inaccessibility of
942 the clerk's office has been moved up in the rule to become paragraph (3). That approach improves
943 the flow, leaving the definition paragraphs in sequence from (4) through (6).

944 The Committee Note has been expanded to include a paragraph that explains the convention
945 that prefers one-week intervals for short time periods — 7 days, 14 days, or 21 days. It also notes
946 continuation of 30-day and longer periods in the original form. This Note will facilitate brief
947 statements in the Committee Notes that identify changes in the time periods set by specific rules.

948 A neat solution has been found for a drafting problem that once seemed difficult. Some time
949 periods are "backward looking" in the sense that they command action measured by a number of
950 days before an event. A rule might direct, for example, that a motion be served 14 days before a
951 stated event. The general rule is that when the last day to act falls on a Saturday, Sunday, or legal
952 holiday, computation of the period is made by continuing to count in the same direction. So if the
953 14th day before the event falls on a legal holiday, say a Wednesday, the filing will be due on
954 Tuesday. That rule works for holidays. But it creates a problem when the 14th day is a day on which
955 the clerk's office is inaccessible — it may not be until Wednesday that a party learns that it had to
956 file on Tuesday one day earlier. This problem was resolved in subdivision (a)(3) by directing that
957 if the clerk's office is inaccessible on the last day, the time to file is "extended." Inaccessibility on
958 Wednesday means that the filing may be made on Thursday if the office is accessible on Thursday,
959 and so on.

960 One other question remains. Rule 6(a)(6)(B) defines legal holiday to include state holidays.
961 Other sets of rules include holidays in the District of Columbia and in any commonwealth, territory,
962 or possession of the United States. Parallelism could be achieved by adopting a definition in Rule

963 6(a). But it also is possible to expand the definition of “state” more generally by amending Rule 81.
964 A later decision approved an amendment of Rule 81 that, if adopted, will pretermitt any need to
965 amend Rule 6(a).

966 The Committee approved a recommendation to publish Rule 6(a) by unanimous vote.

967 Specific Rule Time Periods. Turning to the specific Civil Rules recommended for publication last
968 September, questions were raised about the Committee Notes for Rules 50, 52, and 59. These Notes
969 explain the decision to do two things: retain the provision in Rule 6(b) that forbids extension of most
970 of the time limits set by these rules, but to expand the non-extendable time limits from 10 days to
971 30 days. The first question asked how the 30-day period was chosen. This decision was made on
972 recommendation of a Subcommittee last September, reflecting the experience that the 10-day periods
973 have often proved too short. Courts have adjusted by various strategies such as delaying entry of
974 judgment or setting briefing schedules long after the motion is filed. There is little need for extreme
975 urgency in the post-trial setting. Although there is an inevitable element of arbitrariness in any time
976 period, 30 days seemed a reasonable choice. The second question asked whether it is necessary to
977 refer to the sensitivity that arises from the integration of these rules with Appellate Rule 4. This part
978 of the Committee Note was designed to remind readers of the risk that a party will mistakenly
979 believe that appeal time has been suspended by a motion that in fact is not timely, a risk that should
980 be reduced by extending the period to 30 days. It was agreed that further thought will be given to
981 revising the Note discussion of this topic.

982 The Committee was reminded that it had approved time provisions in Rule 56(a). If Rule
983 56 and the Time-Computation packages are both approved for publication at the same time, a way
984 will be found to ensure that there is no confusion about the independent role of Rule 56(a) as part
985 of the Time-Computation package.

986 The Committee unanimously approved a recommendation to publish the specific time-period
987 amendments set out in the agenda materials.

988 Statutory Time Provisions. The question of computing statutory time periods has proved vexing.
989 Rule 6(a) now applies the rule method of computing time to statutory time periods. It is useful to
990 have a single method for computing all time periods. The Time-Computation Subcommittee and
991 the Advisory Committees have agreed that the better method would eliminate the present rule that
992 excludes intermediate Saturdays, Sundays, and legal holidays in computing periods of less than 11
993 days. The effect of that change is to reduce the effective length of these shorter periods. A 10-day
994 period, for example, now runs for a minimum of 14 days. Removing the exclusion of Saturdays,
995 Sundays, and legal holidays reduces the period to 10 days. That effect can be offset in the rules by
996 amendments that extend former 10-day periods to 14 days when that seems appropriate. It would
997 be very difficult, however, to attempt to identify all relevant statutory periods and then determine
998 which of them might be addressed by superseding rules provisions, even if supersession is a wise
999 approach. Professor Struve has identified an astonishing number of statutes that set time periods less
1000 than 11 days, and there may be others not yet identified.

1001 The Standing Committee has concluded that these statutory time-computation problems
1002 should be addressed by identifying and recommending that Congress amend periods that seem too
1003 short under the new computation method.

1004 A good illustration is provided by Civil Rule 72 and 28 U.S.C. § 636(b). Section 636(b) sets
1005 a 10-day period to serve and file written objections to a magistrate judge’s proposed findings and
1006 recommendations “as provided by rules of court.” Section 636(d) also provides that the practice and
1007 procedure for the trial of cases before magistrate judges “shall conform to rules promulgated by the

Supreme Court pursuant to section 2072 of this title.” Rule 72 has adopted the 10-day period. Under present Rule 6(a), both the statutory 10-day period and the Rule 72 10-day period are calculated by excluding intermediate Saturdays, Sundays, and legal holidays. The proposed amendment of Rule 6(a) would be matched by adopting a 14-day period in Rule 72. The result is to carry forward the same basic result that follows from the present rule; the only difference is the reduction that occurs when legal holidays extend the present 10-day period beyond 14 days. It is important to accomplish this result, which supersedes the statute somewhat less than the present rules do. But it also will be important to amend § 636 so that lawyers who look only at the statute are not misled. If possible, it will be desirable to propose statutory amendments to take effect on the same day as the amended rules take effect — December 1, 2009, if the proposals proceed through the ordinary course.

The agenda materials include Professor Struve’s spreadsheet of brief statutory time periods. They also include memoranda identifying a few time periods that deserve consideration for amendment, but only a few. There is no need to decide on these recommendations by the time the rules proposals are published for comment. Many of the statutory time periods address temporary restraining orders. 10-day periods are common, but some are shorter. It was noted that in considering the no-notice TRO provisions in Rule 65, the Committee has recommended amendment of the 10-day period to 14 days. But that recommendation does not imply a recommendation that the statutory provisions be extended. Rule 65(e), indeed, addresses several of the statutes by providing that the Civil Rules do not modify any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee.

The Standing Committee has not yet settled on the approach to be adopted in recommending specific statutory time amendments. The several advisory committees will coordinate their recommendations through the Standing Committee. It may prove desirable to identify a few statutes for comment in the memorandum that transmits the Time-Computation Project amendments for publication.

RULE 81(e) - STYLE RULE 81(d)(2): DEFINITION OF “STATE”

The definition of state holidays for purposes of Rule 6(a) raised the question whether the general definition of states in Rule 81(e), Style Rule 81(d)(2), should be expanded.

Style Rule 81(d)(2) provides:

(2) District of Columbia. The term “state” includes, where appropriate, the District of Columbia. When these rules provide for state law to apply, in the District Court for the District of Columbia:

(A) the law applied in the District governs; and

(B) the term “federal statute” includes any Act of Congress that applies locally in the District.

Several reasons can be advanced to amend this rule to include at least territories and commonwealths in the definition. “Possessions” also might be included.

A modest reason to amend is to avoid including different definitions of “state” in Rule 6(a) for identifying state holidays and in Rule 81 for all other purposes. Negative implications might be drawn.

1049 More positively, the reasons for referring to states in the Civil Rules seem to apply to other
1050 places where federal “district courts” sit. State law is adopted for service in Rules 4 and 4.1; for
1051 some matters of capacity in Rule 17; for serving subpoenas in Rule 45; for stay of execution in Rule
1052 62(f); for prejudgment remedies in Rule 64(a); for execution in Rule 69; and for jury trial in
1053 condemnation actions exercising the power of eminent domain under state law in Rule 71A(k).
1054 Adoption of state law establishes uniformity with state practice, often in matters that involve
1055 significant state interests. And adoption of state law spares federal courts the need to develop their
1056 own rules to address problems that often require complex rules. Similar advantages follow for a
1057 federal court sitting in a territory or commonwealth.

1058 Criminal Rule 1(b)(9) defines “state” to “include[] the District of Columbia, and any
1059 commonwealth, territory, or possession of the United States.” Parallelism may suggest that Civil
1060 Rule 81 include “possession,” subject to further research to determine whether there are any
1061 difficulties not now understood. The Criminal Rules have encountered some difficulties with
1062 warrants for searches in American Samoa; that experience may help in deciding whether Rule 81
1063 should adhere to the Criminal Rule model. “Possession” also may play a role in the Criminal Rules
1064 because of military bases and “status of forces” agreements.

1065 Finally, Rule 81 has a built-in safeguard: the definition applies only “where appropriate.”
1066 Any unforeseen complications that might arise from exotic local law can be met by finding it not
1067 appropriate to apply the definition in that particular setting.

1068 The Committee agreed that Style Rule 81(d) should be revised to include a “commonwealth,
1069 territory, or possession of the United States,” subject to further research to determine whether
1070 “possession” should be included in the definition.

1071 The means of accomplishing the amendment presented some difficulty. Style Rule
1072 81(d)(2)(A), as quoted above, states that when the rules call for state law to apply, “in the District
1073 Court for the District of Columbia the law applied in the District governs.” This statement seems
1074 to be redundant once the District is defined as a state for rules purposes. The redundancy can be
1075 cured by deleting the phrase. But that leaves another problem. Present Rule 81(e) includes this
1076 sentence:

1077 When the term “statute of the United States” is used, it includes, so far as concerns
1078 proceedings in the United States District Court for the District of Columbia, any Act
1079 of Congress locally applicable to and in force in the District of Columbia.

1080 Style Rule 81(d)(2)(B) incorporates this provision awkwardly. The second sentence says: “When
1081 these rules provide for state law to apply, in the District Court for the District of Columbia: * * * (B)
1082 the term ‘federal statute’ includes any Act of Congress that applies locally to the District.” The
1083 difficulty is that this literally narrows the definition of federal statute to circumstances in which the
1084 rules provide for state law to apply. That is not the scope of present Rule 81(e).

1085 There has not been occasion to consider whether the definition of “federal statute” should
1086 be expanded to include any Act of Congress that applies locally in a commonwealth, territory, or
1087 possession.

1088 The upshot of these considerations was a recommendation to publish for comment a new
1089 Rule 81(d)(2) and (3), subject to any further review that may be possible before the June Standing
1090 Committee meeting:

(2) *State Defined.* The term “state” includes, where appropriate, the District of Columbia and any commonwealth, territory[, or possession] of the United States.

(3) *District of Columbia.* The term “federal statute” includes any Act of Congress that applies locally to the District of Columbia.

In over- and underlining on Style Rule 81(d), the result is:

(d) Law Applicable.

(1) *State Law.* When these rules refer to state law, the term “law” includes the state’s statutes and the state’s judicial decisions.

(2) ~~*District of Columbia State Defined.*~~ The term “state” includes, where appropriate, the District of Columbia and any commonwealth, territory[, or possession] of the United States. ~~When these rules provide for state law to apply, in the District Court for the District of Columbia:~~

~~————— (A) the law applied in the District governs; and~~

(3) *District of Columbia.* ~~(B)~~ The term “federal statute” includes any Act of Congress that applies locally to the District of Columbia.

RULE 6(b): EXTENDING STATUTORY TIME PERIODS

Present Rule 6(b) allows a court to enlarge a time period, or to permit an act to be done after time has expired on a showing of excusable neglect. The rule applies “[w]hen by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time.” Style Rule 6(b), written in terms borrowed from the Criminal Rules, allows a court to extend time “When an act may or must be done within a specified time.” On its face, Style Rule 6(b) seems to allow extension of a time specified by statute. That may be a good thing, even though it may entail a change of meaning. Of course some statutes set time periods that should not be extended by court order. A quick survey of cases that consider present Rule 6(b) shows that courts have not attempted to extend statutes of limitations or “jurisdictional” time limits such as those set for removing an action from state court to federal court.

Judge Rosenthal expressed the appreciation and thanks of the Committee to Professor Struve and Judge Kravitz for the great work done to advance the Time-Computation Project.

RULE 62.1: “INDICATIVE RULINGS”

In May 2006 the Committee recommended publication of a new Rule 62.1 in August 2007, deferring the publication date to allow an interval between the new rules aimed to take effect on December 1, 2007 and the next set of new rules. The Rule would address district court responses to a motion seeking relief that the district court cannot grant because of a pending appeal. The recommendation was discussed at the June 2006 Standing Committee meeting, the September 2006 Committee meeting, and the January 2007 Standing Committee meeting. The Appellate Rules Committee, having initially referred the matter to the Civil Rules Committee, determined that it should consider adoption of a new Appellate Rule to complement the Civil Rule. A draft Appellate Rule 12.1 is set for consideration one week after this meeting.

Rule 62.1 is built on the procedure that most circuits follow when a party moves under Rule 60 to vacate a judgment that is pending on appeal. The district court can defer consideration, deny

1132 the motion, or “indicate” that it would be inclined to grant the motion if the case is remanded for that
1133 purpose. Rule 62.1 extends this procedure to any motion for relief that cannot be granted because
1134 of an appeal that has been docketed and is pending.

1135 The question whether remand should be available only if the district court indicates that it
1136 will grant the motion upon remand remains unsettled. After the Standing Committee discussion in
1137 January the Civil Rules proposal is to publish as “state that it [might or] would grant the motion,”
1138 and to invite comment on the choice. The argument that remand should be available only if the
1139 district court states that it will grant the motion rests on an anticipation that the court of appeals may
1140 prefer to remand only on assurance that disruption of the appeal will be repaid by the opportunity
1141 to avoid decision of issues that will be altered or mooted when the case is remanded and the
1142 judgment is vacated. In addition, a survey of the circuit clerks yielded responses by three; two of
1143 them preferred to be notified of the motion only if the district court states that the motion will be
1144 granted if the case is remanded.

1145 The argument that remand should be possible if the district court states that it “might” grant
1146 relief on remand rests on efficient use of both trial-court and appellate-court resources. A motion
1147 may present complex questions that can be resolved only by investing much time and effort.
1148 Requiring the district court to decide the motion before it knows whether the decision will be mooted
1149 by the ruling on appeal exacts a high price. The process of deciding the motion, moreover, may be
1150 derailed if the appeal is decided in mid district-court passage. The court of appeals is in a much
1151 better position to decide whether, in light of the progress of the appeal, it is better to proceed to
1152 decide the appeal, potentially mooting or changing the issues raised by the motion, or instead to
1153 remand to avoid the risk that the decision on appeal will be superseded by decision of the motion on
1154 remand. Notifying the court of appeals that the district court might grant the motion leaves
1155 determination of the best next step in court of appeals control.

1156 Professor Struve noted that the issue whether to provide for remand on an indication that the
1157 district court might grant the motion will be considered by the Appellate Rules Committee.
1158 Integration of the two rules, if an Appellate Rule 12.1 goes forward, will depend on as-yet
1159 unforeseeable determinations.

1160 The “might” grant alternative was supported by two judges. One observed that it would be
1161 counter-productive to recognize remand only if the district court is prepared to decide the motion on
1162 the merits before remand becomes possible. Both the district court and the appellate court would
1163 benefit from the “might” alternative. Another suggested that so long as the district court has a choice
1164 to defer consideration of the motion, some busy judges will simply defer consideration rather than
1165 divert from other cases the time needed to decide the motion on the merits. Professor Struve added
1166 that the alternative to defer consideration will be useful in the circuits that seem to say that the judge
1167 cannot defer consideration.

1168 A practitioner noted that a statement that the district court “would” grant relief upon remand
1169 will carry great weight in the court of appeals. A less forceful statement that the court “might” grant
1170 relief is less likely to lead to remand, but the statement and any accompanying information will
1171 enable the court of appeals to decide on the better course.

1172 A separate question was raised by the observation that outside Rule 60(b) there may be many
1173 circumstances in which the district court is uncertain whether a pending appeal ousts its authority
1174 to act on a motion. Should the rule apply whenever the court “may” lack jurisdiction to grant the
1175 motion? The response was that this approach could extend the rule too far. The district court may
1176 decide to make an indicative ruling if it is unsure of its authority to grant a motion without remand,

1177 but that risk exists now. To limit the court to an indicative ruling whenever there is a possibility that
1178 a pending appeal may oust its authority to grant the motion would disrupt orderly proceedings when
1179 the court concludes on balance that it does have authority to grant.

1180 The problem that neither the parties nor the court may know whether the court has
1181 jurisdiction to grant a particular motion while an appeal is pending ties to the question of when
1182 notice should be given to the court of appeals. Two alternatives are presented: notice should be
1183 given when the motion is filed, or notice should be given if the district court indicates that it might
1184 or would grant the motion on remand.

1185 The discussion noted advantages in directing that a party notify the court of appeals when the
1186 motion is filed. The court of appeals may wish to postpone further consideration of the appeal when
1187 there is a prospect that the appeal may be undone by action on the motion, whether the remand is
1188 made before the appeal is decided or after. A practitioner observed that it is better to notify the court
1189 of appeals when the motion is filed — the court may be justifiably disconcerted to find that it has
1190 wasted time deciding issues that prove unnecessary to the ultimate judgment.

1191 The argument against notice when the motion is filed rests on concerns expressed by the
1192 circuit clerks surveyed for the Appellate Rules Committee. They point out that many Rule 60(b)
1193 motions are filed by pro se litigants, who are not always sources of fully reliable information. They
1194 prefer not to be afflicted with notice of motions that often will be denied without further incident.
1195 They also believe that practice in this area is better left to regulation by local circuit rules that can
1196 reflect different local cultures. A different question asked whether filing notice when the motion is
1197 filed in the district court would impair the calendaring process — lawyers like more time.

1198 A further observation was that a rule directing that notice must be given to the court of
1199 appeals when the district court states that it might or would grant the motion does not prevent a
1200 lawyer from giving notice when the motion is filed.

1201 A further difficulty with requiring notice when the motion is filed is that the movant is faced
1202 with determining whether the district court has jurisdiction to grant the motion. A practitioner
1203 observed that “it doesn’t come up that way.” The motion will seek relief. In cases of doubt the
1204 lawyer may notify the court that the lawyer believes the court has jurisdiction to grant the motion,
1205 but that in the alternative the court may wish to make an indicative ruling. The resolution is to file
1206 notice with the court of appeals when you become aware there is a question whether the district court
1207 has jurisdiction to grant relief.

1208 A participant suggested that the rule might direct notice when a Rule 60(b) motion is filed.
1209 But the Committee was reminded of the lengthy deliberations that led to the decision to generalize
1210 this procedure to apply to any motion that cannot be granted because of a pending appeal. It was
1211 suggested that perhaps the first paragraph of the Committee Note should be revised to make this
1212 point even more explicit.

1213 Proposed Rule 62.1(c) has been revised to integrate with the draft Appellate Rule 12.1. If
1214 Rule 12.1 is adopted, Rule 62.1 need not address the appellate court’s determination whether to
1215 remand for all purposes or to remand only for decision of the motion, retaining jurisdiction of the
1216 appeal. The most important need is to encourage careful appellate attention to the distinction
1217 between a full remand and a special or limited remand. There is a danger that a party dissatisfied
1218 with the outcome in the district court may not recognize that a full remand may require a new notice
1219 of appeal. It is better to address this concern in an Appellate Rule than to attempt to regulate
1220 appellate court behavior by a Civil Rule.

Two final questions are presented by the reference to a motion “that the court lacks authority to grant because of an appeal that has been docketed and is pending.” The more obvious question is whether this provision should identify docketing of the appeal as the point of transferring authority from district court to court of appeals. Rule 60(a) draws the line at this point. Some courts of appeals have recognized it as the appropriate line in facing Rule 60(b) motions. It has real advantages. It is clear. It recognizes that at all times there should be a court that clearly has authority to act. And it may be difficult to ask a court of appeals to address a question in the interlude between filing a notice of appeal in the district court and the docketing that first informs the court of appeals that the case has come to it. The period between filing the notice of appeal and docketing in the court of appeals is likely to be quite brief as electronic filing takes hold; the bright line can be established at very little cost. The Committee agreed that this is the proper line.

The other question is raised by a style suggestion to delete two words: “lacks authority to grant because of an appeal that has been docketed and is pending.” This seemingly innocuous saving on the word count may generate confusion about the effect of a pending appeal. It seems to imply that any docketed and pending appeal defeats district-court authority to act on any motion. But that is not at all the case. Many appeals leave the district court free to act on many motions. One well-established example is the district court’s authority to dismiss an action while an interlocutory injunction appeal is pending. It is important to retain the restrictive words.

The Committee renewed the recommendation to publish Rule 62.1 for comment, subject to any revisions needed to integrate with any Appellate Rule that may be recommended for publication, or to compensate for a decision not to recommend an Appellate Rule.

RULE 26: EXPERT-WITNESS DISCOVERY

Judge Campbell introduced the report of the Discovery Subcommittee. No action is recommended at this meeting. The Subcommittee has devoted substantial time and two miniconferences to studying four issues with respect to disclosure and discovery of expert trial witnesses.

Two sets of issues go to the categories of expert trial witnesses that must disclose reports under Rule 26(a)(2)(B). The report requirement is limited to an expert witness “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.” This rule apparently means that a report need not be provided by an employee whose duties do not regularly involve giving expert testimony, but some courts have found ways to require reports from such employees. The Committee Note is clear that treating physicians frequently fall outside the ranks of those specially employed to provide expert testimony, so they too fall outside the report requirement. But courts have found difficulty in drawing a line beyond which a treating physician has become retained or specially employed.

The treating physician question is whether a report should be required when the testimony will offer an opinion that goes beyond diagnosis or treatment. The opposing party may claim surprise by such testimony.

Professor Marcus provided additional background. Between 1970 and 1993, discovery of all expert trial witnesses began with interrogatories seeking the substance of the opinions to be given. In some courts depositions were routinely allowed to supplement the interrogatory responses, but other courts were more conservative. The 1993 amendments established the disclosure requirement, but stripped out experts not retained or specially employed — including treating physicians — and employees who do not regularly give expert testimony. Such witnesses must be disclosed under Rule 26(a)(2)(A), although there may be problems with compliance.

1266 Lawyers at the January miniconference wanted attorney disclosure for the witnesses
1267 exempted from the 26(a)(2)(B) report requirement. The disclosure would closely resemble the
1268 answers that were provided to expert-discovery interrogatories under the pre-1993 system. The
1269 attorney would write the disclosure, and provide it at the same time as disclosing the witness's
1270 identity under Rule 26(a)(2)(A). The draft in the agenda materials "cribs from the pre-1993 version."
1271 A more elaborate attorney disclosure could be required, approaching closer to the report required
1272 from a witness covered by 26(a)(2)(B). But the more limited disclosure seems to fill the gap that
1273 some find in the present rules. The disclosure will help opposing attorneys in determining whether
1274 to depose the witness. It will prevent surprise. It addresses the concerns that have been expressed
1275 about employee witnesses who do not regularly give expert testimony.

1276 Judge Campbell noted that the lawyers at the January miniconference were adamant in the
1277 view that treating physicians will stop testifying if required to give 26(a)(2)(B) reports. They also
1278 thought there would be few problems if they were provided attorney disclosure of the testimony
1279 expected from an employee witness who does not regularly give expert testimony.

1280 The ambiguities that arise from treating physician testimony were noted. The physician
1281 ordinarily should be disclosed under 26(a)(2)(A) as an Evidence Rule 702 witness. The physician
1282 may be asked questions of causation or the length of treatment. The opposing party objects that
1283 these topics go beyond the role of treating physician. Objections even may be made when a
1284 physician is asked what was observed in treating a party. Opposing lawyers want to know what the
1285 physician will address. Attorney disclosure will provide that.

1286 Treating physicians also may create another problem. The physician may have been deposed
1287 before the 26(a)(2)(A) disclosure. The other side may then wish to depose the physician a second
1288 time to explore new topics, requiring a stipulation of the parties or court order under Rule
1289 30(a)(2)(B). There is no ready solution to this problem.

1290 The attorney disclosure proposal was commended by a Committee member whose office
1291 defends a large number of medical malpractice cases. The disclosure will provide the information
1292 other parties need without putting a heavy burden on the physician.

1293 An observer noted the decisions that have seemed to misinterpret present Rule 26(a)(2)(B)
1294 by requiring reports from employees whose duties as employees do not regularly involve giving
1295 expert testimony and asked whether the Committee Note to an amended rule would say that the new
1296 attorney disclosure provision supersedes those decisions. It may be that clear new rule text will
1297 suffice without need for comment in the Note.

1298 The Committee consensus was that the Subcommittee seems to be moving in the right
1299 direction with the attorney disclosure proposal.

1300 Judge Campbell resumed the Subcommittee Report, noting that the other two expert-witness
1301 topics being studied by the Subcommittee involve discovery of communications between an attorney
1302 and a trial-expert witness and discovery of draft expert witness reports. Last August the ABA
1303 adopted a resolution that these materials should not be discoverable absent "exceptional
1304 circumstances." Discovery is opposed on several grounds. Among them is the view that the
1305 discovery is expensive but seldom yields anything of value. Perhaps more important is the concern
1306 that exposure to discovery induces costly behavior that impairs the quality of expert testimony.

1307 Seven of the nine lawyers who attended the January miniconference favored the ABA
1308 proposal. They represented many different types of practice. Two, plaintiffs' lawyers from the east
1309 coast and the west coast, disagreed. They advanced the view that an expert appears as a witness

1310 sworn to tell the truth, not an advocate, and that discovery should be available to show how far the
1311 testimony may have been shaped to meet the needs of the case as viewed by the attorney. They did
1312 not seem to offer concrete examples of discovery that made a difference. But their view is important
1313 and must be weighed carefully in developing any proposed amendments.

1314 New Jersey recently adopted a rule that seems to restrict discovery of draft reports and
1315 attorney-expert communications. There has been enough experience with the rule that it seemed a
1316 likely source of at least anecdotal information about operation in practice. The April 18
1317 miniconference in New York convened 11 New Jersey lawyers from a wide variety of backgrounds
1318 to test their experience. They provided an impressive — nearly unique — show of agreement. They
1319 did not merely favor the rule. They were genuinely enthusiastic about it. They report that lawyers
1320 and experts can really collaborate when freed from the shadows of discovery. The expert-witness
1321 reports are better, the testimony is better, the experts who are willing to be witnesses at all are better.
1322 Depositions are shorter. They do not miss the opportunity for discovery of attorney-witness
1323 communications or draft reports; they have not given up anything useful in return for the benefits.

1324 Some of the New Jersey lawyers were involved in the process that adopted the rule. They
1325 reported that there was no opposition even at the time of adoption. And the lack of opposition did
1326 not reflect a lack of awareness — the rule was well publicized along the way to adoption.

1327 Professor Marcus continued the Subcommittee report. The 1993 disclosure requirements
1328 created a better way to deal with what might be a lawyer speaking through an expert. But there seem
1329 to have been some downside consequences.

1330 One of the most interesting and important points made in the miniconference was that the
1331 New Jersey rule means more than it says. It seems to distinguish between communications before
1332 the report is served and communications after; they say that this distinction is not observed — full
1333 protection carries over. The bar has converged on this practice because all agree on its great benefits.

1334 The agenda materials include alternative models to limit discovery of draft expert-witness
1335 reports. One concern is that a bar on discovery might intrude on effective deposition questioning.
1336 The New Jersey lawyers say that is not a problem. “They seem to have achieved an understanding
1337 that is better than the rule text.”

1338 A Committee member observed that there are no opinions interpreting the New Jersey rule.
1339 The miniconference lawyers said that the absence of opinions reflects the fact that the rule works.
1340 And they asked “why should experts be the only witnesses who cannot interact with lawyers about
1341 what will happen at trial,” free from discovery.

1342 Another Committee member observed that there is some value in showing how hard a lawyer
1343 had to push the expert to get a favorable opinion. The current rule could work, but lawyers do not
1344 understand how to make that happen.

1345 Still another Committee member said that the Subcommittee made a point of trying to find
1346 the downside of the bright-line rule described by the New Jersey lawyers. They said there was none.
1347 The rule allows full access to all facts and data considered by the expert. Facts and data considered
1348 are discoverable, and can be examined at trial, whatever the source — if the attorney asserted a fact
1349 to be assumed in framing an opinion, that is discoverable. The New Jersey lawyers say that is what
1350 they need. And the New Jersey lawyers also said that they are uncomfortable with the federal
1351 practice when they appear in federal court; they often stipulate to adopt the state practice.

1352 A practitioner offered a caution. If something like the New Jersey rule is adopted, courts will
1353 have to be ever more alert to the danger that experts will be advocates. But in a recent case with 18
1354 experts all parties agreed to a stipulation that adopted rules very much like the New Jersey practice.
1355 They did so for self-serving reasons. Each wanted to be able to help its experts "improve the ways
1356 of presenting their entirely objective reports." A rule like this will help a lot. But the experts who
1357 will say anything for a fee will be a problem; jurors have to understand what we're doing.

1358 Massachusetts practice was described as quite similar to New Jersey practice. The plaintiffs'
1359 bar has developed ways to undercut bad experts by using their own experts.

1360 A participant in the miniconference noted that New Jersey experience may not transfer
1361 automatically to other settings — the New Jersey lawyers think they have a collegial bar. But they
1362 did assert that they contest their cases vigorously, including discovery disputes. It is only these
1363 issues of expert discovery that find them united.

1364 A judge suggested that the New Jersey practice could save a lot of court time. He has never
1365 found draft reports useful in assessing a trial expert's testimony.

1366 Texas practice was described briefly. The rule emerged from lawyers' concerns that expert
1367 discovery not become a sideshow. In allowing for discovery of documents and things "provided to,
1368 or reviewed by or for the expert in anticipation of testifying," the rule excludes discovery of the
1369 expert's own draft reports. Communications between lawyer and expert witness are not
1370 discoverable; if they were, at least in theory discovery could take the form of deposing the attorney.
1371 "Anything oral is off limits in discovery."

1372 The Subcommittee report concluded with the statement that proposals for rules amendments
1373 will be made, probably for the fall Advisory Committee meeting.

1374 **RULE 68**

1375 The agenda materials include a brief memorandum reporting on survey research on Rule 68
1376 offers of judgment being done by Professors Thomas A. Eaton and Harold S. Lewis, Jr.. Rule 68
1377 escaped revision in each of two lengthy Advisory Committee undertakings in the 1980s and 1990s.
1378 But suggestions for revision regularly appear on the agenda, fueled by a desire to find ways to
1379 encourage earlier settlements reached before unnecessary litigation costs are incurred. Completion
1380 of the articles reporting on this research and making recommendations supported by it may provide
1381 an occasion to return once again to Rule 68.

1382 **CLASS ACTION FAIRNESS ACT: FJC STUDY**

1383 Thomas Willging reported on the most recent phase of the Federal Judicial Center study of
1384 the impact of the Class Action Fairness Act on federal court dockets. He began by observing that
1385 Emery Lee, "an expert in statistical analysis as well as a wonderful lawyer," had done much of the
1386 analysis in the report. The whole research team, indeed, is excellent.

1387 Last September's report projected that the Act would lead to an annual increase of about 370
1388 additional class actions filed in, or removed to, federal courts. The study now has analyzed 16
1389 months of data. For the most recent 12 months there have been 364 additional filings. "That's pretty
1390 close."

1391 The types of cases in the increase have been pretty much the types that the Act was expected
1392 to influence. Most were diversity cases.

Figure 2a in the report illustrates contract cases — mostly insurance cases. The filing trend was downward before CAFA. There has been an increase since, all of it in diversity cases. Of an average 16 new cases a month, 11 were original filings. The relationship between original filings and removal also is contrary to the pre-CAFA trend.

Figure 2b shows there have been few tort personal injury or property damage cases, either before CAFA or after. Property damage cases increased slightly, all of them original filings.

Figure 2c shows that “other fraud” cases increased at a rate of about 8 a month, 5 original filings and 3 removals.

Diversity cases are charted in figure 3. It shows that the numbers were falling before CAFA and then went up dramatically in the first 6 months after CAFA. They rose again in the next 6-month period, and now have leveled off. Figure 4 separates original diversity filings from removals. Original filings skyrocketed in the first year of CAFA, and then leveled off. Removals went up in the first 6 months, and then fell. The proportions between original filings and removals have reversed as compared to pre-CAFA experience — original filings now outnumber removals.

Figure 5 shows filings in district courts grouped by circuits. There are dramatic increases across the circuits. At least 7 circuits have doubled or more than doubled class-action activity comparing the 12 months before CAFA to the 12 months after. Filings in the 2d, 3d, 5th, and 11th Circuits more than doubled; it is difficult to know what is going on. And it is difficult to know how many of these cases could have been filed in districts in more than one circuit — whether “universal venue” is drawing lawyers to prefer filings in some circuits over others.

Figure 6 shows filings in the 10 districts that have the greatest class-action activity. Filings have doubled in 9 of the 10. “There is an indication that lawyers are choosing federal courts for diversity actions.”

The next step will be to look at 306 pre-CAFA cases to document litigation activities: are there state claims or federal claims, and how many of each; motion practice; remand motions; certification; trial.

A participant observed that the most dramatic changes seem to be in California. The California Judicial Council is studying state-court class-action practice, and will generate information parallel to the FJC work. Mr. Willging replied that the FJC has talked extensively with the people conducting the California study. The FJC also has talked with RAND researchers, who are looking for a state to study. The FJC is willing to coordinate the federal study with any state study. But most states do not collect data. It would be terrific to encourage states to develop better data.

A recent RAND study reported on class actions against insurance companies. It found that only 10% of them were filed originally in federal court, while another 20% were removed to federal court.

Brief note was made of the goals of CAFA that lie beyond the allocation of class actions between state courts and federal courts. It will be interesting to see whether there is a decline in “coupon settlements.”

FJC STUDY: RULES 56 AND 12(e)

Joe Cecil reported briefly on the FJC study of Rules 56 and 12(e) that had been discussed with the Subcommittee report on Rule 56. He noted that there is a rather high rate of granting

1435 summary judgment in whole or in part. Part of the explanation is that Rule 56 is often used in cases
1436 with many defendants, trimming back the number of parties without disposing of the claims.

1437 Rule 12(e) has been used with greater frequency in some types of cases than in others.
1438 Greater frequency is found in civil rights cases and civil RICO actions. The RICO actions may be
1439 special because the Manual for Complex Litigation includes a model order that directs complex case
1440 statements. That approach may prove useful for other types of cases.

1441 **NEXT MEETING**

1442 It was decided that the next meeting should be set for November 8 and 9 at a place to be
determined.

Respectfully submitted,

Edward H. Cooper, Reporter

Preliminary Draft
of
Proposed Amendments
to the
Federal Rules
of
Practice and Procedure

SUBMITTED FOR PUBLIC COMMENT

Comments Due by February 15, 2008

Administrative Office of the U. S. Courts

James C. Duff, Director

**A SUMMARY FOR BENCH AND BAR
(AUGUST 2007)**

REQUEST FOR COMMENT ON PROPOSED
AMENDMENTS TO THE FEDERAL RULES
OF PRACTICE AND PROCEDURE

The Judicial Conference's Advisory Committees on Appellate Rules, Bankruptcy Rules, Civil Rules, and Criminal Rules have published proposed amendments to various rules and forms and seek public comment on the proposed changes. The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) **has not approved these proposals** but submits them for public comment. The proposals have not been presented to the Judicial Conference or the Supreme Court.

The full text of the proposed rules amendments and explanatory Committee Notes is set out in the *Request for Comment* pamphlet, which is posted at www.uscourts.gov/rules and available in hard copy on request to the Secretary to the Standing Committee. The following summarizes the major aspects of the proposed Appellate, Bankruptcy, Civil, and Criminal Rule amendments.

The rules committees welcome all comments, whether favorable or adverse. All comments on these proposals will be considered carefully by the respective rules committees, which consist of experienced trial and appellate lawyers, scholars, and judges. All comments submitted are available to the public.

Comments sent electronically or in hard copy must be received by the Secretary to the Standing Committee **no later than February 15, 2008**. Comments may be sent electronically to Rules_Comments@ao.uscourts.gov or by mail to the address set out at the end of this brochure.

The public comment period includes public hearings regarding the proposals. Requests to testify at a public hearing must be received by the Secretary to the Standing Committee no later than 30 days before the scheduled hearing date. Information on the dates and places of the public hearings is at the end of this brochure.

Following the public comment period, all amendments require approval by the relevant advisory committee, the Standing Committee, the Judicial Conference, and the Supreme Court. Under the proposed schedule, any approved changes would take effect on December 1, 2009, unless altered by Congress.

I. Time-Computation Rules:

Proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45 simplify the time computation methods in each set of rules and make them consistent across the rules. The amendments respond to frequent complaints by practitioners about the effort and uncertainty in calculating time periods, and to comments by judges about the anomalous results of the current computation system. The amended rules' principal simplifying innovation is the adoption of a "days-are-days" approach to computing all periods, including short time periods. Under the current rules,

intermediate Saturdays, Sundays, and legal holidays are omitted when computing short time periods but included when computing longer periods. By contrast, under the amended rules, intermediate Saturdays, Sundays, and legal holidays are always counted. Other changes proposed by the amended rules include how to count forward when the period is measured after an event and the deadline falls on a Saturday, Sunday, or legal holiday, how to tell when the last day of a period ends, how to compute hourly time periods, and how to calculate deadlines when the clerk's office is "inaccessible."

In tandem with the proposed changes to the time calculation method, each rules committee reviewed all time periods in the rules. To further simplify time counting, many rules were changed to adopt multiples of 7 days – 7, 14, 21, and 28-day periods – so that applicable deadlines would usually fall on weekdays. To ensure that the amended time deadlines are reasonable, many short time periods were extended to account for the loss of the additional time now provided by excluding intermediate weekends and holidays. The proposed adjustments to the deadlines are set forth below.

The Standing Committee expects to recommend to Congress that some short statutory deadlines, which may be affected by the change in the time-computation rules, be lengthened to offset the loss of intermediate weekends and holidays. A number of statutory provisions that could be affected are listed in the *Request for Comment* pamphlet, but only a few are likely to warrant recommendations for legislative change as a result of the rule changes. The public is invited to comment on whether attorneys rely on the time-computation rules in general when computing statutory time periods, which of the listed statutory provisions should be recommended for legislative action to offset the changes in the time-computation rules, and whether other statutory periods should be considered.

A. Time periods in the Rules of Appellate Procedure are amended as follows:

Three and five days are extended to seven days in Rules 27, 28.1, and 31.

Seven and eight days are extended to 10 days in Rules 5(b)(2), 19, and 27.

Seven and 10 days are extended to 14 days in Rules 4(a)(5), 4(a)(6), 4(b), 5(d)(1), 6, 10, 12, 30, and 39.

Ten days are extended to 30 days in Rule 4(a)(4)(A)(vi).

Twenty days are extended to 21 days in Rule 15.

B. Time periods in the Rules of Bankruptcy Procedure are amended as follows:

Five days are extended to seven days in Rules 2006, 2007, 2008, 2015.3, 6004, 9006, and 9027.

Ten days are extended to 14 days in Rules 1007, 2003, 2015.1, 2015.2, 2016, 3020, 4001, 6004, 6006, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9027, and 9033.

Fifteen days are revised to 14 days in Rules 1007, 1019, 1020, 2015, 2015.1, 2016, 3015, 4001, 4002, 6004, 6007, and 8009.

Twenty days are extended to 21 days in Rules 1011, 2002, 2003, 2007.2, 2015, 2015.3, 3001, 3015, 3019, 6003, 7012, 8002, 9027, and 9033.

Twenty-five days are extended to 28 days in Rules 2002, 3017, and 4004.

C. Time periods in the Rules of Civil Procedure are amended as follows:

The one-day period in Rule 6(c) becomes seven days.
The one-day period in Rule 54(d) becomes 14 days.
The three-day period in Rule 55 becomes seven days.
Five-day periods in Rules 32, 54, and 81 become seven days.

The five-day period in Rule 6(c) becomes 14 days.
Ten-day periods in Rules 12, 14, 15, 23, 38, 59(c), 62, 65, 68, 72, 81, and Supplemental Rule C become 14 days.

Ten-day periods in Rules 50, 52, and 59(b), (d) and (e) become 30-day periods.

The less-than-11-day period in Rule 32 becomes less than 14 days.

Twenty-day periods in Rules 12, 15, 27, 53, 71.1, 81, Forms 3, 4, and 60, and Supplemental Rules B, C and G become 21 days.

Rule 6(b)'s reference to (nonexistent) provisions for extending the times set by enumerated provisions in Rules 50, 52, 59, and 60, and Rule 59(c)'s reference to a 20-day extension, are eliminated.

The timing provisions in Rules 56(a) and (c) are replaced by new provisions that recognize authority to set time requirements by local rule or by court order, and in default of a local rule or court order allow a motion to be made at any time until 30 days after the close of all discovery. The new provisions also establish default times for response and reply.

D. Time periods in the Rules of Criminal Procedure are amended as follows:

Five days are extended to seven days in Rule 47.

Seven and 10 days are extended to 14 days in Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2254 and § 2255.

Twenty days are extended to 21 days in Rules 5.1 and 12.3.

II. Proposed Amendments to the Federal Rules of Appellate Procedure:

Rule 4 would be amended to: (1) eliminate an ambiguity that resulted from the 1998 restyling, whereby Rule 4(a)(4)(B)(ii) might be construed to require an appellant to amend a prior notice of appeal when the district court amends the judgment

after the notice of appeal has been filed, even if the amendment favors the appellant; and (2) make clear that the 60-day appeal period applies when an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

Rule 22 would be amended to reflect that Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 will now address the certificate of appealability requirement set by 28 U.S.C. § 2253(c).

The proposed amendment to **Rule 26** clarifies the operation of the “three-day” rule when a time period ends on a weekend or holiday.

Rule 40 would be amended to clarify that the 45-day period to file a petition for panel rehearing applies when an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

New **Rule 12.1** parallels new Civil Rule 62.1 and addresses the procedure to be followed for motions that the district court cannot grant because an appeal is pending. Under the new rule, the court of appeals may remand if the district court states either that the motion would be granted or that the motion raises a substantial issue.

III. Proposed Amendments to the Federal Rules of Bankruptcy Procedure:

New **Rule 1017.1** establishes procedures for the court to consider a debtor’s request to defer prepetition counseling because of exigent circumstances.

Amended **Rule 4008** requires an entity filing a reaffirmation agreement to also file a cover sheet on the applicable Official Form that includes sufficient information for the court to determine whether the proposed reaffirmation agreement is presumed to be an undue hardship for the debtor.

The proposed amendments to **Rules 7052 and 9021** and new **Rule 7058** account for the 2002 amendment of Civil Rule 58, which clarifies the time when a judgment that is not set forth on a separate document becomes final for appeal purposes. With some exceptions involving posttrial motions, Civil Rule 58 requires that every judgment be set forth on a separate document and provides a 150-day default appeal period if the requirement is not met. Under the proposed new Rule 7058 and amendments to Rule 7052, the “separate document” requirement and the 150-day default appeal period will apply only to a judgment in an adversary proceeding. They will not apply to a judgment or order in other actions, including contested matters.

Amended **Official Form 8** requires the debtor to provide more information on leased personal property and property subject to security interests.

Amended **Official Form 27** implements the requirements of Rule 4008 and requires certification that the form is a true and correct copy of the reaffirmation agreement and that any difference between income and expenses reported on the form and schedules I and J is explained.

IV. Proposed Amendments to the Federal Rules of Civil Procedure:

Amended **Rule 8** eliminates “discharge in bankruptcy” as an affirmative defense. Under the Bankruptcy Code, a discharge voids any judgment on a discharged debt and acts as an injunction against any creditor seeking to collect the debt, whether or not the debtor invokes the discharge, making it inaccurate to characterize “discharge in bankruptcy” as an affirmative defense.

The proposed amendment to **Rule 13** deletes subdivision (f), addressing amendments to add a counterclaim, as largely redundant of Rule 15, which sets out standards governing pleading amendments in general.

Rule 15 is amended to redefine the circumstances in which a pleading may be amended without leave of court. A pleading to which a responsive pleading is required can be amended once as a matter of course 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. The amended rule also deletes reference to the trial calendar because many courts no longer keep a central trial calendar.

Rule 48 is amended to require the court to poll jurors individually after a verdict upon a party’s request. The court may also poll jurors on its own motion and may order a new trial or further jury deliberations if the poll reveals a lack of unanimity. The amendment is modeled on Criminal Rule 31(d).

Proposed new **Rule 62.1**, which is integrated with proposed new Appellate Rule 12.1, clarifies the procedures for remand to a trial court to decide a timely motion for postjudgment relief that the court otherwise lacks authority to grant because an appeal has been docketed and is pending. Under the proposed rule, a case could be fully or partially remanded if the district court indicates either that it would grant the motion or that the motion raises a substantial issue. The proposed procedure adopts well-recognized practices in remanding for trial-court action on a motion to vacate under Rule 60(b).

Amended **Rule 81** expands the definition of the term “state” to include, where appropriate, “any commonwealth, territory [, or possession] of the United States.”

V. Proposed Amendments to the Federal Rules of Criminal Procedure:

Amended **Rule 7** deletes as unnecessary subdivision (c)(2), which is more appropriately set forth in Rule 32.2.

Rule 32 is amended to require the government to state in the presentence report whether it seeks forfeiture under Rule 32.2.

The proposed amendments to **Rule 32.2** clarify procedures applicable when the government seeks forfeiture of property as part of a defendant’s sentence. Under the new procedures: (1) the government’s notice of forfeiture should not be designated as a count in the indictment or information and the notice need not identify the specific property or money judgment that is subject

to forfeiture; (2) the court must enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to suggest modifications; (3) the court is authorized to enter a forfeiture order that is general in nature in a case in which it is not possible to identify all of the property subject to forfeiture; (4) the time when a forfeiture order becomes final as to the defendant is clarified; (5) the government must submit a special verdict form; and (6) technical changes are made modifying the notice, publication, and interlocutory sale of property subject to forfeiture.

Amended **Rule 41** clarifies that the warrant provisions apply to the search of electronically stored information. The rule creates a two-step process under which officers may seize or copy electronically stored information and review it later to determine what information falls within the scope of the warrant. Under the amended rule, the inventory describing the electronically stored information may be limited to a description of the physical storage media seized or copied. The amended rule also preserves a judge's discretion to impose a deadline for the return of the storage media.

The proposed amendments to **Rule 11** of the Rules Governing Proceedings under §§ 2254 and 2255 make the requirements concerning certificates of appealability more prominent by adding and consolidating them in the pertinent Rule 11. The amended rules also require the district court to grant or deny the certificate at the time a final order is issued.

Public hearings are scheduled to be held on the amendments to

- Appellate Rules in Pasadena, California, on January 16, 2008, and in New Orleans, Louisiana, on February 1, 2008;
- Bankruptcy Rules in Pasadena, California, on January 16, 2008, and in Washington, D.C., on January 25, 2008;
- Civil Rules in Pasadena, California, on January 16, 2008, and in Washington, D.C., on January 28, 2008; and
- Criminal Rules in Pasadena, California, on January 16, 2008, and in Washington, D.C., on January 18, 2008.

Those wishing to testify should contact the Secretary at the address below in writing at least 30 days before the hearing.

All written comments on the proposed rule amendments should be mailed to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

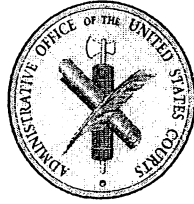
Comments on the proposed rule amendments may also be sent electronically to <Rules_Comments@ao.uscourts.gov>.

In accordance with established procedures all comments submitted on the proposed amendments are available for public inspection.

The text of the proposed rule amendments and the accompanying Committee Notes can be found at the United States Federal Courts' Home Page at www.uscourts.gov/rules. For further information, copies of this brochure, the *Request for Comment* pamphlets, and other materials, contact:

John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of the U. S. Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544
(202) 502-1820

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544



JAMES C. DUFF
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JILL C. SAYENGA
Deputy Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May 15, 2007

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: SEALING CASES

The Judicial Conference's Executive Committee tasked the rules committees, in consultation with any appropriate Conference committee, to address the request of the Court of Appeals for the Seventh Circuit that standards be developed regulating and limiting the sealing of "entire" cases.

The court's initial June 2006 request was construed to address only problems arising from inaccurate responses generated by CM/ECF systems to public inquiries about sealed cases. The inaccurate responses led to a spate of media articles, claiming that secret proceedings were being held in federal court. At its March 2007 session, the Conference approved the recommendation of the Committee on Court Administration and Case Management, urging courts "to ensure that, in response to queries about sealed cases, the CM/ECF message received reads 'case under seal' rather than 'case does not exist.'"

The court subsequently clarified its original request, asking that the propriety of sealing "entire" cases be considered (see attached request from Judge Frank Easterbrook, chief judge of the Seventh Circuit Court of Appeals). The request has been directed to the rules committee for action.

About ten years ago, the Advisory Committee on Civil Rules considered proposed rule amendments addressing standards governing the sealing of individual papers filed in a court. But no action was taken. The extant case law provided a judge with considerable discretion to determine when to seal papers, based on the facts in each case. Other than a general provision recognizing the court's discretion, little more could be accomplished under the limited rulemaking powers and any rule provision would offer little guidance.

Sealing entire cases is rare and when it occurs, it is usually ordered in criminal cases. But civil and bankruptcy cases may also be sealed and appellate cases theoretically may be sealed as well. The court's request implicates the interests of each of the advisory

Sealing Cases

Page Two

rules committees, and it may require legislation. Judge Levi has decided to appoint a subcommittee with representatives from each advisory committee. Professor Dan Coquillette will serve as the head reporter for the subcommittee, assisted by the reporters from the advisory committees. In addition, CACM will be asked to designate one of its members to serve on the subcommittee. Judge Harris Hartz will chair the subcommittee.

Judge Levi requests that the respective advisory committee chairs please advise him of the member designated to serve on the subcommittee.

John K. Rabiej

Attachment

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

FRANK H. EASTERBROOK
CHIEF JUDGE

February 23, 2007

James C. Duff
Director
Administrative Office of the United States Courts
Thurgood Marshall Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Jim:

I request that recommendation 4.b submitted by the Committee on Court Administration and Case Management be placed on the discussion calendar for the Judicial Conference's upcoming meeting.

CACM does not discuss the genesis of this proposal, and I wonder whether it might be related to a letter that Joel Flaum, my predecessor as chief judge, sent to the Standing Committee on June 13, 2006. Collins Fitzpatrick, our circuit executive, told me that this request had been rerouted to CACM.

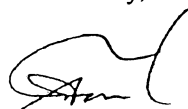
Judge Flaum's letter reflected a consensus of the Judicial Council of the Seventh Circuit that too many cases are being litigated under seal. (The concern is not the sealing of particular documents but the sealing of the whole case.) Our Council thought that the only justification for sealing an entire piece of litigation is a statute requiring that step (as, for example, the False Claims Act does for the initial stages of *qui tam* litigation). If there is any other justification for concealing from the public that litigation is ongoing, I'm unaware of it.

What has emerged from CACM is a proposal, not to define (and limit) the circumstances under which the federal courts hide the existence of litigation, but simply to put a more accurate label ("case under seal" rather than "case does not exist") on litigation that is being conducted in secret. This does not address the concern that led to Judge Flaum's letter on behalf of the Judicial Council.

Now perhaps the Advisory Committees on Civil and Criminal Rules are considering this subject concurrently. If so, then the Judicial Conference will hear from them in due course and my concern about the limits of CACM's recommendation is abated. But if CACM's proposal is the only one on this topic now under consideration by any committee of the Conference, then the Conference as a whole needs to discuss whether more is to be done.

* * *

Sincerely,



Frank H. Easterbrook

cc: Collins T. Fitzpatrick

EXPERT DISCOVERY ISSUES

Since the April meeting, the Discovery Subcommittee has given considerable further attention to issues of discovery regarding expert witnesses. On the day before the April meeting began, it held a mini-conference with New Jersey lawyers to learn more about their experience with a New Jersey state-court rule that imposed limits on expert-witness discovery. A brief report on that event was made during the April meeting. Since then, the Subcommittee has held telephone conferences on six occasions -- May 8, June 22, July 17, Aug. 17, Sept. 12, Sept. 28, and Oct. 11 -- to discuss these matters further. In addition, Judge Kravitz and Prof. Marcus participated in a panel discussion during the ABA convention devoted to expert discovery issues.

The Subcommittee has found the issues raised more intricate and challenging than might have been expected. As a consequence, it does not return with fully-formed proposals for possible amendments. Instead, it returns with some ideas fairly fully formed and others still forming. The purpose of this memorandum is to sketch the work done since the April meeting and introduce the issues raised. During the meeting, the Subcommittee hopes to receive advice and reactions from the other members of the full Advisory Committee.

Besides this memorandum, the agenda book should also include the following materials that should help to flesh out the picture regarding the issues raised:

- (1) Notes on Oct. 11 conference call
- (2) Notes on Sept. 28 conference call
- (3) Notes on Sept. 12 conference call
- (4) Sept. 5, 2007, memo regarding issues to be discussed on Sept. 12. (Ultimately the conference calls on Sept. 12, Sept. 28, and Oct. 11 largely dealt with these issues. Accordingly, the memorandum seems useful to provide a context for appreciating the discussion during those calls. In addition, it sets out a variety of considerations that bear generally on the matters discussed and that may be useful as background.)
- (5) Notes on Aug. 17 call
- (6) Research memo from Matt Hall (Matt Hall was Judge Levi's Rules Clerk. At the request of the Subcommittee, he did research on the showings necessary to obtain discovery of material protected under Rule 26(b)(3) or 26(b)(4))
- (7) Notes on April 18 mini-conference with New Jersey lawyers

The purpose of this memorandum is to introduce these issues with some specifics on current thoughts about possible amendments. As noted above, the Subcommittee is not presently recommending going forward with any of these amendment ideas, although some have advanced relatively well along in the amendment process. In some instances, there is also a rough draft of a possible Committee Note.

The Subcommittee has not seen these drafts of possible amendments before they were included in the agenda book, although they attempt to carry forward ideas discussed during the Subcommittee's deliberations. The Subcommittee has not yet discussed any draft Committee Note language. So all of these matters remain open for discussion by the Subcommittee and the full Committee and will certainly be revised before being formally submitted to the full

Committee. Needless to say, some or all current ideas may be discarded after further examination.

For the present, then, the memorandum proceeds with the following:

- (1) Disclosure under Rule 26(a)(2)(A) regarding expert witnesses not required to provide reports
- (2) Report requirements in Rule 26(a)(2)(B) -- revisions to deal with issues of disclosure of attorney-expert communications and disclosure of draft reports
- (3) Addition to Rule 26(b)(3) to limit discovery of attorney-expert communications or draft reports
- (4) The problem of expert "work papers"

Because the notes on the last four conference calls (and the memorandum on which the last three calls focused) provide considerable detail about the drafting refinements that have occupied the Subcommittee, it does not seem important to provide a detailed introduction about those matters. But some overview of the orientation of the discussions leading up to those calls seems helpful to acquaint the full Committee with developments since the April meeting.

By way of background, at the April meeting the discussion included presentation of the idea that attorney disclosure should be required for expert witnesses who do not have to provide reports under Rule 26(a)(2)(B). That issue was the first that called the Committee's attention to expert discovery roughly three years ago. Then it seemed that some courts were requiring full reports from these exempted witnesses, somewhat in the teeth of what the rule said, because they thought that disclosure was very important to permit the other side a fair chance to prepare to meet those expert opinions.¹ But requiring a full report of such witnesses could present difficulties. Treating physicians would probably resist preparing reports. Imposing the "waiver" consequences of the report requirement on in-house experts who don't regularly testify might produce difficulties also (although other changes now being discussed might reduce those difficulties). The Subcommittee's idea presented in April was to require attorney disclosure rather than a full report from these people. Since then, the Subcommittee has continued to regard this addition as important,² and item (1) in this memorandum therefore deals with this issue.

¹ Not all courts have taken this view of the current exemption. For example, in *Watson v. United States*, 485 F.3d 1100, 1107-08 (10th Cir. 2007), the court rejects the argument that a report should be required because it is otherwise unfair to allow a party to call an expert to offer opinions on the ground that the drafters of the 1993 amendments decided not to require reports from these witnesses.

² Recent decisions show that courts still resist the exemption from the report requirement in Rule 26(a)(2)(B). For example, in *Dyson Technology, Ltd v. Maytag Corp.*, 241 F.R.D. 247 (D. Del. 2007), the court held that the cases requiring full expert reports even of those experts whom current (B) exempts were persuasive and therefore not only that a full report was required as to an employee who did not ordinarily offer expert testimony, but also that as a result all privileged or work product information considered by the witness was subject to the waiver consequences we have been trying to ameliorate. Although this issue arises infrequently in reported cases, then, it continues to arise with vigor.

A related issue involved treating physicians. Another concern regarding expert witness disclosure was the failure to identify a treating physician as an expert witness. If the doctor will testify about causation or prognosis, that testimony ordinarily would come in under Fed. R. Evid. 702, 703, and 705, making identification of the doctor pursuant to Rule 26(a)(2)(A) necessary even if a report need not be prepared.³ Failure to identify could therefore raise the risk that the doctor would be prevented from testifying.⁴ The Subcommittee discussed including a reference

³ Recent cases highlight these issues. In *Kirkham v. Societe Air France*, 236 F.R.D. 9 (D.D.C. 1006), defendants moved to strike plaintiff's designation of two treating doctors as expert witnesses or to require that they provide reports. The court said that treating doctors can testify without preparing a report, but added that "the applicability of the written report requirement to treating physicians who provide expert testimony is unclear because, in practice, the testimony of treating physicians often departs from its traditional scope -- the physician's personal observations, diagnosis and treatment of the patient -- and addresses causation and predictions about the permanency of plaintiff's injuries, matters that cross over into classic expert testimony. Thus, there are widely divergent views within the federal courts on whether a treating physician providing expert testimony is required to provide an expert report in advance of testifying under Rule 26(a)(2)(B)." *Id.* at 11. See also *Gonzalez v. Executive Airlines, Inc.*, 236 F.R.D. 73, 79 (D.P.R. 2006) ("Because they necessarily rely on their opinions as experts in treating patients, treating physicians are not bound by the expert report requirements of Rule 26 so long as they limit their testimony to those opinions they formed and relied on during the course of their examination and/or treatment of the patient. Any opinions that they form outside the context of their examination of the patient, however, constitute expert opinion testimony and are subject to the more stringent requirements of Rule 26(b)(4)(B).").

⁴ A recent example is *Fielden v. CSX Transportation, Inc.*, 482 F.3d 866 (6th Cir. 2007). Plaintiff sued his employer, claiming that he had developed carpal tunnel syndrome due to his work. He provided no expert reports by the deadline for serving them. Defendant then moved for summary judgment on the ground there was no evidence of causation even though plaintiff had listed his treating doctors in answer to an interrogatory as witnesses who would testify on causation. Plaintiff opposed the motion with a letter report from a treating physician that counsel had obtained after the cutoff for expert disclosure. Although the doctor's deposition had been taken, and had shown that the doctor developed his conclusion about causation as a part of treatment (see *id.* at 867 n.1), the district judge held that the letter report had to be excluded under Rule 37(c)(1).

The Court of Appeal reversed:

Fielden did not retain Dr. Fischer for the purposes of providing expert testimony because there is evidence that Dr. Fischer formed his opinions as to causation at the time he treated Fielden and there is no evidence that Dr. Fischer formed his opinion at the request of Fielden's counsel. * * * Under a straightforward reading of the rule and its advisory note, Fielden did not need to file an expert report from Dr. Fischer.

This conclusion is supported by the obvious fact that doctors need to determine the cause of an injury in order to treat it. Determining causation may therefore be an integral part of "treating" a patient.

Id. at 869-70. At the same time, the court recognized that "[a] party might attempt to avoid Rule 26(a)(2)(B)'s requirement by having a treating physician testify on an issue instead of having an expert do so." *Id.* at 870. And in order to reach its decision in this case the appellate court had to

to treating physicians in the text of Rule 26(a)(2)(A) to alert lawyers to the existing need at least to identify those witnesses, as well as the need to provide disclosure under the new disclosure requirement, but decided that it was inadvisable to single out these expert witnesses. Below, there is an attempt in the draft Committee Note to highlight the need at least to identify treating physicians, along with the need to provide disclosure regarding their testimony. Adding a disclosure requirement not only provides appropriate notice to the other side of the likely content of doctors' opinions, but also may alert lawyers to the need to identify doctors who will offer such opinions.

Regarding attorney-expert communications, the Subcommittee first thoroughly discussed the basic question whether such protection should be provided. Although a different conclusion is possible,⁵ the Subcommittee unanimously concluded that providing protection would be desirable. The costs of intense inquiry into attorney-expert communications and draft reports were high, and the benefits low in terms of actually providing information important either to determining whether the expert should be allowed to testify under Daubert or whether the jury should accept the testimony.⁶

deal with and distinguish a lot of other cases.

See also *Botnic v. Zimmer, Inc.*, 484 F.Supp.2d 715 (N.D. Ohio 2007) (plaintiff's failure to provide an expert report announcing expert opinions from a treating physician warranted exclusion of the physician's testimony).

⁵ Consider *Elm Grove Coal Co. v. Director, Off. of Workers Comp. Programs*, 480 F.3d 278 (4th Cir. 2007), in which the court dealt with the specialized question of discovery in administrative proceedings under work product provisions essentially identical with those applicable in court under the Civil Rules, but minus the 1993 expert disclosure provisions. The administrative proceeding had accepted a claim by Blake, a retired coal miner, for benefits under the Black Lung Benefits Act arising from his work for Elm Grove. Blake's expert witnesses testified that Blake's lawyers had provided them with materials and were involved in drafting of their reports, but the ALJ refused to order production of draft reports or discovery of attorney-expert communications. The Court of Appeals concluded that discovery had to be ordered. It explained as follows (*id.* at 301):

[W]e are unable, in these circumstances, to agree that Blake's expert witnesses could be properly and fully cross-examined in the absence of the draft reports and attorney-expert communications sought by Elm Grove. As the Supreme Court has cautioned, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." [citing *Daubert*] And, as several courts have observed, it is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him.

⁶ Another point to keep in mind goes back before the 1993 adoption of Rule 26(a)(2)(B). Some fifteen years before that amendment, Judge Frankel concluded that Fed. R. Evid. 612(2) ordered disclosure of what the lawyer gave an expert witness, even though seemingly core work product. If one wants to clear the field, therefore, it might be important to consider amendments to the Civil Rules saying that discovery may be had only on a very exacting showing, does that trump (or at least inform) a determination whether production should be ordered pursuant to Evidence Rule 612(2) because "it is necessary in the interests of justice."

Once that initial determination was made, the extent and location of protection became the focus of much discussion. The concern about the extent of protection was that, given the current atmosphere of intense scrutiny of these topics in many courts, lawyers would continue to press for such discovery unless it were forbidden or virtually forbidden. Thus, for example, one suggestion was that discovery of draft reports be flatly prohibited. But a flat prohibition seemed odd; if discovery of the work done by a nontestifying expert could be had under Rule 26(b)(4)(B) in exceptional circumstances, it would be strange for discovery with regard to the drafts done by a testifying expert to be completely off limits. As an alternative, the “exceptional circumstances” standard of Rule 26(b)(4)(B) (seemingly favored by the ABA in its resolution) was also considered, as was work-product protection as provided in Rule 26(b)(3)(A) and (B). To shed light on the choice between the Rule 26(b)(3) and (b)(4) standards, Matt Hall, Judge Levi’s Rules Clerk, was enlisted to do research on the application of those standards. His research report should be included in these agenda materials. It indicated that the showing required to justify discovery under Rule 26(b)(3) is quite demanding, and that the seemingly higher standard of Rule 26(b)(3)(B) is not clearly preferable. The Subcommittee decided that the Rule 26(b)(3) standard was the proper fit. It concluded also that trying to set a new standard would lead to undesirable complications; better to choose one already recognized by the courts and counsel.

Regarding location, the Subcommittee extensively discussed three possible locations. First, a protective provision could be located in Rule 26(a)(2), which was in a sense the source of the current “problem.” But that might raise questions about whether the protection extended beyond disclosure and also applied to discovery. It also considered locating the provision in Rule 26(b)(4)(A), because the expert’s deposition is likely to be the main setting in which these issues will be thrashed out. But once the decision was made to use the standard for discovery articulated in Rule 26(b)(3), that made including the provision in (b)(4) questionable. In addition, including the provision in (b)(3) had the advantage of making it clear that it applied to all discovery methods, not just depositions. Further drafting concerns exist about how to frame

There is, of course, a very good argument that Rule 612 was never about the situation we are addressing in our discussion because the expert witness is not using the sort of materials the lawyer is likely to provide “to refresh memory for the purpose of testifying,” which is what Rule 612 is focused upon. There is usually no issue of refreshing memory here. We are, instead, talking of materials the lawyer provides to the potential expert witness to orient her to the issues in the case, long before the expert testifies and often long before a decision whether this person will be identified as a witness is made. Maybe, indeed, it would make sense for Rule 612(2) to apply (in civil cases) only to materials used by the expert witness after she has been identified under Rule 26(a)(2)(A). Then, at least, the idea of refreshing memory may be salient.

It could thus well be argued that Evidence Rule 612(2) could easily co-exist with the regime outlined in this memorandum, and that amendments to the Civil Rules could be pursued without a glance at Rule 612. In addition, the idea that the more specific controls over the more general (if that applies to provisions from different sets of rules) arguably means that the addition of Rule 26(a)(2) in 1993 superseded the previous decisions based on Rule 612. It seems likely that since 1993 the decisions have focused on Rule 26(a)(2) and not on Rule 612.

Nonetheless, it may be unwise to assume that a change to the Civil Rules will be treated as superseding decisions based on Rule 612. Reference to this issue in a Committee Note to an amendment of a Civil Rule might be helpful, but it is not clear that it could do much about the interpretation to be given to an Evidence Rule. The draft Committee Notes below do not include discussion of Evidence Rule 612.

such a protection, but item (3) below offers first-cut ideas that can serve as the focus for discussion during this meeting.

Item (2) below, therefore, includes possible amendments to Rule 26(a)(2) that parallel and provide a basis for the protections outlined in item (3). It specifies that only a “final” report must be disclosed, to deal with arguments that there is still a requirement to disclose draft reports. And it removes the phrase “or other information,” which seems to have provided support for disclosure or discovery regarding attorney-expert communications. Instead, it says that disclosure is required of “the facts or data considered by the witness.” This phrase is further explained in the draft Committee Note. The Subcommittee discussed, but unanimously rejected, changing “considered” to “relied on.” Such a change, it was feared, would unduly curtail legitimate inquiry into the basis of the opinions to be presented at trial.

Regarding draft reports, the Subcommittee eventually decided to treat these in the same way as lawyer-expert communications. Accordingly, item (3) below permits discovery of draft reports only upon the showing required for discovery of work product under Rules 26(b)(3)(A) and (B). The Subcommittee considered limiting protection for draft reports to those “prepared by the witness.” But eventually it decided that this limitation would produce time-consuming and pointless inquiries into the relative roles of the lawyer and the witness in preparing the final report. In addition, the risk that the lawyer would simply write the report and have the expert sign it seemed not to be too pressing because such an expert would be very vulnerable to cross-examination.⁷

Finally, item (4) below briefly introduces the problem of expert “work papers” on which the Subcommittee hopes for considerable input and advice from the full Committee. Some courts assert that such materials are not discoverable,⁸ but often justifications for probing such materials are accepted. As the notes of the Sept. 28 and Oct. 11 conference calls report, the Subcommittee has considered this issue at some length. At present, it seems that there are two competing considerations that bear on whether protection should be given such materials. On the one hand, if the absence of protection means that some experts will adopt strategies to avoid creating such working papers that interfere with their effective preparation, providing the protection might not take anything away from the other side and promote efficiency in the use of experts. On the other hand, inquiry into the work papers prepared by the expert during the development of the opinions to be expressed in testimony seems central to adequate probing of the opinions that will be presented. Indeed, even the testing of nontestifying experts may sometimes be discoverable under Rule 26(b)(4)(B) when no alternative source of essential information exists. Making the materials generated during preparation of the opinions offered by the testifying expert almost as hard to obtain (as by protecting them unless the Rule 26(b)(3)(A) and (B) showing can be made) may be unwise.

⁷ On this point, consider Faruki, *Cross-Examination That Hurts the Witness, Not You*, 33 *Litigation* 38, 39 (Spring 2007):

With an expert whose report was largely ghostwritten by counsel, traps abound unless the expert has studied and internalized the report. For example, if the expert does not know what is in her own lengthy report, you may find opportunities to have the expert deny having reviewed documents or performed an analysis that the report says she did review or perform.

⁸ See., e.g., *McDonald v. Sun Oil Co.*, 423 F.Supp.2d 1114 (D. Or. 2006) (experts’ working notes were not subject to disclosure during discovery).

A related consideration that the Subcommittee has discussed is the proper treatment of experts who are designed to testify on some matters and also serve as “sounding boards” with regard to general strategy. If the goal is to discourage the wasteful practice of hiring two sets of experts, curtailing inquiry into the preparatory activities of the expert witness may be necessary to avoid trespassing also into the work done by the expert in the “consulting” role. On one level, this focuses on what was “considered by” the expert in reaching the opinions to be offered at trial. When the expert explores various analytical methods or tests before settling on one that will be the basis for the opinion offered at trial, the question whether the others were considered in reaching the opinion to be offered become central. On another level, it focuses on whether strategic interaction with the lawyer about the conduct of the case should be accessible because the expert is to testify. For example, if the expert advises the lawyer on how to probe or challenge the report of the other side’s expert, should that interaction be regarded as discoverable? A likely response would be that it does not relate to “facts or data” considered by the expert in reaching her own opinions, but it is a legitimate concern in addressing the problem raised by item (4).

The Subcommittee has reached no conclusion about whether any rulemaking to deal with the issues presented in item (4) would be appropriate. It will attempt during the November meeting to make clear the tradeoffs and considerations that bear on the question whether to proceed further on this topic. It is worth noting, however, that this specific subject was not raised in the ABA resolution, and that pursuing rule change ideas like those described in items (1), (2), and (3) may produce considerable benefits without necessitating a venture also into the topic introduced in item (4).

Duration of work product protection: During the Oct. 11 conference call, as reflected in the notes of that call, the Subcommittee also began discussion of the question whether it should broaden its inquiry to include discussion of the duration of work product protection. Presently, many courts apparently regard protection as ending once the litigation is completed. But for many litigants related litigation may begin or continue after the suit for which the work was initially done has ended.

The Supreme Court dealt with related issues in *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983). In a concurring opinion, Justice Brennan articulated reasons supporting extension of protection beyond the first suit: “Any litigants who face litigation of a commonly recurring type -- liability insurers, manufacturers of consumer products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on -- have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes.” *Id.* at 31. But the question whether this concern has particular salience in relation to the work of expert witnesses, and the way in which it should be handled when the party for whom the expert worked in the earlier case is different from the party for whom the expert is working in the current case, raised issues beyond the current understanding of the Subcommittee.

For the present, the Subcommittee intends to explore these issues further, and it invites the full Committee to provide reactions and advice about this topic.

- (1) Disclosure under Rule 26(a)(2)(A) regarding expert witnesses not required to provide reports

**Rule 26. Duty to Disclose:
General Provisions Governing Discovery**

(a) Required Disclosures

* * *

(2) *Disclosure of Expert Testimony*

- (A) *In General; Disclosure Regarding Testimony of Certain Witnesses.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. For any such witness who is not required to provide a report under Rule 26(a)(2)(B), this disclosure must also state:
- (i) the subject matter on which the witness is expected to provide evidence under Federal Rule of Evidence 702, 703, or 705; and
 - (ii) the substance of the facts and opinions to which the witness is expected to testify.

Draft Committee Note⁹

Rule 26(a)(2)(A). Rule 26(a)(2)(A) is amended to mandate disclosures regarding the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B). Before 1993, an interrogatory seeking the identity of expert witnesses permitted inquiry about the opinions to be offered by all such witnesses. The expert report requirement of Rule 26(a)(2)(B) -- added in 1993 -- calls for much more extensive information, but that rule exempted certain expert witnesses from providing a report at the same time it eliminated the former interrogatory practice. This amendment adds disclosure requirements regarding those exempted witnesses in Rule 26(a)(2)(A)(i) and (ii).¹⁰ These new provisions include information that formerly could be obtained by interrogatory. Under Rule 26(b)(4)(A), the depositions of these expert witnesses may be taken, using the information provided by this disclosure. The goal is to ensure fair notice of the expected expert testimony.

⁹ The Subcommittee has not discussed any draft Committee Note. These drafts are provided only to indicate what sorts of discussion might be included, and to shed light on the discussion of the possible rule changes outlined in text.

¹⁰ Initially, the Subcommittee considered including also an additional requirement -- "(iii) a summary of the grounds for each opinion." Eventually that was dropped on the ground that it was not urgently needed and that it might present considerable difficulties with regard to some witnesses affected, particularly treating physicians.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. Reasoning that having a report before the deposition or trial testimony of all expert witnesses is desirable, these courts have disregarded the limitations on who must prepare a report under Rule 26(b)(2)(B). But with the addition of this disclosure requirement to provide advance information about the opinions of such witnesses, courts should no longer be tempted to overlook Rule 26(a)(2)(B)'s limitations on the full report requirement.

Sometimes the person who will offer expert testimony also will be a "fact" witness -- often called a "hybrid expert." A frequent example is a treating physician or other health care professional. Another recurrent example is an employee of a party who does not regularly provide expert testimony. Often such witnesses provide not only testimony about strictly historical facts but also evidence under Fed. R. Evid. 702, 703, or 705. Parties must identify such witnesses under Rule 26(a)(1)(A) and provide the required disclosure with regard to such opinions. Failure to do so may lead to requests to exclude evidence under Rule 37(c)(1).

[Additional issues may arise with "hybrid experts." First, if the person's deposition has already been taken as a "fact" witness, there may be an objection that it cannot be taken under Rule 26(b)(4)(A) because of the one-deposition limitation of Rule 30(a)(2)(A)(ii). In general, such objections should not be well-taken to the extent the deposition is limited to the opinions enumerated in the Rule 26(a)(1)(A) disclosure; otherwise a party could prevent an expert deposition by designating as its expert a fact witness who had already been deposed. But if the party who designated the witness can show that the original deposition fully explored the issues on which the opinion testimony will focus, that may be a ground for a protective order against a further deposition of the witness.

Second, the ten-deposition limit of Rule 30(a)(2)(A)(i) might be raised if a party who seeks to take the person's deposition after the Rule 26(a)(1)(A) designation has taken ten depositions already. If the designated expert was one of those ten, the expert deposition should be viewed as separate from the "fact" witness deposition for purposes of the ten-deposition limit; otherwise, parties might be deterred from designating as experts those who have already been deposed as fact witnesses. This treatment is consistent with regarding the expert deposition of the witness as separate from a prior deposition of the same person as a "fact" witness for purposes of the one-deposition rule.

In regard to both types of Rule 30(a)(2)(A) issues, the parties should try to reach agreement, and in the absence of such agreement courts will need to design appropriate arrangements for the circumstances in individual cases.]¹¹

¹¹ The bracketed material is a very rough first effort at addressing issues that might properly be foreseen in the Note. Perhaps, however, it would be better to remain silent on them. But it could be better to propose different default views.

- (2) Report requirements in Rule 26(a)(2)(B) --
revisions to deal with issues of disclosure
of attorney-expert communications and
disclosure of draft reports

**Rule 26. Duty to Disclose:
General Provision Governing Discovery**

(a) Required Disclosures

* * *

(2) Disclosure of Expert Testimony

* * *

- (B) *Written Report.*** Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written final report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
 - (ii) the facts or data or ~~other information~~ considered by the witness in forming them.
 - (iii) any exhibits that will be used to summarize or support them;
 - (iv) the witness's qualifications, including a list of all publications authored in the previous ten years;
 - (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
 - (vi) a statement of the compensation to be paid for the study and testimony in the case.

Draft Committee Note

Rule 26(a). Rule 26(a)(1) and (2) are amended -- together with Rule 26(b)(3) -- to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony from those expert witnesses not required to provide expert reports and limit the disclosure obligation -- whether under Rule 26(a)(1)(A) or (B) -- to facts or data considered by the witness. In addition, the amendments make clear that draft expert reports need not be disclosed. Rule 26(b)(3) is amended to limit discovery regarding communications between expert witnesses and counsel or of draft reports. Together, these changes provide

broadened disclosure regarding some expert testimony and curtail disclosure and discovery that have proven counterproductive.

Before 1993, only very limited discovery was provided regarding the expected testimony of expert witnesses. A party had a right by interrogatory to require other parties to identify such witnesses and provide a general description of the testimony they would offer. The court could thereafter order further discovery -- often by deposition of the expert witness -- but there was no right to any further discovery.

In 1993, major rule changes were made regarding expert discovery. The former expert-witness interrogatory provision was removed. Rule 26(a)(2) was added requiring disclosure -- without the need for a discovery request -- identifying every expert witness. As to all such witnesses retained or specially employed to provide expert testimony, and as to any employee of a party whose duties regularly included giving expert testimony, an extensive report was required, including a complete statement of all opinions to be presented at trial and the basis for those opinions, all exhibits to be used in relation to the opinions, a detailed listing of the witness's qualifications, including all publications during the prior ten years, a list of all cases in which the witness testified as an expert during the prior four years, and the compensation to be paid to the expert. Rule 26(b)(4)(A) was amended at the same time to provide each party the right to take the deposition of another party's expert witness. Rule 37(c)(1) was added to preclude testimony at trial on matters not properly disclosed before trial.

The current amendments narrow none of these 1993 provisions. Indeed, by adding an obligation to provide disclosure about expert witnesses who are not required to provide expert reports, they strengthen disclosure about certain expert witnesses.

[Insert Committee Note on Rule 26(a)(2)(A) amendment here]

Rule 26(a)(2)(B). One aspect of the 1993 amendments has produced problems, however, which these amendments seek to cure. Under Rule 26(a)(2)(B), an expert report was also to include "the data or other information considered by the witness in forming the opinions." This provision has been widely interpreted to call for disclosure of all communications between counsel and expert witnesses required to provide reports, and to require production of drafts of expert reports. The Committee has been repeatedly informed that these features of practice under the 1993 amendments have produced considerable costs without corresponding benefits. The American Bar Association has adopted a resolution urging that court rules be changed to protect against undue intrusion into collaboration between attorneys and expert witnesses and to preclude production of draft reports.

The sole justification for discovery from retained experts is to permit preparation of effective cross-examination of the expert testimony to be offered at trial. Before 1993, the authorized interrogatory provided only a limited opportunity to prepare for expert testimony at trial. The 1993 amendments' introduction of disclosure and the expert report, combined with depositions of right, provided a valuable expansion of that opportunity. This expansion could be particularly important in relation to determinations whether proposed expert testimony should be admitted under the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The Committee has been told repeatedly that routine discovery into attorney-expert communications and regarding draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts -- one for purposes of consultation and another to testify at trial -- because disclosure of their collaborative interactions with expert consultants

would reveal their most sensitive and confidential case analyses, often called “core” or “opinion” work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot. At the same time, attorneys often feel compelled to adopt an excessively guarded attitude toward their interaction with testifying experts that impedes effective communication. Experts might adopt strategies that protect against discovery but also interfere with their effective work, such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers’ memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.

Discovery or cross-examination focused on the details of attorney-expert communications, or minor variations between draft reports and final reports, can consume much time without producing corresponding benefits. Only rarely -- if at all -- does such discovery contribute significantly to a court’s decision whether to admit proposed expert testimony under *Daubert* or to a jury’s decision whether to accept or reject the expert’s testimony at trial. Much more often, inquiry into these matters has proved to be a waste of time and money.

Recognizing these drawbacks, experienced attorneys often stipulate to forgo disclosure or discovery regarding attorney-expert communications beyond the facts or data considered by the expert, and to forgo disclosure or discovery of draft reports. The widespread use of stipulations to avoid the effect of broad interpretations of Rule 26(a)(2)(B) is a signal that the rule provisions interfere with effective practice. At least one state -- New Jersey -- has amended its discovery rules to insulate against such discovery. See N.J. R. 4:10-2(d)(1). The Committee has been informed that the New Jersey rule change was well-received by the bar, and that it has worked well in practice.

Rule 26(a)(2) is therefore amended to specify that disclosure is required only of “final” reports. Rule 26(b)(3)(D) is added to provide that discovery of draft reports may be allowed under some circumstances, but only by satisfying the provisions of Rule 26(b)(3)(D) can a party obtain such discovery. This amendment does not weaken the duty to supplement under Rule 26(e), however; like other disclosure obligations, expert reports must be supplemented as provided in Rule 26(e).

In addition, Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered. This amendment deletes the phrase “or other information” included in 1993, which has been one ground for decisions requiring disclosure of all attorney-expert communications and draft reports. The refocus on “facts or data” is meant to limit the disclosure requirement (and corresponding opportunity for discovery) to material of a factual nature, as opposed to theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material received by the expert, from whatever source, that contains factual ingredients likely to affect or bear on the opinions to be offered at trial. The disclosure obligation -- and discovery opportunity -- extends to any facts or data “considered” by the expert, not only that relied upon by the expert. In this way, the important advantages of the 1993 amendments can be preserved while the excessive costs and intrusion into attorney-expert communications experienced in some cases under the 1993 version of the rule can be curtailed.¹²

¹² This paragraph is a first effort to explain how “facts or data” should be interpreted to ensure that parties get what they need to mount an effective challenge to the adversary’s expert testimony. If we go forward, the content and placement of this explanation in a Note will be important.

Rule 26(b)(3)(D) permits discovery regarding attorney-expert communications or draft reports only upon a showing that the party seeking discovery has a substantial need for such discovery. Given the breadth of the disclosure and discovery opportunity regarding facts or data considered by the expert, it is expected that this showing can be made only rarely, as explained further in the Committee Note to Rule 26(b)(3)(D). Even where that showing of need is made, the protections of Rule 26(b)(3)(B) apply to guard against disclosure of mental impressions, opinions, or legal theories [of counsel]. In this way, these amendments will guard against the difficulties that have been reported under existing practice.

(3) Addition to Rule 26(b)(3) to limit discovery of attorney-expert communications or draft reports

**Rule 26. Duty to Disclose:
General Provision Governing Discovery**

* * *

(b) Discovery Scope and Limits.

* * *

(3) Trial Preparation; Materials.

* * *

(D) Communications between counsel and an expert witness. A party may obtain discovery regarding communications between a person who has been identified under Rule 26(b)(2)(A) and [retaining] {a party's} counsel -- or regarding a draft report prepared by such a person -- only with regard to facts or data considered by the expert in forming the opinions the expert will express. The court may order further discovery only on a showing that satisfies Rule 26(b)(3)(A)(i) and (ii). If the court orders further discovery, the protection of Rule 26(b)(3)(B) applies [to counsel's mental impressions, opinions, or legal theories].¹³

¹³ An alternative to the version in text that was also discussed by the Subcommittee could be as follows:

(D) Communications between counsel and an expert witness. All communications between [retaining] {a party's} counsel and a person who has been identified as an expert witness under Rule 26(a)(2)(A) -- and any draft report -- are protected as trial preparation material under Rule 26(b)(3)(A) and (B), except that disclosure and discovery are allowed with regard to facts or data considered by the expert in forming opinions the witness will express.

The text version may be preferred because it avoids the argument that the protection is limited to "documents and tangible things," as in Rule 26(b)(3)(A), because the phrase "subject to Rule 26(b)(4)" complicates the use of Rule 26(b)(3)(A) protections for expert witnesses, and

Draft Committee Note

Rule 26(a)(2)(B) is amended to require expert-witness disclosure only with regard to the “facts or data considered” by the expert in forming the opinions to be expressed in testimony, and to require only that a final report be provided. As explained in relation to that amendment, experience under case law that required disclosure or permitted discovery of attorney-expert communications or draft reports has shown that this form of discovery has many negative consequences and few positive benefits.

Rule 26(b)(3)(D) is added to provide protection comparable to work-product protection under Rule 26(b)(3)(A) and (B) for all attorney-expert communications. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether or not they are required to provide reports under Rule 26(b)(2)(B). It applies to all communications, whether in writing, by e-mail, or otherwise. Thus, Rule 26(b)(3)(A)’s limitation of its protection to “documents and tangible things” does not apply to the protection provided by Rule 26(b)(3)(D).

Rule 26(b)(3)(D) provides similar protection against discovery for draft expert reports. The term “draft report” refers to any document or electronically stored information in the form of a report prepared before service of the final report. With regard to a supplemental report provided pursuant to Rule 26(e), the term would include any draft of such supplemental material. But scientific testing of material involved in the litigation, and notes of such testing, would not be exempted from disclosure to the extent that related to any opinion or conclusion reached by the expert witness.¹⁴ [And if the testing resulted in the destruction of the material so that it could not be tested by other parties, that might be an exceptional circumstance that would warrant permitting discovery even of preliminary analyses that were not the basis for any opinion or conclusion reached by the expert witness.]¹⁵

Discovery is permitted regarding attorney-expert communications or draft reports only in limited circumstances and by court order. No such discovery may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) -- that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be extremely rare for a party to be able to make such a showing with regard to expert-attorney communications.

Rule 26(a)(2)(B) requires disclosure of all facts or data considered -- not just relied on -- by the expert in forming the opinions to be presented at trial. Rule 26(b)(3)(D) authorizes searching examination of the development of the expert’s opinions, including consideration of alternative approaches to the issues presented and methods or information not considered by the

because it is possible to make it clear that the protections of Rule 26(b)(3)(B) apply only with respect to the mental impressions, etc., of counsel.

¹⁴ This discussion would need to be reevaluated depending on what is done about expert “work papers.” If protection is afforded to “work papers,” that may bear on discovery of the material mentioned in text.

¹⁵ The bracketed material was prompted by questions during the Aug. 9 ABA event. It is really about a separate problem that is more akin to a ground for discovery under Rule 26(b)(4)(B) regarding the work of a nontestifying expert.

expert.¹⁶ A party that believes full disclosure or discovery has not been provided with regard to such facts or data may present that contention to the court under Rule 37, but such a contention is not a ground for breaching the protection against inquiry into attorney-expert communications or draft reports. To the contrary, the assumption of the rule is that the broad disclosure Rule 26(a)(2)(B) requires -- coupled with permission under Rule 26(b)(3)(D) to inquire by deposition and otherwise about any facts or data considered by the expert -- should abundantly empower the interrogating lawyer. Against this background, it is not enough for a party to suggest that further discovery might yield something more of value to examining the expert witness.¹⁷

If the rare case in which a party does nonetheless make a showing of such a substantial need for discovery regarding attorney-expert communications, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). This protection should not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.¹⁸ But the court should protect against inquiry into the attorney's mental impressions even if a party has made the showing of need required to justify any discovery.

This stringent protection is limited to communications between the expert witness and ["retaining"] {a party's} counsel. The difficulties that the Committee has learned about arise from the relationship between lawyers handling litigation and expert witnesses they retain to assist in that litigation, including providing testimony. The protection is limited to that situation. But in appropriate cases, it may be that an expansive interpretation should be given to this term. For example, it may happen that a party is involved in a number of suits about a given product or service, and that a given expert witness is retained to testify on that party's behalf in several such cases. In such a situation, a court should recognize that "retaining" counsel should include all lawyers acting on behalf of the client in relation to the related litigation. Other situations involving similar reasons for interpreting ["retaining counsel"] {"a party's counsel"} expansively may exist.

Although Rule 26(b)(e)(D) forbids discovery of draft reports, there should be no limitation on inquiry into the basis for any opinion expressed in an expert witness's final report. Either during deposition or at trial, full and searching inquiry into the grounds for such opinions - including alternative theories or methods considered and rejected by the witness -- should be allowed.¹⁹

¹⁶ This assertion may need to be reexamined if protection is to be afforded for expert "work papers."

¹⁷ This is a first-cut effort to provide a clear statement in the Note about the difficulty of justifying discovery based on the "I think that the lawyer coached the witness" assertion.

¹⁸ Again, this point may need to be reconsidered if protection will be afforded to the expert's "work papers."

¹⁹ This paragraph is intended to foreclose objections to deposition or trial questioning about the expert's process of analysis. Is it sufficient? It should also be noted that it might be in tension with protection for an expert's "work papers."

(4) The problem of expert “work papers”

The expert “work papers” topic focuses on notes, etc., prepared by the expert in connection with readying the opinions to be offered at trial. We have heard a great deal about counsel telling their experts never to take notes, and about experts who have developed rather elaborate ways of leaving no traces of their thinking processes. We have also heard that lawyers often feel constrained to hire a second set of experts for frank communication about the case that won’t be subject to discovery. The protections afforded by a rule like 26(b)(3)(D) -- described in item (3) above -- would at least partially respond to those concerns and reassure counsel. But arguably allowing inquiry into the preparation of the opinions to be expressed by the expert would also intrude into those candid exchanges about the case unless protection were provided for the expert’s preparation activities. Practiced experts might still avoid taking notes. Canny lawyers might tell their experts to create a file entitled “draft report” immediately and put all their thoughts down there in order to provide protection against discovery.

This topic surfaced during the Subcommittee’s discussions since the April Committee meeting. As footnotes above suggest, it bears on the first three topics because it could affect the latitude allowed a party to probe the opinions to be offered by an expert witness. Arguably, the greater that latitude, the clearer the point that generally precluding discovery of attorney-expert communications and draft reports does not materially impair the legitimate interests of the other side. Expert discovery was never a way to gather relevant information in general, but only a way to empower the other side to challenge the opinions to be offered. At the same time, the broader the inquiry into development of the expert’s opinions, the greater the temptation to engage in strategic behavior to foil discovery.

Discussion of these issues was central to the Sept. 28 and Oct. 11 conference calls, and the notes of those calls contain much important detail about that discussion. As yet, the Subcommittee has not reached a conclusion about whether any effort to provide protection for expert work papers should be undertaken. It has not discussed broader protection for preparatory work done by testifying experts (e.g., forbidding deposition questioning about that work), but might give serious consideration to some possible rulemaking to facilitate the work of experts and enable lawyers to speak candidly with them.²⁰

²⁰ Only for purposes of suggesting what a rulemaking effort might look like, it might become a new Rule 26(b)(3)(D):

(E) Expert witness work papers. Any document, electronically stored information, or tangible thing containing or embodying the preliminary analysis of a person identified as an expert witness under Rule 26(a)(2)(A) is protected as trial preparation material. The court may order discovery of such material only on a showing that satisfies Rule 26(b)(3)(A), and subject to the protections of Rule 26(b)(3)(B) [for counsel’s mental impressions, conclusions, opinions, or legal theories].

The Subcommittee has only discussed the general topic of whether there should be serious consideration of protection of expert “work papers.” This rough draft is provided only because sometimes possible rule language lends concreteness to discussion.

The “dual purpose” use of a single expert might provide particularly difficult problems. If discovery is allowed only about the opinions to be expressed at trial, it appears that with regard to the other work done by the person as a consultant the protections of Rule 26(b)(4)(B) would apply. If so, it may well be that there will be frequent occasions when retaining counsel contend that the discovery goes beyond what is allowed regarding the opinions to be offered at trial. But how readily could that protection be applied if there is a close relationship between the opinions to be offered and the opinions that are not to be offered?

No doubt experts would prefer to have “work product” protection for their trial preparation activities that correspond to what lawyers are afforded under Rule 26(b)(3). No doubt affording them such protection -- at least with regard to “work papers” -- would also provide comfort to lawyers deciding how broadly or candidly they could discuss the case with the expert. If such protection is not forthcoming, it may be that amendments like the ones sketched in parts (1) through (3) will not achieve their purpose of eliminating the unfortunate practices that have arisen since 1993.

But further constraints on discovery regarding the basis for the opinions to be offered might significantly compromise the ability of the opposing party to prepare those opinions. And work papers may be key to that challenge.

NOTES ON CONFERENCE CALL
DISCOVERY SUBCOMMITTEE
Oct. 11, 2007

On Oct. 11, 2007, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. David Campbell (Chair, Discovery Subcommittee), Hon. Mark Kravitz (Chair, Advisory Committee), Chilton Varner, Daniel Girard, Anton Valukas, Prof. Edward Cooper (Reporter to the Advisory Committee), John Rabiej, and Prof. Richard Marcus (Special Reporter to the Advisory Committee).

The call was introduced with an outline of points that seem to have been resolved in prior calls:

- (1) There should be protection for attorney-expert communications
- (2) This protection should be located in a new Rule 26(b)(3)(D) and provide “work product” type protection
- (3) The protection should extend to “all communications,” and thus be broader than the Rule 23(b) protection limited to “documents and tangible things”
- (4) The protection should apply to communications with the “retaining” attorney, or the “a party’s attorney” (subject to further drafting discussion)
- (5) Draft reports should receive “work product” protection
- (6) The protection for draft reports should not be limited to those “prepared by the witness” so that phrase should not be included in the proposed amendment
- (7) The handling of the draft report issues would involve changes to both Rule 26(a)(2) and Rule 26(b)(3). The change to 26(a)(2) would specify that there is no obligation to disclose draft reports. The change to Rule 26(b)(3) would provide protection like that provided for attorney-expert communications for draft reports as well.

A question was raised about whether there was any need to say in Rule 26(a)(2) that draft reports need not be disclosed. Why does one have to say what one does not need to disclose? Indeed, is there any reason to add the word “final” there? Perhaps all we need say is that a report must be disclosed, as the current rule says.

This suggestion drew the response that the current rule has led many courts to say that draft reports must be disclosed or that they are readily discoverable. At least putting the word “final” in is important to show that we are changing that approach. Maybe the further point that there is no need to disclose draft reports can be included in the Committee Note, supported by the addition of “final” to the rule. This response drew support on the ground that it’s important to “make it a bright line.”

It was suggested that the way to carry forward for the present is to leave “final” in as an amendment and put brackets around “No draft report need be disclosed.” One reaction was that the style people will reject negatively to adding the word “final.” That prompted the comment that adding “final” gives a basis for a Committee Note statement that there is no need to disclose draft reports.

Another point was raised about supplementation: It is important to say that using the term “final” report does not nullify the obligation to supplement under Rule 26(e). The fact that

the “final” report has been provided does not mean that it is by definition complete and need not be supplemented.

Eventually, the resolution for further discussion was to leave in “final” and take the final sentence “No draft report need be disclosed” out of the rule, but to make that point in the Note.

Disclosure regarding witnesses not required to provide reports

Discussion turned to the proposed language for Rule 26(a)(2)(A) to require party disclosure regarding the expected testimony of expert witnesses not required to make a report. One question was whether there was reason to hesitate about removing the requirement that the disclosure include “(iii) a summary of the grounds for each opinion.” Concern about whether this would be unduly burdensome with treating doctors and others had led to removal of that provision. There was no sentiment for restoring that provision.

Another question was whether to add “including a treating physician” to the rule to alert lawyers to the need to identify doctors who would give testimony under Fed. R. Evid. 702, 703, and 705. The New Jersey rule does mention treating doctors in order to highlight this recurrent need. The concern is that too many lawyers seem not to appreciate, or to focus on, this issue. On the other hand, the rule already requires such disclosure, and putting in treating doctors (or treating “health care professionals”) seems to raise questions about why they are included and others are not. In a sense, one might say that the current rule is fine, but that Committee Note that accompanied it was inadequate in failing to note affirmatively that treating doctors are included in the identification requirement even though not required to provide a report. It was suggested that adding this redundant statement to the rule might “give fits” to the Style Subcommittee. Another comment was that the discussion of experts not required to provide reports had focused initially not on doctors but on full-time employees who don’t regularly provide expert testimony. Mentioning the doctors in the rule but not those employees seems incomplete. This drew the additional observation that it’s not just employees. For example, a state police officer testifying about an accident may be asked not only what she observed but her opinion about the cause of the accident, etc.

The resolution was not to mention treating doctors or anyone else in the rule. Accordingly, the “including a treating physician” language would not be used. The Committee Note, however, should emphasize that treating doctors, full-time employees, and others who will give such testimony should be identified (and disclosure provided about their expert testimony).

Duration of protection

A question had arisen about whether possible amendments might focus also on the duration of whatever protection might be provided. The initial stimulus was a series of decisions in the Northern District of California holding that an expert witness could be questioned about work done on a related topic as a consultant in an earlier case. In the earlier case, the expert had worked for a party not involved in the current litigation, and had not been designated as a testifying witness, but the topic on which the expert had worked was related to the topic on which the expert was designated to testify in the current case. The opposing party demanded discovery regarding the work the expert did in the earlier case, and the court ordered that discovery even though the party that retained the expert in the earlier case had objected.

The general question was introduced as extending beyond issues involving expert witnesses. Work product is a protection designed to foster preparation in a given case, so there is

an argument that after the case is over the reason for the protection expires. This argument is weaker when the litigant faces recurrent litigation about related topics; then the litigant's overall litigation preparation is not limited to one case. In *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983), the Court confronted a related question regarding a request under the Freedom of Information Act, which allows the government to withhold material that would be exempted from discovery in civil litigation. The Court held that the government could withhold the material under the FOIA, but did not hold that the same would be true with regard to a discovery request in civil litigation (which was not before the Court). In a concurring opinion, Justice Brennan argued that "[a]ny litigants who face litigation of a commonly recurring type -- liability insurers, manufacturers of consumer products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on -- have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes." But some lower courts have permitted discovery in some such circumstances.

The discussion opened with the observation that this possibility of later discovery raises concerns in the mind of lawyers. Repetitive litigation is quite common; the possibility of discovery in relation to later cases can cast a shadow over trial preparation in the current one. The problem is important.

A question was raised, however, on whether the concerns about attorney-expert communications are different from other matters protected by work product. Unless they are different, it would seem that this discussion opens much wider issues about the whole ambit of work product protection.

That prompted a supplemental comment that the orientation of our current drafting ideas for protecting attorney-expert communications is not precisely to say that "work product" protection applies, but rather to say that discovery is only allowed if the showing required for discovery of work product is made. That's not quite the same thing, so it may be that some attention to the duration of this limitation on discovery could be handled independent of larger issues about the duration of protection under current Rule 26(b)(3). But that does leave open the question what exactly is the reason why discovery of this relevant information is not permitted. If it is not forbidden by work product protection, what is the reason why it is only permitted when the showing needed to obtain work product is made? And should it be unlimited? For example, consider the case from the N.D. Cal. in which the earlier litigation involved a different client and a different product or service, although the technical issues were similar. Would that be a case in which the earlier protection should apply? And would it apply only if invoked by the earlier litigant, or should the current employer of the expert be permitted to invoke the protection, even over the objection of the earlier employing litigant? What if the earlier litigant affirmatively wanted to provide the information sought in the current case? Would the current litigant be permitted to prevent that even though the protection "belongs" to the earlier litigant? The response was that this should be limited to something like a "similar adversary context," but that application of this limitation might be a challenge.

This discussion prompted the reaction that the lawyer may develop a relationship with a given expert that prompts the lawyer to seek the services of the expert repeatedly on behalf of different clients but in relation to the same general sort of problem. Another agreed that this the "more likely situation." Experts develop a reputation in certain areas, and they are hired by different lawyers or clients to provide assistance (either as consulting or testifying experts) as a result. Often courts will rule that in subsequent litigations the work product protection from prior cases does not apply, leading to inquiry in later cases about all work done in the earlier cases.

A reaction to this possibility was that it seems odd that this later discovery would include the expert's discussions with attorneys involved in the earlier cases, which is the protection being discussed. It is odd to think that this is vigorously protected in Case A, but entirely withdrawn as soon as Case A is over, even if it's the same lawyer involved in Case B.

One response is that facts or data from the earlier case might be pertinent to the testimony offered in the later case. The question seems to be a relevance question. Why is the work done in Case A relevant in Case B? The answer would seem to be that the work done in Case A is so similar to the opinions offered in Case B that it would be within the "facts or data considered" provision that we rely on to assure adequate access to information that shaped the current opinions. Moreover, why would the lawyer in Case A care if this comes out unless she uses the expert again?

A reaction was that if protection does not survive, we may defeat the goal we are seeking to achieve in terms of the rules' influence on attorney conduct. Lawyers want a way to impeach the other side's expert. Unless this door is closed it will be the focus of the other side's discovery.

A concern was raised about whether the Subcommittee presently has a sufficient knowledge base for addressing these issues. "I don't understand this without more knowledge about the cases." The reaction was that this should be flagged as an issue for discussion with the full Committee, and that in addition it would be desirable to seek a fuller appreciation of the caselaw.

Another point was that the same sort of issue arises with the turncoat expert -- the long-time expert for a manufacturer who "gets religion" and wants to expose the manufacturer's flaws. Should work product protection constrain the freedom of movement of that expert?

This discussion drew the suggestion that the Administrative Office has Judicial Fellow who might be available to provide this research assistance. That possibility was universally welcomed. The resolution was that the issue should be flagged for discussion with the full Committee, and that in addition an effort should be made to enlist the research assistance of the Judicial Fellow.

Expert's work papers

The question of protecting against discovery of expert work papers was summarized as presenting a choice between the "half loaf" and the "full loaf" protection. The half loaf would insulate against discovery of attorney-expert communications and draft reports, subject to discovery if the showing required by Rule 26(b)(3) were made. The full loaf would extend the same protection to expert "work papers," but would not limit deposition questioning or trial questioning about the analysis or methods used by expert witnesses in reaching the conclusions offered in evidence.

Some competing considerations were sketched. There is a concern that unless we can assure that notes and other materials prepared by experts will be protected from discovery, the result will be that lawyers will urge experts not to create such things. Thus, providing protection would not really deprive opposing parties of anything they would get, and failing to provide protection would impede and complicate the process of preparing expert opinions. Unless protection of expert work papers is added, an amendment package limited to the half loaf may not accomplish what we set out to accomplish.

At the same time, it may be that concern about games lawyers play could lead us to interfere unduly with the ability of the other side to probe and challenge the expert testimony. Unlike lawyers, expert witnesses are allowed to take the stand and ask the jury to accept their opinions. Discovery is the main method that opposing parties have to challenge those opinions (besides hiring experts of their own). Although the protection for work papers does not overtly limit deposition questioning, it could impede effective questioning. Like other witnesses, expert witnesses may not remember without the assistance of their notes the sorts of things the questioner wants to probe. As a result, it may be that arguments for access to work papers would be more frequent and more forceful than with regard to drafts or attorney-expert communications. The full loaf protection might even put those items at greater risk if sometimes it seemed to provide a choice between “full loaf” discovery (including communications) and denying access to work papers.

Additionally, there is a set of issues in relation to the dual function expert that may not previously have been fully explored. One idea is to facilitate attorneys’ use of just one expert for both the testifying and consulting functions. The retention of a second expert is a cost we seek to avoid. But we have come to appreciate that policing this dividing line with dual purpose experts may prove difficult in a number of instances. Consider the expert who has developed opinions X and Y, but includes only X in her report. How should discovery regarding opinion Y be handled? One response is that it is allowed only under Rule 26(b)(4)(B) -- where exceptional circumstances are shown -- because in developing that opinion the expert was acting as a consulting expert. That conclusion becomes more difficult to justify the closer the relationship between X and Y. For example, in the deposition of the expert, can the other side ask whether the expert ever considered opinion X in her work? Is that question off limits (absent the Rule 26(b)(4)(B) showing) because the expert has, but not if the expert has not? And is the development of opinion Y somehow within the facts or data considered by the expert in developing opinion X? Ultimately, it may prove impossible to develop an entirely satisfactory resolution of these questions, but it is important to recognize that they exist.

An initial reaction was that an additional point to keep in mind is that this discussion relates to Daubert concerns. It is important to allow sufficient discovery to permit challenges to the proposed testimony under Daubert. A response to that was that the guarantee of discovery regarding facts or data should suffice for that purpose. But that drew the response that the expert’s work papers are the facts or data that the questioner needs. A follow-up to that point was that we must keep in mind that these are people who are getting on the witness stand. It is one thing to insulate their communications with counsel and draft reports, and quite different to prevent discovery regarding the work they did to develop that testimony.

One way of looking at the problem it was suggested, was to recall the views of the New Jersey lawyers. It seemed that they treated the New Jersey rule as providing “whole loaf” protection, and they said they were very satisfied with it. They felt that they could adequately challenge the opposing expert under that regime, and that it had eliminated much of the phony business that the 1993 amendment had introduced into federal practice. Moreover, it’s hard to see what the difference is between a draft report and a work paper. What if the expert writes some notes on the side of her draft report? Are those protected or not under the half loaf approach?

A response regarding the New Jersey experience was that at that time we had not really focused on this work paper issue, so it’s hard to say for sure what the reaction on that would have been. And it is important to foresee the far-reaching consequences of saying that such materials are generally immune to discovery. “We are moving into a different sphere conceptually.”

Protection may allow the attorney to eliminate from consideration anything that raises questions about the opinion to be advanced.

A reaction was that to the extent facts or data are included in work papers, they should be discoverable. But it is important to realize also that if discovery is more generally allowed there simply will not be work papers.

A question was raised about stipulations to circumvent the current federal practice. We have been told that they are frequent. Do they go beyond draft reports and attorney-expert communications to include work papers as well? If not, why should we take that extra step?

The initial response was that generally there is no explicit stipulated protection for work papers, and that they are disclosed to the extent they include analysis or tests used by the expert in forming the opinions reached.

That raised the question whether such work papers are redacted to eliminate communications with counsel. How does one separate out the work prompted by interaction with counsel from the work independent of that? One reaction was that the "actual calculations" would be subject to discovery, but it was recognized that this distinction might be very difficult in some instances. The work done by the expert might be prompted by or integrally related to communications with counsel. How can a rule unravel such an integrated set of materials? Could a judge do so in camera? Maybe this actually is an argument for the full loaf treatment because there is no meaningful way to police the half loaf treatment.

Another view offered was that this discussion frames the trade-off involved. One risk is that we might adopt amendments that really wouldn't change the costly and wasteful behavior that prompted us to consider the changes in the first place. The alternative risk is that we will weaken the ability of litigants to challenge the other side's expert witnesses. The argument for taking the full loaf step is that the current intense inquiry into the process by which the expert reached the conclusions really is a distraction that produces little of value in determining whether the opinions should be accepted, whether at the Daubert stage or before the jury. The real test is whether one can challenge the conclusions themselves, not details about the work done to reach them. And the present reality of intense discovery about that work shows that there is big cost to be paid for a small advantage in terms of useful information about the expert opinions being offered. The New Jersey attorneys said this tradeoff was a good one in their experience.

A reaction to this view was that, at the grand level, this pits the interest in truth against litigation efficiency. That brought the rejoinder that the current activity generates very large expenses, but not much more truth. How can one say that we are not revealing more truth under the current regime? came the response. The answer was that participants in the mini-conferences, particularly the one in January, said that there were very few instances in which anything of value actually came from all this effort, in part because lawyers arrange that no work papers or draft reports come into existence.

Another point offered was that the current regime encourages the use of "professional" witnesses who know how to leave no tracks and are willing to work on those terms. If one considers an academic witness, one finds that the person may have world-recognized skills in a discipline, but not have these "testifying" skills. As a result, it becomes necessary to prepare the academic witness on things like not taking notes, which may not sit well with this witness.

Returning to the issue of insulating work papers, it was asked how this all really plays out. Given that we are leaving in "considered" as the verb with regard to "facts or data," why

can't you ask about other facts and data without work papers. The response was that where the expert only gets the "right" result on the 37th test the argument will be that it is the only one considered in reaching the conclusion offered in the testimony. Perhaps the witness will say "I don't recall what the results were on other tests, but I have them here in my briefcase." The reaction to this point was that this is the sort of situation in which a justification can be made for ordering production even though this material is protected.

Reflecting on the choice between the full loaf and half loaf approaches as a matter of rulemaking, it may be that we are confronting a choice about whether to "be bold" in proposing rule changes. But on the other hand, there is a considerable possibility that even the half loaf approach would be regarded as quite controversial and bold enough. This observation prompted the reaction that the work papers issue would be the most controversial if included in an eventual rule amendment proposal.

This discussion drew the observation that we are not addressing the scope of inquiry at trial, and that at trial it seems that inquiry about the alternative tests, methods, and approaches would almost certainly be allowed. That being the case, it must also be true that they are permissible during discovery. So in the 37 tests situation, it must be true that one can press the witness to admit doing the 36 other tests. The question is whether broader discovery is worth the price in artificial behavior. At least one possibility is that the attorney will hire a consultant to do the 37 tests, and then tell the testifying expert which one to do, and to do only that one.

Attention focused on the scope of the "considered by" language now in the rule in relation to the limitation that it relates to those facts or data the witness used in forming the opinions that would be expressed in testimony. What if the position given is that the expert did Test A and Test B, but is testifying only to a conclusion based on Text A. Does this mean that the Test B results were not considered by the witness in forming the opinion to be offered at trial?

Reflecting on these issues, one member suggested that it is likely that no rule would entirely eliminate the temptation for some lawyers to hire a second consulting expert. But rule changes can reduce the number of such situations. "Personally, I'm very pessimistic about drafting a 'work papers' provision." At the same time, protecting attorney-expert communications and draft reports would do a lot to ameliorate the problems we've heard have developed since 1993. It is important to leave in "facts or data considered" because that's the best we can do as a rulemaking matter. The caselaw will have to address the application of this rule language in individual cases, hopefully in a realistic sensitive to the dynamics of this subject. Potentially, trying to insulate work papers could turn into a tinderbox.

Another member agreed that a key element of the rule is the interaction of the facts or data considered provision and the provision limiting disclosure to those considered in forming the opinions to be expressed. Should "in forming" be dropped? This raised the question what the limit then would be? Although the expert's entire professional experience is arguably relevant in the sense that questioning could focus on it to determine the expert's qualifications, it is hard to know what disclosure is required unless it was the basis for the opinion. High school physics is in the background somewhere, however, but that comes out in regard to the witness's qualifications not as a basis for the testimony in the "facts or data considered" sense.

Questioning the expert witness on alternative tests should be open, it was urged, and would be even with the whole loaf amendment. Moreover, it was added, if there is an expert who has done Text A and Test B and then testifies only on the basis of Test A, "you can cut that witness up on cross examination" without work papers.

This prompted the reminder that experts are used in other ways than at trial. For example, they may testify in support of class certification. Their affidavits or testimony may be used in support of summary judgment motions. Even if jurors may adopt a common sense skepticism about seamless expert testimony, the veneer of authority may actually be tougher to pierce in those settings without access to work papers.

The conclusion was that the work papers issue should be brought forward for discussion by the full Committee. It would be useful to present a version of possible rule language in a footnote of the memo to the full Committee in order to permit Committee members to appreciate how a rule change might effect such changes. But this should be presented only for purposes of focusing discussion, not as something the Subcommittee is presently thinking about advancing. At the meeting, it would be helpful to have "pro" and "con" presentations about taking the 7 "whole loaf" approach.

NOTES ON CONFERENCE CALL
DISCOVERY SUBCOMMITTEE
Sep. 28, 2007

On Sep. 28, 2007, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. David Campbell (Chair, Discovery Subcommittee), Hon. Mark Kravitz (Chair, Advisory Committee), Chilton Varner, Daniel Girard, Anton Valukas, Prof. Edward Cooper (Reporter to the Advisory Committee), John Rabiej, and Prof. Richard Marcus (Special Reporter to the Advisory Committee).

The call was introduced with a summary of the progress made during the call on Sep. 12 - (1) that the protection for attorney-expert communications should be in Rule 26(b)(3); (2) that some method of identifying the counsel with whom such protected communications occur should be in the rule, but perhaps that "retaining" is not the best way to say what we want to say; and (3) that draft report protection should not be limited to drafts "prepared by the expert," so that phrase should not be retained for further discussion.

Against that background, there seemed at least five possible topics for current discussion: (1) the level of protection for draft reports; (2) whether to provide protection for "work papers;" (3) the duration of this protection -- whether limited to this case or also with regard to other cases; (4) attorney disclosure regarding experts not required to provide reports; and (5) draft Committee Note language.

The discussion began with the draft report topic. By way of introduction, it was noted that the initial orientation had been to provide absolute protection for such material, but that questions were raised on whether absolute protection was warranted. It is possible under Rule 26(b)(4)(B) to obtain discovery of work done by nontestifying expert consultants in exceptional circumstances; should it be harder to obtain discovery of work done by testifying experts? But routine inquiry into draft reports -- perhaps even a requirement to disclose them -- is ordinarily a useless distraction. So insisting that there be no disclosure except of the final report seems sufficient, and the question might be limited to whether there should be a prohibition on discovery of draft reports under all circumstances. Perhaps, instead, discovery should be allowed when a showing sufficient to overcome Rule 26(b)(3) work product protection is made.

An initial reaction was that the question of draft reports blends with the issues presented by the "work papers" question. There is reason to be concerned about providing too much protection. The goal should be to eliminate the "freebie" aspect of this form of discovery. Under the present regime one can get discovery of attorney-expert communications and draft reports and therefore one goes after this freebie. Going beyond eliminating the freebie may be dangerous.

Another view was that the right approach would be to provide the same protection to draft reports that is provided to nontestifying experts' work under Rule 26(b)(4)(B). Assuring access to the facts and data considered by the expert is sufficient to equip the other side to cross-examine the expert witness, and discovery of draft expert reports should be limited to very rare situations. This observation prompted the question whether there would accordingly be a requirement to preserve drafts, and the response that this was uncertain.

At this point, it was suggested that the issues might be separated into two steps: (1) making clear in Rule 26(a)(2)(B) that there is no disclosure requirement for draft reports, and (2) including draft reports in Rule 26(b)(3)(D), which will protect attorney-expert communications. A reaction was that it is possible that there could be draft reports that are independent of expert-attorney communications. The response was that expert "work papers" may originate with the

expert and not involve attorney interaction, but that the report is something prepared for the litigation and almost certain to implicate attorney-expert communication.

Another view was that this is "really preparation for trial." All of this should be in the realm of work product, subject to the requirement that there be disclosure about the facts and data considered by the expert in reaching the conclusions to be presented at trial. A reaction was that it is important to "run conceptual tests" on the impact of this protection -- to consider scenarios that can occur and, in light of those, decide how much protection is appropriate.

At this point, it was asked whether there was any support for absolute protection for draft reports, and there was none. It was also asked whether there was any support for routine and free discovery of draft reports, and there was none. Accordingly, "the question is how to find the middle point." Work product protection seems like a useful middle point.

Another suggestion was to avoid multiple tests. It is desirable to invoke a currently recognized test -- such as the work product test in Rule 26(b)(3) -- that could be employed in this context. Devising a different standard for this situation would unduly complicate things. Therefore, using the same standard as for the attorney-expert communications seems wise.

But it was cautioned that there is a need to be careful to limit the Rule 26(b)(3)(B) protections for mental impressions to the mental impressions of counsel. The idea of Rule 26(b)(3) is to protect the trial preparation work of counsel, not of others who may be working on preparing the case. That observation prompted the reminder that Rule 26(b)(3) on its face covers work done by others, not just lawyers. Insurance claims agents, for example, are covered. Unless the work of these people is presented to the other side as a report it is protected. And the "waiver" resulting from such disclosure is limited to the topics on which disclosure focuses. Trying to redact a draft report would lead to all sorts of difficulties; there would be a discovery field day with the redacted report. Better to keep the draft report off the table.

There was agreement that if all of this material is work product, it would be good to use the familiar standard for such material. That prompted an expression of uneasiness about whether this would carry over to "work papers." Different considerations are involved there. It is one thing to say that communications with counsel and draft reports should be viewed as work product. We should be very careful about going beyond that. In general, the expert's work papers are different from attorney communications and from draft reports.

This discussion prompted the observation that the definition of draft reports and work papers -- and the distinction between the two -- may be very difficult. For one thing, counsel could tell the expert to call everything a "draft report," thereby blending the two. The point is that "we want the expert's own thoughts discoverable." At the same time, those thoughts may be shaped by counsel; can we keep these separate?

The problem can be illustrated with an example: Suppose the attorney tells the expert to prepare a draft report, and the draft comes back with conclusions *X* and *Y*. Then the lawyer says "Take out *Y*. That's not helpful to us and the other side will use it against us." The expert does so and a final report is provided to the other side with only conclusion *X*. Afterwards, the expert's deposition is taken and the examining attorney asks "Did you reach any other conclusions?" Or perhaps the examining attorney asks "Did you consider conclusion *Y*?" What should happen then?

This example prompted the response that "It depends on how separate *X* and *Y* are." And a further response: "But this comes up all the time." One reaction is to think of the expert who

is consulted about unrelated topics; maybe that should be considered to invoke Rule 26(b)(4)(B) as to the topics not included in the testimony even after the expert is designated a witness with regard to certain topics. For example, in an antitrust case, the expert consultant might report to counsel early in the litigation on theories for the case under both section 1 and section 2 of the Act, and the lawyer might say "I'm only interested in pursuing section 1 claims; don't worry about the section 2 claims." If during a deposition the other side wants to ask about section 2 claims, can the expert say "I'm retained only to testify about section 1"?

Another example was offered: The issue is to value certain property. One way of doing it is a cashflow method, and another is the comparable sales method. The expert initially does both analyses, and they yield very different results. Then the lawyer says "take out the comparable sales method." In the deposition the expert is asked "Did you consider any other methods of valuing the property?" or "Did you consider a comparable sales method?" What should happen then? Maybe the protection should be limited to the fact of communication with the attorney and not apply to the analysis of the expert.

This example prompted the response that what matters is that the question be asked properly. "Did you reach any other conclusion?" is a proper question. "Did you consider comparable sales?" is a proper question. "What did you and the lawyer talk about?" is not a proper question.

The discussion expanded to consideration of work papers. One tentative reaction was that discovery can reach work papers, but should not extend to draft reports. "Usually experts have notes. Usually the other side can see them." Another reaction was that we can't eliminate all game playing. The focus should be on whether the work papers bear on the conclusions in the report, and thus the opinions to be expressed at trial. If everything about communication with the attorney is excised, shouldn't we start there? "I routinely produce and obtain the expert's file."

A response was that there is a tension. Suppose the attorney says "Why not run these calculations?" Then they turn out badly. If I do that with a consulting expert, I'm not concerned. But if this is my testifying expert I have a big problem. So do I have to hire a consulting expert anyway, even after we have this new protection? Won't that mean that our effort to streamline practice has failed?

One reaction was to compare a situation in which the lawyer does not propose specific types of tests, but rather says "Contact me before you do any tests or analyses, and I'll tell you whether I think that's worth doing (and paying for)." Can it then be said that the lawyer was sufficiently involved in the decisions about what tests to do so that selective revelation is protected by the rule?

Another reaction was that you simply would not take this sort of chance with a testifying expert if this will make it discoverable. There is a distinction between the process the expert goes through to develop the opinion that will be presented at trial and another form of work done to develop an opinion that is not used at trial. If the goal is to eliminate the need for a second set of experts, we need to find a way to protect that second form of activity even when done by the same expert. This prompted the additional reaction that the New Jersey attorneys said that it was important to them to have protection for the sensitive interactions they needed to have with their experts. Working on alternative analyses is one of the most sensitive tasks for counsel.

A reaction was that it would be desirable to be able to define a bright line between the consultant and the testimony functions of experts. Another reaction was that the "collaborative process" language in the New Jersey rule might be a method of identifying what we want to

insulate. A third reaction was that this should lead to the conclusion that work papers should be protected. But drawing the line between work papers that relate to the opinions in the final report and those that are not may be very difficult. Yet that might lead to lawyers telling experts not to write anything down until after the final report is prepared. "We would really be right back where we are." This prompted agreement -- the New Jersey lawyers said there won't be "gotcha" material in the work papers, and that going through what there is is not worth the effort. The basic objective would be to require that calculations made to reach the conclusion in the final report should be available, as should inquiry into whether certain points or approaches were not considered. But it may often be very difficult to distinguish what is a basis for the opinions in the testimony and report and what is not.

Another view was that "I'll tell my expert you need to be able to explain all methods of dealing with this problem." That is the way a good lawyer will prepare an expert. The problem presented when the attorney asks that a really relevant opinion be ditched is very rare. The lawyer knows that these issues have to be addressed. This prompted the reaction that it can often happen that there are, for example, two possible causes and the lawyer says "We're focusing on no. 1, so forget no. 2." There's no problem with holding back draft reports and communications with attorneys, but curtailing discovery of these alternatives is dubious.

This discussion prompted another example -- The issue in the case is a process. The expert has done 37 tests and finally found one that turns out "right." The expert then discards the records of the first 36 tests. In deposition, the expert is asked "Did you do any other testing?" The expert answers "no." Without access to the work papers, what can be done about this? One reaction was that this is perjury. The tests are all really about the opinion offered, and they have to be subject to discovery. Another reaction was that the issue is whether there is a work product objection to the question -- "You can answer to the extent you answer does not include protected work product." Then the answer is "none."

Having the documents may be crucial to handling these issues. "I was taught that if you don't have the documents you can't challenge the witness effectively." So this might require retention of work papers?, it was asked. The response was that "that's a really tough question." Perhaps there will be nothing more than the report, however, because the attorney says that is the way to avoid discovery.

One reaction to this concern was that it often happens that the expert says "It's not in my report, but I have it in my notes." So notes do exist separately from the report. But an alternative example was offered: When there is a dispute about groundwater, the way to address it is by developing a model to permit conclusions about the situation. The expert will laboriously build a model that most reliably replicates what is probably happening underground. This will be an elaborate process, but once the expert has developed a reliable model the material related to other models will be discarded. All the work papers on the model used would be turned over, but the additional material on the models not used would not be retained and not be turned over. Should that be all right?

The immediate response was that it should. If the other side has all the information to check the model actually used, there is no need to provide additional information on the models not used. Each side already challenges the other side's models and tries to justify use of its own. Another agreed that "You have to disclose the basis for the model used."

This discussion prompted the observation that "this is a very diverse world, and the various examples offered show how difficult it is to generalize." The groundwater situation may well raise different issues from a medical malpractice case in which the question of causation

must be unraveled. Another type of situation is accident reconstruction. Many other examples can be imagined. The point is that there may understandably be different attitudes about disclosure and discovery regarding these different situations.

Another question raised was whether the rule in New Jersey is really the right referent for the federal courts. The federal courts have to deal with such a broad array of types of cases that the New Jersey experience may not be comparable. A reaction to this question was that the experience should not be that different. The basic point is that preparation of drafts is always an iterative process with the lawyer. But notes and work papers are different.

This prompted the question "what's wrong with a rule that protects communications and drafts, but not work papers?" The answer was that the lawyer will not feel sufficiently comfortable with such a rule so that the practice of hiring two sets of experts will continue. A reaction to this was that even with broader protection the guarantee of discovery of "facts or data" relied upon by the expert would weaken the confidence of the lawyer. Indeed, it may be that a good lawyer will not be willing under any rule to do "truly exploratory stuff" with the expert who will testify at trial. It will still be necessary for the expert witness to respond about results he or she reached with any work done pertinent to the conclusions eventually advanced.

The counter was that the objection that one has to hire two sets of experts will not be truly answered with the narrower rule permitting discovery of work papers. Although saying facts and data are not protected could conceivably affect that decision, running different models, etc., is a different matter. In "truly mega-trials" this does not matter. But more generally it does.

A question was raised about whether it would be appropriate to publish two versions of a possible rule and invite public commentary on both rather than "trying to decide today." The response was the alternatives are sometimes published, but usually only where the Advisory Committee as a whole is at a standstill. For the present, it does seem that the Subcommittee has found itself uncertain in light of nuances that it did not appreciate or unearth initially. The topics on which we have focused are not the ones that were initially raised with the Advisory Committee, or that were directly addressed by the two mini-conferences that have been held. The problem for the present is how most profitably to grapple with the hard issues we've encountered. And one very valuable resource is the rest of the Advisory Committee.

The situation was summed up as dealing with the extent of the protection for work papers. All seem agreed to protecting communications with attorneys and draft reports. The question is whether, beyond that, work product protection should apply to the work of the expert in developing the opinions presented, and in exploring other analyses. Ideally, that might be easy -- all that bears on the opinions to be presented at trial should be subject to discovery. But in fact the dividing line is difficult to police. If one is talking about a single expert performing both consultant and witness functions, one is dealing with a person who is aware of the work done in the consultant mode. "You can't erase memory cells of experts. Lawyers face this all the time. That's why lawyers decide not to tell experts certain things."

The question for further reflection was summed up as involving what could be called the "half loaf" and the "full loaf" rulemaking responses:

- (1) The half loaf response: A rule amendment could seek to protect attorney-expert communications and draft reports, but whatever the expert considered in developing conclusions and whatever notes, etc., the expert generated in that activity would be subject to discovery. Work papers would not be protected.

(2) The full loaf response: The only topic on which discovery is allowed is the opinion reached. It is not permissible to inquire at all about the collaborative process between the lawyer and the expert or how that may have related to the development of the opinions to be presented. Work papers would ordinarily not be discoverable although probing the grounds for the opinions to be presented would be permitted.

A reaction was that the full loaf response might raise doubts about permitting full discovery about the facts or data considered by the expert. The reaction was that allowing the broadest discovery of "what did the expert consider" will lead to hiring a second set of experts. If so, this rule change will not make a big difference. Put differently, the half loaf response may not accomplish much of what we set out to do and leave the basic problem unsolved. The expense that the post-1993 regime produced may not be lessened by the half-loaf solution.

The problem may be most acute in the "small" case rather than the mega-case, in which duplicative expert assistance is most likely. The problem is to develop a rule that assures that full discovery will be allowed of facts and data regarding the opinions to be expressed but also clearly and reliably guards the consultative process that may be going on simultaneously to the development of the opinion so that there is no felt need to hire a second set of experts.

For present purposes, the objective will probably be to present the challenging problems that have emerged to the full Advisory Committee. That might be expressed in terms of the choice between the half loaf and the full loaf approaches outlined above. The lengthy and ongoing Subcommittee process not only has unearthed many complexities, it has also avoided enmeshing the committee in a number of problems that were not initially apparent. A discussion with the full Committee will be timely.

We can offer the full Committee evolved drafts on some points -- Rule 26(b)(3) treatment for the attorney-expert communications, Rule 26(a)(2)(A) treatment for the disclosure regarding the expert who does not have to provide a report, and Rule 26(a)(2)(B) revisions to remove the current language that is read to require disclosure of all attorney-expert communications. In addition, it is relatively easy to see that disclosure of draft reports should not be required by the rule, and perhaps the amended rule should say that clearly.

On the question whether to go with the "half loaf" or the "full loaf" approaches, it might be that an effective method for presenting it would be to try to articulate during the full Committee meeting the strongest positions in favor of or in opposition to each version. It might be that such presentations could be assigned to members of the Subcommittee for purposes of the full Committee meeting.

A further Subcommittee conference call was scheduled for 7:15 a.m. Pacific time on Thursday, Oct. 11, to address the issues one more time before the full Committee's meeting. But it is likely that at least some topics will need full examination and discussion during the full Committee meeting.

NOTES ON CONFERENCE CALL
DISCOVERY SUBCOMMITTEE
Sept. 12, 2007

On Sept. 12, 2007, the Discovery Subcommittee of the Advisory Committee on Civil Rules had a conference call. Participants included Judge David Campbell (Chair of the Subcommittee), Judge Mark Kravitz (Chair of the Advisory Committee), Chilton Varner, Daniel Girard, Anton Valukas, Prof. Edward Cooper, John Rabiej, and Prof. Richard Marcus.

Discussion at the outset concerned the pace with which these issues could be moved forward, particularly whether it was important to try to have a final proposal for the November Advisory Committee meeting so the expert discovery issue could be presented for decision (or at least discussion) by the Standing Committee at its January meeting. The conclusion was that there was no urgency about having a final proposal for the November meeting.

By way of further introduction, Judge Campbell noted that because there was limited time for discussion during this call, it would be desirable to focus on some issues and defer other issues for later discussion. Most important would be reaching a decision on where to put a rule provision protecting attorney-expert communications. In any remaining available time after that topic was resolved, the discussion would turn to draft reports, then expert "work papers," and finally the draft committee notes. The question of attorney disclosures regarding expert witnesses not required to provide reports seemed least in need of thorough further discussion.

Location for the protection
of attorney-expert communications

The first topic was where to locate the attorney-expert communication provision. The provision itself was discussed during the Aug. 17 call and sought to invoke the two-tiered protection accorded work product under Rule 26(b)(3). Three locations were presented in the materials. First, it could be in Rule 26(a)(2). Second, it could be in Rule 26(b)(4)(A). Third, it could be in Rule 26(b)(3).

This choice was introduced as involving a number of considerations. One is that the problem originated in Rule 26(a)(2) in the amendments of 1993. Making a change there would accordingly deal with the problem at its source point in the rules. At a minimum, the "or other information" language would have to be removed from Rule 26(a)(2) and "factual" added, with an explanation that the goal of this amendment was to change the notion that all information of any sort -- including communications with the lawyer -- must be disclosed. The Committee Note to that change could call attention to protective provisions placed elsewhere in the rules regarding attorney-expert communications. But adding an affirmatively protective provision would not so necessarily fall in this portion of the rule. The proposed change drew its content from Rule 26(b)(3), so that might be a more suitable location. Including the change in Rule 26(b)(3) would have the advantage of making it clear that the protection applies with regard to all forms of discovery, including discovery against nonparties. But if the provision were put there, the "subject to Rule 26(b)(4)" language in the rule might seem confounding. In addition, it would be important to deal with the limitation of the basic Rule 26(b)(3) protection to "documents and tangible things," for the goal is for the protection to extend much farther and include any mode of communication. Another alternative would be to put the provision in Rule 26(b)(4)(A), which is the rule about the activity that is most likely to give rise to problems -- depositions of expert witnesses. But that provision does not seem to apply to other forms of discovery, and it might seem odd to draw its protections from Rule 26(b)(3).

An initial question was whether it was essential that such a provision be located in only one of these three locations. A reaction to that was that although the problem began in Rule

26(a)(2), it had “spun out of control,” so that the point of origination seems not to be important to deciding where to put the solution. That prompted the reaction that the provision could go in any one of these three locations. This is a choice on which we can’t go wrong. The question is whether there is a strong consensus for one particular location.

One reaction was that it seemed better in Rule 26(a)(2)(B) than the other locations, although that conclusion was somewhat based on the “feel” of the provision there. This drew the response that at the end of the day it’s a discovery/deposition issue, not a disclosure issue, so Rule 26(a) -- which is about disclosure -- seems not to be the right place. That drew the agreement of another participant -- “put it in the discovery rule.” Another participant noted that the title of Rule 26(b) is “Discovery Scope and Limits,” which is what this is about. Another response was that although Rule 26(a)(2) is currently a focus of concern, in five years the current concern about Rule 26(a)(2) will be forgotten if the rules are amended.

Another participant expressed a preference for Rule 26(b)(3). This is not just about depositions, and it is more of a Rule 26(b)(3) proposition. There would then be the problem of the “documents and tangible things” limitation in (b)(3), but (b)(3) is not a privilege rule and putting the protection there should not get into difficulties that can result from seeming to create a “privilege.” That prompted support from another on the ground that, in effect, we would be putting protections regarding the work of the expert into (b)(3), which is the logical place for them to be. A suggestion in response to this point was to put “subject to Rule (b)(3)” in Rule 26(b)(4), but it was objected that such an addition would seem circular, with (b)(3) being subject to (b)(4), and (b)(4) being subject to (b)(3).

At this point, a consensus emerged that 26(a)(2) was not a preferred location for a rule change. Discussion focused on the choice between (b)(3) and (b)(4). Regarding Rule 26(b)(3), a preference was expressed for the footnote rule language over the text rule language. The text language says that communications are “protected as trial preparation material under Rule 26(b)(3)(A) and (B).” The alternative locution is to state that a party may obtain discovery regarding communications between counsel and an expert only by satisfying Rule 26(b)(3)(A)(i) and (ii), and then subject to the protections of Rule 26(b)(3)(B) with regard to counsel’s opinions, etc. The goal is to make an affirmative statement of the protection that is clearly broader than the (b)(3) protection only as to “documents and tangible things.” The footnoted version and the text version may be combined in a mix-and-match arrangement to achieve the proper level of protection. But it might be best to begin “All communications between [retaining] counsel and an expert witness” are protected to deal with the “documents and tangible things” concern.

It was suggested that the language “subject to Rule (b)(4)” might profitably be removed from (b)(3). The response was that doing so would create further problems. For example, that might weaken the protections of Rule 26(b)(4)(B) for the nontestifying expert.

The consensus was to use (b)(3) as the location, as set forth on p. 14 of the memo for the conference call, with consideration in the drafting of including features of the footnoted version on that page.

“Retaining” counsel

Discussion turned to whether the protection should be limited to communications between the expert witness and “retaining” counsel. The topic was introduced as focusing the protection of the problem that had been identified. Both the New Jersey rule and the ABA

proposal (which was probably heavily influenced by the New Jersey rule) are limited to retaining counsel.

An initial question was whether in-house counsel would be included. The response was that this seemed simpler than the issue presented when a defendant is represented by a number of outside lawyers who have retained the same expert witness; this situation should be covered by a rule referring to retaining counsel.

Another initial reaction was that there could arise difficulties when an expert was independently retained by different lawyers to deal with similar issues. This might be a problem, for example, with an expert who testified for various plaintiffs with regard to a given product or service claimed to be defective.

A question was raised about who retains the expert -- the attorney or the party? It would be important to think about that question; simply saying "counsel" would be too abstract. On this subject, it is worth noting that Rule 26(a)(2) requires disclosure by a party, and if (as proposed now) this is amended to require a disclosure of the opinions and their basis when a report is not required it might be that the focus should be on the parties. Maybe "a party's counsel" is the right solution.

Yet another problem might arise when the expert has talked to both sides. How should one approach protections then? That drew the response that this sort of thing "happens all the time." But one response to that point was that caselaw provides a basis for disqualifying the expert under such circumstances. Nonetheless, another participant opined, it would be better to think in terms of the party rather than the counsel. That's the right approach for the work product and attorney-client privileges. Generally one will provide by contract with the expert that the expert will not represent adverse parties in the case.

It was suggested that this discussion shows that leaving in "retaining" is important. A reaction to that suggestion was that in (b)(3) "retaining" covers all counsel we would want to cover. But a concern was raised about whether this would invite litigation about who retains whom. Maybe "the party's counsel" would be a better way to put it. That could lead to protection for communications between "a party's counsel and a person who has been identified as an expert witness under Rule 26(a)(2)(A)." But this could cause complications if counsel for both sides were in touch with the same expert. Should protections apply to all such communications?

Adding "in any form"

A different concern was whether it is useful to add "in any form" as is included in brackets. This might provide rule language to emphasize that the "documents and tangible things" limitation of Rule 26(b)(3) does not apply to this protection. But the phrasing "All communications . . ." should be broad enough to accomplish that purpose, and the point can be emphasized in the Committee Note. Moreover, saying "in any form" here might raise a negative inference about other rules where that phrase is not included.

* * * * *

Ultimately, the resolution was that these issues about "retaining" counsel and "in any form" should initially be addressed by the Special Reporter in the next round of drafting.

Draft reports

The current draft reports draft was introduced as including an absolute protection against discovery of draft reports but raising a question about whether to include the bracketed language "prepared by the witness." So far as that language is concerned, it might be preferable to include it to permit inquiry into whether the lawyer actually was the source of the report, but if the report itself is the thing that matters this added language seems unnecessary. Moreover, preoccupation with "the three sentences added by the lawyer" would not be useful. Leaving in this phrase will reopen the door for litigation about draft reports.

The discussion broadened to the question whether anything more need be said than that only a "final" report must be disclosed. Perhaps the overall package -- with its strong protection for communications between the attorney and the expert -- is sufficient to assure protection for draft reports so long as the disclosure requirement is only for the "final" report. The Committee Note can confirm that there is no disclosure of draft reports.

Another suggestion was that the draft report is really a feature of the communication between the expert and the lawyer. Lawyers ask to see drafts and comment on them. That's just one aspect of communications between the expert and the lawyer. If we have properly provided protections for those communications, why should there be any additional or separate protection for draft reports?

It was noted that putting in an absolute protection for draft reports made them less discoverable than other communications between the lawyer and the expert. Even work done by a nontestifying expert consultant can be discovered under exceptional circumstances pursuant to Rule 26(b)(4)(B). Making draft reports by testifying experts harder to obtain might be peculiar. Moreover, lawyers might begin to tell their experts to open a file entitled "draft report" at the beginning of involvement in the case and make all their notes, etc., there. This could lead to gamesmanship.

Another suggestion was that this overlaps with the question of the expert's work papers. Maybe the answer is to put everything into that category. Indeed, maybe the goal should be to put the testifying expert in the same category regarding discovery as the nontestifying consultant. This drew the reaction that the two are really not the same. The nontestifying expert won't be on the witness stand, and the normal idea of expert discovery is that it's not a way to obtain information but only a method for arming a party to combat the other side's expert witness. So only in exceptional circumstances is it proper to require that there be revelation of what the nontestifying expert has done. Things are very different with the testifying expert. That, after all, was the idea behind adding the broad expert witness disclosure provision of 26(a)(2) in 1993. That provision may have gone too far, but insulating the testifying expert in the way the nontestifying expert is insulated would go too far the other way.

Another participant noted that this illustrates the sense in which we are caught between the goals of facilitating appropriate interaction between the lawyer and the expert witness and assuring sufficient opportunity to challenge the trial witness.

Another added that discovery of work done by the testifying expert is important. For example, if the expert did 37 tests before finding one that worked out the "right" way, it is important to permit discovery regarding the other 36. This issue overlaps with the expert "work papers" issue.

A further call to continue discussion of the issues raised by the memo for the Sept. 12 call was scheduled for Friday, Sept. 28, at 7:15 a.m. California time. At that time we should resume with discussion of the draft reports issue and then continue to the expert "work papers" question.

MEMORANDUM

To: Discovery Subcommittee, Advisory Committee on Civil Rules
CC: Mark Kravitz, Ed Cooper, John Rabiej
From: Rick Marcus
Date: Sept. 5, 2007
Re: Discussion materials for Sept. 12 conference call

This memorandum builds on the Aug. 17 conference call to present refined drafting ideas. It seeks to use the two-tier Rule 26(b)(3) standard as the protection for attorney-expert communications, and to offer three alternative placements for such protections -- in Rule 26(a)(2) (Alternative 1), in Rule 26(b)(4) (Alternative 2), and in Rule 26(b)(3) (Alternative 3). In any of those places, it seeks to make clear that this protection applies to all information about attorney/expert communications, not only information contained in "documents and tangible things," the limitation found in Rule 26(b)(3). And it also tries to make clear, whatever the placement, that this protection applies to any form of discovery.

Regarding draft expert reports, the memorandum presents a draft amendment to Rule 26(a)(2) that makes drafts nondiscoverable. It does not propose any ground for discovery such drafts. This draft is Alternative 4.

Regarding the expert's preliminary analysis or "work papers," the memorandum then offers various drafts of possible language to protect against discovery of documents, electronically stored information or tangible things that embody that preliminary analysis. It does not propose a broader protection for preliminary analysis because the Aug. 17 discussion indicated that such analysis may be a legitimate subject for discovery. As a result, making such discovery (or, perhaps trial questioning) permissible only when a stringent showing is made would seem unduly narrow. Indeed, the discussion below raises a number of questions about providing any protection at all for this material. This appears in Alternative 5.

Finally, Alternative 6 offers a revised treatment of the attorney disclosure requirement for expert witnesses who are not required to provide reports. It is in Rule 26(a)(2)(A), drops the former provision (iii), which might cause difficulties with treating doctors, and offers a broader alternative to mentioning treating doctors in the rule that includes a reference to all treating "health care professionals."

ALTERNATIVE 1: AMENDING RULE 26(a)(2)(B)

**Rule 26. Duty to Disclose:
General Provision Governing Discovery**

(a) Required Disclosures

* * *

(2) Disclosure of Expert Testimony

* * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data or other information considered by the witness in forming them, but -- except as to such facts or data -- all communications [(in any form)] between the expert witness and [retaining] counsel are protected as trial preparation material under Rule 26(b)(3).
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous ten years;
- (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

This draft leaves open a number of issues for discussion. The first is the "documents and tangible things" limitation in Rule 26(b)(3). The "(in any form)" addition above is designed to do that, and to provide a basis for Committee Note language explaining that objective.¹ The goal

¹ During the call on Aug. 17, another idea mentioned was to reword one of the alternative rule provisions then under discussion to say "including the protections of Rule 26(b)(3)" in order to extend protection beyond documents and tangible things. The goal of the language in the draft is to deal directly with the application of Rule 26(b)(3) protection no matter what the form of the attorney-expert communication. There might be some concern with using the "including the protections" language that it is not clear what the other protections are or where they come from.

is to include communications in written, e-mail, telephone, face-to-face, or other form. The question is whether the added parenthetical suffices for that purpose.

A second discussion topic suggested by the above redraft is whether “retaining” should be retained as a limiting factor on protecting discussions with counsel. It may be that sometimes experts have had discussions with other lawyers who would not qualify as retaining counsel but that we would want to protect against disclosure of those discussions. That concern might be most prominent with an expert who acts on behalf of the same client (a manufacturer, for example) in regard to a number of separate suits about the same product. Then there might be a risk if this protection were limited to “retaining” counsel, and that limitation left exposed all communications with other counsel for the defendant except the counsel of record in this particular case. More generally, there is an abiding and troubling problem about how to handle work product protection initially applicable only in another lawsuit. There undoubtedly could be other situations raising these issues.

One response to this concern is that the Committee Note could define “retaining counsel” broadly enough to encompass such situations. In other circumstances, “this litigation” in a protective order is defined to include all other cases involving claims about the same product, so maybe the same sort of attitude toward the term in this rule would solve the problem. The draft Committee Note below makes a first stab at this sort of statement. If the Note can introduce sufficient flexibility about the term “retaining counsel,” it may not cause a problem.

Another response to concern about limiting the protection to “retaining” counsel is that extending it beyond that situation would be too broad. The reason we are providing this protection is to reassure retaining counsel, and not others. The basic idea of putting protections into Rule 26(b)(3)(B) is that intrusion into this area (a) can require revelation of highly sensitive material about counsel’s tactics, and (b) does interfere with the effectiveness of the interaction between the expert and that person. We don’t have a similar reason for reassuring other lawyers (except, perhaps, in the multiple lawsuit situation mentioned above). It is hard to see why lawyers in unrelated cases, or lawyers who don’t have any cases but know the expert, would have similar 26(b)(3)(B) interests at stake unless the expert is working on numerous cases at once. As noted above, there is an abiding question about the extent of work product protection in other litigation, and this would be a related issue.

Another point is that this is not a problem that anyone has told us is important. The ABA resolution asks that protection be provided for communications “between an expert and the attorney *who has retained the expert*.” The New Jersey rule speaks of “communications between an attorney and any expert *retained or specially employed by that attorney*.” We were not told that this restriction produced problems in New Jersey practice.

Whether there would be a disadvantage to dropping “retained” is not clear. It is not likely that retaining counsel want to encourage their experts to talk about the case with other lawyers. And it might be odd if we were to cover such things as discussions with an attorney sister-in-law at Thanksgiving dinner. The idea of Rule 26(b)(3) -- particularly 26(b)(3)(B) -- is to guard the litigation preparation activity of the lawyer in this case. Extending that protection to other unknown lawyers (who may not have any cases) might be too open.

The difficulty is not really with what the protections should be but with the focus of current Rule 26(b)(3) on documents and tangible things. Hopefully the draft language, coupled with Committee Note language, will address the issue head on.

Another concern we discussed on Aug. 17 was whether the protections of Rule 26(b)(3)(A) were sufficient to guard against routine requests based on the argument "I think the lawyer coached the expert." The Committee Note language below has additional material designed to address this concern.

Another concern discussed on Aug. 17 was about providing similar protection against discovery from experts not required to provide reports. That might be a reason for locating this provision in another rule where it is not tied to the report requirement. But it was the report requirement that originally (in 1993) opened the door to this discovery problem that has emerged since 1993. If Rule 26(b)(3)(B) is amended in this way now, it would seem a real stretch to conclude that nonetheless the addition of a relatively narrow attorney disclosure provision (narrower than the interrogatory authorized before 1993) would accomplish there the sort of incursion into opinion work product that resulted from the broad 1993 description of what had to be disclosed. To the extent that including the protective provision here might be seen to open the door to discovery of attorney-expert communications for experts not required to provide a report, it would seem that a firm Committee Note could shut it.

Because Committee Note language looms large with regard to the issues left from discussion from the Aug. 17 call, and because it is still written in terms of a Rule 26(a)(2) amendment, I'll turn to that next. It could be revised to accommodate putting this provision in Rule 26(b)(3) or (b)(4).

Draft Committee Note

Rule 26(a)(2) is amended to address concerns about expert discovery. The amendments (1) limit disclosure and discovery regarding communications between retaining counsel and testifying experts to facts or data considered by the expert, (2) require disclosures regarding expected expert testimony from those expert witnesses including treating physicians not required to provide expert reports, and (3) forbid disclosure or discovery regarding draft expert reports. The court is authorized to order discovery of communications between counsel and experts only in unusual circumstances.

Before 1993, only very limited discovery was permitted regarding the expected testimony of expert witnesses. A party had a right by interrogatory to require other parties to identify such witnesses and provide a general description of the testimony they would offer. The court could thereafter order further discovery -- often by deposition of the expert witness -- but there was no right to any further discovery.

In 1993, major rule changes were made regarding expert discovery. The former expert-witness interrogatory provision was removed. Rule 26(a)(2) was added requiring disclosure -- without the need for a discovery request -- identifying every expert witness. As to all such witnesses retained or specially employed to provide expert testimony, and as to any employee of a party whose duties regularly included giving expert testimony, an extensive report was required, including a complete statement of all opinions to be presented at trial and the basis for those opinions, all exhibits to be used in relation to the opinions, a detailed listing of the witness's qualifications, including all publications during the prior ten years, a list of all cases in which the witness testified as an expert during the prior four years, and the compensation to be paid to the expert. Rule 26(b)(4)(A) was amended at the same time to provide each party the right to take the deposition of another party's expert witness. Rule 37(c)(1) was added to preclude testimony at trial on matters not properly disclosed before trial.

The current amendments change none of the 1993 provisions mentioned above. Indeed, by adding an obligation to provide disclosure about expert witnesses who are not required to provide expert reports, they strengthen disclosure about certain expert witnesses.

One aspect of the 1993 amendments has produced problems, however, which these amendments seek to cure. Under Rule 26(a)(2)(B), an expert report was also to include "the data or other information considered by the witness in forming the opinions." This provision has been widely interpreted to call for disclosure of all communications between counsel and expert witnesses required to provide reports, and to require production of drafts of expert reports. The Committee has been repeatedly informed that these features of practice under the 1993 amendments have produced considerable costs without corresponding benefits. The American Bar Association has adopted a resolution urging that court rules be changed to protect against undue intrusion into collaboration between attorneys and expert witnesses and to preclude production of draft reports.

The sole justification for discovery from retained experts is to permit preparation of effective cross-examination of the expert testimony to be offered at trial. Before 1993, the authorized interrogatory provided only a limited opportunity to prepare for expert testimony at trial. The 1993 amendments' introduction of disclosure and the expert report, combined with depositions of right, provided a valuable expansion of that opportunity. This expansion could be particularly important in relation to determinations whether proposed expert testimony should be admitted under the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The Committee has been told repeatedly that routine discovery into attorney-expert communications and regarding draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts -- one for purposes of consultation and another to testify at trial -- because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses, often called "core" or "opinion" work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot. At the same time, attorneys often feel compelled to adopt an excessively guarded attitude toward their interaction with testifying experts that impedes effective communication. Experts might adopt strategies that protect against discovery but also interfere with their effective work, such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers' memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.

Discovery or cross-examination focused on the details of attorney-expert communications, or minor variations between draft reports and final reports, can consume much time without producing corresponding benefits. Only rarely -- if at all -- does such discovery contribute significantly to a court's decision whether to admit proposed expert testimony under *Daubert* or to a jury's decision whether to accept or reject the expert's testimony at trial. Much more often, inquiry into these matters has proved to be a waste of time and money.

Recognizing these drawbacks, experienced attorneys often stipulate to forgo disclosure or discovery regarding attorney-expert communications beyond the facts or data considered by the expert, and to forgo disclosure of discovery of draft reports. The widespread use of stipulations to avoid the effect of broad interpretations of Rule 26(a)(2)(B) is a signal that the rule provisions interfere with effective practice. At least one state -- New Jersey -- has amended its discovery rules to insulate against such discovery. See N.J. R. 4:10-2(d)(1). The Committee has been

informed that the New Jersey rule change was well-received by the bar, and that it has worked well in practice.

Rule 26(a)(2)(B)(ii) is therefore amended to provide that attorney-expert communications are protected as trial preparation materials under Rule 26(b)(3). Accordingly, neither disclosure nor discovery may ordinarily inquire into attorney-expert communications. [All communications between expert witnesses and retaining counsel are protected as trial preparation material. The amendment provides that Rule 26(b)(3)'s protection extends to all such communications "in any form," such as by e-mail, telephone, or in face-to-face interaction. Thus, this protection is broader than the protection in Rule 26(b)(3) for "documents or tangible things." As the technology of communication develops, new modes of interaction may emerge; this protection should extend to attorney-expert communications by any such means.]²

[The same protection applies to attorney communications with experts not required to provide a report. Rule 26(a)(2)(A) is amended to require limited disclosure regarding the expected testimony of such expert witnesses in order to put other parties on notice of their opinions or conclusions. Because this disclosure includes a much narrower array of topics than the report requirement, there should be no room to argue that this limited disclosure obligation supports discovery regarding attorney-expert communications. The purpose of the amendment to Rule 26(a)(2)(B) is to protect all such communications.]³

The protection provided for attorney-expert communications under Rule 26(a)(2)(B) extends to all discovery methods. It provides protection under Rule 26(b)(3), which applies to all discovery and to nonparty discovery via subpoena.⁴

Discovery is permitted regarding such communications only in limited circumstances and by court order. No such discovery may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) -- that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be extremely rare for a party to be able to make such a showing with regard to expert-attorney communications.

Rule 26(a)(2)(B) requires disclosure of all facts or data considered -- not just relied on -- by the expert in forming the opinions to be presented at trial. Searching examination of the development of the expert's opinions, including consideration of alternative approaches to the issues presented and methods or information not considered by the expert, is permitted in deposition or at trial.⁵ A party that believes full disclosure has not been made with regard to such facts or data may present that contention to the court under Rule 37, but an argument that there has not been a full disclosure of such facts or data is not a ground for broaching the protection

² This is first cut effort to deal with the "documents and tangible things" limitation of Rule 26(b)(3).

³ This is the initial effort to address concerns about discovery concerning attorney communications with experts not required to prepare reports. It might be clearer to provide this protection in another rule -- perhaps Rule 26(b)(3) itself -- so that such an explanation would not be necessary. But this explanation could suffice.

⁴ This is another initial effort to address a concern raised in discussion on Aug. 17.

⁵ As noted below in regard to Alternative 5, this assurance might be weakened by adoption of a strong protection for "preliminary analysis" or "work papers" of the expert witness.

against inquiry beyond that into attorney-expert communications. To the contrary, the assumption of the rule is that the broad disclosure the rule requires should abundantly empower the interrogating lawyer. Against this background, it is not enough for a party to suggest that intrusion into attorney-expert communications might yield something more of value to examining the expert witness.⁶

In the rare case in which a party does nonetheless make a showing of such a substantial need for discovery regarding attorney-expert communications, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). This protection should not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.⁷ But the court should protect against inquiry into the attorney's mental impressions even if a party has made the showing of need required to justify any discovery.⁸

⁶ This is a first-cut effort to provide a clear statement in the Note about the difficulty of justifying discovery based on the "I think that the lawyer coached the witness" assertion.

⁷ Again, this point may need to be reconsidered if something like the protection for the expert's preliminary analysis presented in Alternative 5 goes forward.

⁸ This is a first-cut effort to address the operation of the Rule 26(b)(3)(B) protection. One difficult aspect of this protection is that the expert's development of the opinions to be presented at trial should not be protected. When this rule was written, the "hermetic seal" between expert testimony (covered by Rule 26(b)(4)) and activity by lawyers and others (insurance claims agents, etc.) was in place. Now we have a problem in that the rule speaks of the "party's attorney or other representative," which may seem to include the expert witness. Indeed, I believe that for purposes of Fed. R. Evid. 801(d)(2) expert witnesses have on occasion been held to be representatives authorized to speak on behalf of the party. It is difficult to know for sure how to address this difficulty, but the draft Committee Note language in the text is hopefully a start.

It might be that one would be comfortable only with a rule provision that specified that the protection of Rule 26(b)(3)(B) applies only to the mental impressions, etc., of counsel. To do that could require backtracking to a version of the Rule 26(b)(3) protection included in the memorandum for the Aug. 17 call, adapted to include revisions based on the discussions on Aug. 17:

- (ii) the facts or data or other information considered by the witness in forming them, but -- except as to such facts or data -- all communications [(in any form)] between the expert witness and [retaining] counsel are protected as trial preparation material under Rule 26(b)(3). The court may order disclosure or discovery regarding such communications only on a showing that satisfies Rule 26(b)(3)(A)(i) and (ii), and subject to the protections of Rule 26(b)(3)(B) for counsel's mental impressions, conclusions, opinions, or legal theories.

In case this is a concern, it seemed worthwhile to include this alternative here.

[This stringent protection is limited to communications between the expert witness and “retaining” counsel. The difficulties that the Committee has learned about arise from the relationship between lawyers handling litigation and expert witnesses they retain to assist in that litigation, including providing testimony. The protection is limited to that situation. But in appropriate cases, it may be that an expansive interpretation should be given to this term. For example, it may happen that a party is involved in a number of suits about a given product or service, and that a given expert witness is retained to testify on that party’s behalf in several such cases. In such a situation, a court should recognize that “retaining” counsel should include all lawyers acting on behalf of the client in relation to the related litigation. Other situations involving similar reasons for interpreting “retaining counsel” expansively may exist.]⁹

Rule 26(a)(2)(B)(ii) is also amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered. This amendment deletes the phrase “or other information” included in 1993, which has been one ground for decisions requiring disclosure of all attorney-expert communications and draft reports. The refocus on “facts or data” is meant to limit the disclosure requirement (and corresponding opportunity for discovery) to material of a factual nature, as opposed to theories or mental impressions of counsel or of the expert. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material received by the expert, from whatever source, that contains factual ingredients likely to affect or bear on the opinions to be offered at trial. The disclosure obligation -- and discovery opportunity -- extends to any facts or data “considered” by the expert, not only that relied upon by the expert. In this way, the important advantages of the 1993 amendments can be preserved while the excessive costs and intrusion into attorney-expert communications experienced in some cases under the 1993 version of the rule can be curtailed.¹⁰ As noted above, the breadth of this term means that a party seeking discovery of attorney-expert communications will only very rarely be able to show a substantial need for such discovery.¹¹

⁹ This paragraph is a first-cut effort to address the “retaining” counsel limitation. It would, of course, be unnecessary if “retaining” were removed from the rule.

¹⁰ This paragraph is a first effort to explain how “facts or data” should be interpreted to ensure that parties get what they need to mount an effective challenge to the adversary’s expert testimony. If we go forward, the content and placement of this explanation in a Note will be important.

¹¹ This sentence tries to link up the discussion of broad disclosure/discovery of facts or data considered with the limitations under Rule 26(b)(3)(A)(ii) on additional discovery regarding attorney-expert communications.

ALTERNATIVE 2: AMENDING RULE 26(b)(4)

**Rule 26. Duty to Disclose:
General Provision Governing Discovery**

* * *

(b) Discovery Scope and Limits.

* * *

(4) Trial Preparation: Experts.

- (A) *Expert Who May Testify.*** A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. Except as to facts or data considered by the expert in forming such opinions, all communications [-- in any form --] between the expert witness and [retaining] counsel are protected as trial preparation material under Rule 26(b)(3).

As we have discussed, one argument in favor of placement in Rule 26(b)(4)(A) is to put the provision where one would expect to find it and avoid the problem of “hidden” provisions. It could be debated where such a provision should appear. Right now, Rule 26(a)(2)(B) has ramifications for Rule 26(b)(4)(A) depositions that might be considered hidden from one who looks only at that rule. But that rule itself does refer to Rule 26(a)(2)(B), which may be a sufficient clue that it merits attention as well. And since the report usually has to be prepared before the deposition, putting the protection for attorney-expert communications in Rule 26(b)(4)(A) might raise objections that it is hidden for those looking only at Rule 26(b)(2)(B) when deciding what they must disclose in the report. Ultimately, it may be that there is no perfect solution to the problem that provisions that apply to related activities appear in different places.

Putting the provision in Rule 26(b)(4) might raise some other difficulties. On its face, this rule is only about depositions, and so it might not be the right place to locate a protection about interrogatories, Rule 34 requests, or subpoenas. The goal is certainly to provide protection with regard to all discovery devices. Rule 26(b)(4)(B) does at least refer also to interrogatories, but it does not refer to Rule 34 or 45 requests, and is limited rather clearly to another category of expert witness -- those who will not testify. Moreover, it uses a different standard for discovery -- exceptional circumstances. So it is a dubious location for an amendment of the sort we are considering.

It would seem that some sort of Committee Note language like that proposed above in regard to a possible amendment to Rule 26(a)(2)(B) could address the problem of other forms of discovery.

As we have noted in the past, making changes to Rule 26(b)(4) may lead to perplexities because the method used above invokes Rule 26(b)(3), and that says it is “subject to Rule 26(b)(4).” That is an artifact of the former hermetic seal between expert discovery and other

912CALL.WPD

10

MEMO -- SEPT. 12 CALL

discovery. To say here that this material is protected under Rule 26(b)(3) may suffice to do that, but may seem circular.

ALTERNATIVE 3: AMENDING RULE 26(b)(3)

**Rule 26. Duty to Disclose:
General Provision Governing Discovery**

* * *

(b) Discovery Scope and Limits.

* * *

(3) Trial Preparation; Materials.

* * *

(D) Communications between counsel and an expert witness. All communications [-- in any form --] between [retaining] counsel and a person who has been identified as an expert witness under Rule 26(a)(2)(A) are protected as trial preparation material under Rule 26(b)(3)(A) and (B), except that disclosure and discovery are allowed with regard to facts or data considered by the expert in forming opinions the witness will express.¹²

This alternative would clearly apply to all discovery. As we have noted, this more direct way of dealing with the problem might be criticized as creating a new privilege.

One response to that privilege argument is to stress that expert discovery is different from other discovery; the objective is not to enable parties to gather information to use at trial, but only to equip them to blunt the evidence proffered by the party calling the expert.

One way of looking at this is to recall the pre-1993 cases involving Fed. R. Evid. 612(2). Any one of these alternatives could be interpreted as conflicting with the court's authority (to the extent it exists) to order disclosure of materials consulted by the expert witness pursuant to that Evidence Rule. In that sense, it might be said that the Civil Rules are creating a "privilege" that nullifies an Evidence Rule. Probably the easiest first answer to those sorts of objections is that all these Rule 26 provisions do is cabin the discovery authorized by Civil Rules 26 et seq. In that sense, it would not seem that anything in Civil Rule 26 would apply, for example, to discovery

¹² In the memorandum for the Aug. 17 conference call, the Rule 26(b)(3) option was expressed differently. In case it would be useful to have that still before you, here it is:

(D) Communications between counsel and an expert witness. A party may obtain discovery or disclosure regarding communications [-- in any form --] between a person who has been identified under Rule 26(b)(2)(A) and [retaining] counsel only with regard to facts and data considered by the expert in forming such opinions. The court may order further discovery only on a showing that satisfies Rule 26(b)(3)(A)(i) and (ii). If the court orders further discovery, the protection of Rule 26(b)(3)(B) applies [to counsel's mental impressions, opinions, or legal theories].

(or proposed questioning at trial) in a criminal case. So this is not really a "privilege" in the strong form.

At the same time, Rule 26(b)(3) protection is often called a "privilege," and it functions much the same as a privilege in civil cases. Perhaps the best that can be said on this point as it bears on the alternative places to make rule changes in the civil rules is that the bottom line difference between using one location or another is fairly limited. Surely the Civil Rules should be able to constrain the arguably overbroad discovery unloosed in 1993 without creating a "privilege."

Finally, it's worth noting that the "subject to Rule 26(b)(4)" proviso in Rule 26(b)(3) should be considered for its implications for this sort of change. Perhaps it would suffice to say in the Committee Note that the absolute separation between expert discovery and Rule 26(b)(3) was relaxed by the addition of Rule 26(a)(2)(B) in 1993, and that this amendment is designed to solve problems introduced by the 1993 changes through application of the protections of Rule 26(b)(3) in the expert witness situation, which is most directly the focus of Rule 26(b)(4). That sort of commentary could explain the placement and deal with the exception for Rule 26(b)(4) that appears in Rule 26(b)(3). Perhaps another idea would be to delete the "subject to Rule 26(b)(4)" phrase from Rule 26(b)(3). It is not clear whether it still serves a purpose if (a) there is a deposition of right, so that the main discovery technique that might occur to other parties (compared, for example, to interrogatories) is now permitted, (b) most of these witnesses operate under a particularly rigorous disclosure regime if they are subject to the report requirement, and (c) at least as to this most sensitive matter (attorney-expert communications) we are saying that the protection is exactly what Rule 26(b)(3) prescribes.¹³

¹³ This idea could be pursued with the following amendment to Rule 26(b)(3) in conjunction with amendments elsewhere along the lines of Alternative 1 or 2:

- (A) *Documents and Tangible Things.* Ordinarily, a party may not discovery documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, ~~subject to Rule 26(b)(4);~~ those materials may be discovered if: * * *

This change might produce a number of problems. For one thing, as mentioned in relation to Alternative 5 below, there seems a good reason not to treat retained expert witnesses' preparatory activities the same as the sorts of things addressed in Rule 26(b)(3). But removing the "subject to Rule 26(b)(4)" language might mean that the protections of Rule 26(b)(3)(B) for all their mental impressions, opinions, etc., and we may not want to provide such strong protection for that. So this possibility is pursued only in a footnote. Entirely abandoning the "hermetic seal" between Rule 26(b)(3) and Rule 26(b)(4) may produce unforeseen effects.

ALTERNATIVE 4: DRAFT REPORTS

**Rule 26. Duty to Disclose:
General Provision Governing Discovery**

(a) Required Disclosures

* * *

(2) Disclosure of Expert Testimony

* * *

- (B)** *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written final report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. No draft report [prepared by the witness] need be disclosed. Discovery of draft reports is not permitted. The report must contain:

This redraft has removed the "preliminary analysis" question for discussion under the next heading, and is designed to close the door entirely on discovery of draft reports. The idea was to simplify by leaving out the difficult "preliminary analysis" topic, and to conclude that drafts are really not needed at all. The sole purpose for a report is to enable the opposing party to know what will be presented by the witness. Access to drafts is not essential to that.

One drafting question that remains is whether to include the phrase "prepared by the witness." If there is an assertion that the attorney actually prepared the draft, do we want to say that this insulation against disclosure or discovery of draft reports does not apply? On the one hand, that might be the sort of situation in which disclosure of the draft would seem most justifiable. We have at least one case (from the New Jersey federal court at that) in which the lawyer instructed the witness to retype the report on his own letterhead and sign it. On the other hand, if it is indeed acceptable for the lawyer to draft the report (e.g., in the case of the drill press operator or the auto mechanic), we might feel that even in such a situation the role of the lawyer is not that important. Perhaps the idea there, as elsewhere, is that the report is not the main event. The report is, instead, merely a method of notifying the other side what the witness will be saying from the stand, and what counts is what the witness does say. To the extent the witness deviates from what the lawyer initially wrote, it's difficult to see why the lawyer's version is important. And we have been told that a witness who is simply a parrot for the lawyer's version will be a weak witness with or without the draft. So "prepared by the witness" may create difficulties but not protect anything of importance.

The draft Committee Note therefore has been revised. One topic that was included in brackets in prior versions of the Note was preservation. Because the revised approach does not authorize discovery of draft reports under any circumstances, that discussion of preservation has been removed.¹⁴

¹⁴ Just to hold the thought, however, it is worth noting that preservation might be a topic mentioned somewhere in a Committee Note regarding amendments if those go forward. We

Draft Committee Note

[This draft could be melded with the draft above of a possible note for amendments confined to 26(a)(2), which already mentions draft reports. Some differences would be necessary if we addressed attorney-expert communications in Rule 26(b)(3) or (b)(4)]

Rule 26(b)(2)(B) is also amended to specify that disclosure and discovery are limited to the final report prepared by the expert witness. As noted above, the Committee has been informed that existing practice authorizing discovery regarding draft reports has produced costs that outweigh the benefits. Because such reports are often prepared on computers, difficult questions can arise about what exactly is a "draft." Each modification in an electronic version of a "draft" might be said to produce a new "draft." Expert witnesses adopt elaborate strategies to avoid producing draft reports because they will be subject to disclosure or discovery. The need to take such measures intrudes on careful preparation by expert witnesses, and may deter some highly qualified individuals from agreeing to serve as expert witnesses. Accordingly, the amended rule provides that no disclosure is required of any draft report and that discovery is not allowed about draft reports.

The term "draft report" refers to any document or electronically stored information in the form of a report prepared before service of the final report. With regard to a supplemental report provided pursuant to Rule 26(e), the term would include any draft of such supplemental material. But scientific testing of material involved in the litigation, and notes of such testing, would not be exempted from disclosure to the extent that related to any opinion or conclusion reached by the expert witness.¹⁵ [And if the testing resulted in the destruction of the material so that it could

have heard a number of reports about preservation obligations and court orders for preservation of materials in connection with expert witness activities. The Civil Rules do not (except for Rule 26(b)(5)(B)) prescribe preservation obligations. Whether a judge could order something preserved, such as a draft report, that is not subject to discovery is a nice question. Because this is such a frequent concern, it is preserved in this footnote.

It is perhaps worth noting a 7th Circuit case that one of the participants in the ABA Aug. 9 event brought to my attention recently. In *Fidelity National Title Ins. Co. v. Intercounty National Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005), the court held that it was improper to destroy interview notes that did not "support" the expert's opinion. The party accused of improper behavior relied on its document retention policy. Judge Posner found that inconsistent with Rule 26(a)(2)(B):

There is nothing wrong with a policy of destroying documents after the point is reached at which there is no good business reason to retain them. * * * But a firm's document-retention policy cannot trump Rule 26(a)(2)(B). The rule does not require merely that the party disclose data that it happens to have retained; it must disclose all the data that an expert that it retained to testify at trial "considered," implying that it must retain those data, as otherwise it could not disclose them.

Id. at 751.

¹⁵ This discussion would need to be reevaluated depending on what is done about preliminary analysis, which is covered in Alternative 5. The dividing line between "draft reports" and "work papers" of the expert may be ticklish in a number of situations.

not be tested by other parties, that might be an exceptional circumstance that would warrant permitting discovery even of preliminary analyses that were not the basis for any opinion or conclusion reached by the expert witness.]¹⁶

[The limitation on disclosure or discovery applies to a draft report “prepared by the witness.” This phrase protects drafts or portions of drafts prepared by employees of the witness, or persons working directly under the supervision of the witness. But it would not include a draft prepared by another person, such as retaining counsel.]

Although amended Rule 26(a)(2)(B) forbids discovery of draft reports, there should be no limitation on inquiry into the basis for any opinion expressed in an expert witness’s final report. Either during deposition or at trial, full and searching inquiry into the grounds for such opinions - including alternative theories or methods considered and rejected by the witness -- should be allowed.¹⁷

¹⁶ The bracketed material was prompted by questions during the Aug. 9 ABA event. It is really about a separate problem that is more akin to a ground for discovery under Rule 26(b)(4)(B) regarding the work of a nontestifying expert.

¹⁷ This paragraph is intended to foreclose objections to deposition or trial questioning about the expert’s process of analysis. Is it sufficient? It should also be noted that it might be in tension with the treatment of “preliminary analysis” included in Alternative 5.

ALTERNATIVE 5: EXPERT "WORK PAPERS"

This is a topic that didn't really surface before our Aug. 17 conference call. It was briefly addressed in the materials for that call under the label "preliminary analysis," which was distinguished from "draft reports." As noted in the discussion of draft reports, the dividing line between the two may occasionally be difficult to discern. But the tension is not difficult to identify. On the one hand, it is important to permit full inquiry into the background and basis for the expert's opinions and conclusions. On the other hand, it is also true that we've been told about problems created by experts avoiding taking notes. Finally, we've also been warned about the risk that testing by experts that cannot now be reproduced is shielded from discovery by protections like the ones we are considering (a topic briefly mentioned in the draft Committee Note to Alternative 4).

Some reflection suggests that providing protection for this material may not be a good idea. To put the idea in context, consider a hypothetical situation in which a manufacturer sued for selling a defective product had a document retention policy specifying that all research and development materials that might be used to criticize the design selected by the company should be discarded so they could not be used in litigation. See *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 481-82 (S.D. Fla. 1984) (imposing sanctions in part because defendant had, during the 1960s and 1970s, "purged" its files of any documents that might be detrimental to Piper in a suit). Although the common law duty to preserve information relevant to anticipated litigation may generally not apply until litigation is on the horizon, a "retention" policy specifically keyed to defeating possible litigation would seem quite dubious.

This is not to say, as mentioned with regard to Alternative 4 above, that the Civil Rules themselves prescribe preservation duties (except for the one in Rule 26(b)(5)(B)). The point here is whether to create a protection against discovery of expert "work papers" because otherwise experts may behave in a way somewhat like the hypothetical manufacturer mentioned above. The problem with the expert witness is that usually he or she is brought into the picture only after litigation is on the horizon (more often, already filed), and the job of the expert is to prepare for the litigation. In a sense, then, one could treat the litigation preparation activities of the expert as similar to those of the lawyer. But the lawyer is not preparing to be a witness, and we can say that providing protection for the lawyer's trial preparation activities does not interfere with discovery of evidence. Indeed, it is routinely said that work product does not protect against discovery of facts.

The expert witness -- though also engaged in trial preparation activities -- may be in a very different situation. At least some of what may be in the work papers could be said to contain discoverable facts. That might be the right characterization for the experiments done by the expert. Indeed, as mentioned during our Aug. 17 call, much of what's in the "work papers" would seem to be "facts or data considered" by the expert and the sort of thing we want to include in disclosure and permit to be the subject of discovery. So there is a clear tension between that impulse and providing protection against discovery.

The counter to this concern is that what we should be focused on is that the actual behavior we are encouraging (perhaps almost requiring) among experts is that they don't take notes or do other things that produce work papers. If that's so, we would not be taking anything away by protecting against discovery in most circumstances since we're talking about things that wouldn't come into existence absent such protection. Under this instrumentalist view, the important thing is to avoid discouraging experts from doing their jobs in the most efficient, reliable way. Whether the likelihood of this avoidance behavior supports adopting a rule that protects against discovery could certainly be debated. It could be said that protection of this sort

cuts against the normal attitude of document retention law that prospective evidence should be preserved when its possible importance in litigation is reasonably foreseeable. It might even be said that such protection encourages and rewards improper actions.

So it is important to approach this topic with considerable uneasiness about whether rulemaking of this sort is desirable. Besides the concerns mentioned just above, there would be a problem determining how to differentiate between what is protected under this sort of provision and inquiry that we are assuring is allowable about the basis for the expert's proposed testimony. The draft Committee Note with regard to Alternative 4 above emphasizes that full inquiry in deposition or at trial is allowed about the basis for the opinions expressed, and that the door is shut only with regard to the expert's draft report. There may sometimes be a difficult call determining what is a draft report and what is not. Maybe lawyers will tell experts to do all notetaking in the form of a "draft report" so that the notes will be protected, for example. At some point, however, protecting the preliminary analysis by an expert raises risks of undermining the argument that precluding discovery of draft reports and limiting discovery of attorney-expert communications should be accepted because it does not interfere with legitimate fact-gathering for the party confronting the expert testimony.

For purposes of discussion only, this portion of the memorandum offers an initial effort to provide protection. It proceeds on the assumption that the protection should be limited to "work papers" and not extend to the actual analytical work done in connection with them and the resulting opinions that are to be expressed.

Alternative 5A

**Rule 26. Duty to Disclose:
General Provision Governing Discovery**

* * *

(b) Discovery Scope and Limits.

* * *

(3) Trial Preparation; Materials.

* * *

Alternative 5A(1)

- (E)** Expert witness work papers. Any document, electronically stored information, or tangible thing containing or embodying the preliminary analysis of a person identified as an expert witness under Rule 26(a)(2)(A) is protected as trial preparation material. The court may order discovery of such material only on a showing that satisfies Rule 26(b)(3)(A), and subject to the protections of Rule 26(b)(3)(B) [for counsel's mental impressions, conclusions, opinions, or legal theories].

Alternative 5A(2)

- (E) Expert witness work papers. Any document, electronically stored information, or tangible thing containing or embodying the preliminary analysis of a person identified as an expert witness under Rule 26(a)(2)(A) is protected as trial preparation material. The court may order discovery of such material only on a showing of exceptional circumstances.

Alternative 5B

**Rule 26. Duty to Disclose:
General Provision Governing Discovery**

* * *

- (b) *Discovery Scope and Limits.*

* * *

- (4) *Trial Preparation: Experts.*

Alternative 5B(1)

- (A) **Expert Who May Testify.** A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. Except as to facts or data considered by the expert in forming such opinions, all communications [-- in any form --] between the expert witness and [retaining] counsel are protected as trial preparation material under Rule 26(b)(3). Any document, electronically stored information, or tangible thing containing or embodying the preliminary analysis of a person identified as an expert witness under Rule 26(a)(2)(A) is protected as trial preparation material. The court may order discovery of such material only on a showing that satisfies Rule 26(b)(3)(A), and subject to the protections of Rule 26(b)(3)(B) [for counsel's mental impressions, conclusions, opinions, or legal theories].

Alternative 5B(2)

- (A) **Expert Who May Testify.** A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. Except as to facts or data considered by the expert in forming such opinions, all communications [-- in any form --] between the expert witness and [retaining] counsel are protected as trial preparation material under Rule 26(b)(3). Any document, electronically stored information, or tangible thing containing or embodying the preliminary analysis of a person identified as an expert witness under Rule 26(a)(2)(A) is protected as trial preparation material. The court may order discovery of such material only on a showing of exceptional circumstances.

These are very tentative first-cut drafts designed to suggest some alternative locations and provisions. Alternatives 5A(1) and (2) build another additional provision into Rule 26(b)(3), and could be used with Alternative 3. Alternatives 5B(1) and (2) build even more obviously on Alternative 2. It should be possible, however, to draft protective provisions for "work papers" that are separate from protective provisions for attorney-expert communications. It is likely that many of the same concerns that influence placement of the provision for attorney-expert communications would be pertinent to the work papers issue.

No effort was made to include such a provision in Rule 26(a)(2). The idea discussed on Aug. 17 was to separate draft reports and preliminary analysis materials. Moreover, since the disclosure is only the report, it seems that this material is a different topic.

Whatever their defects as a matter of drafting, the above alternatives may serve to identify the policy issues that are presented. The basic issue is whether to provide such protection at all. As noted above, this seems quite different from protecting the attorney-expert communications. Much as expert witnesses might desire for their own analytical work the sort of protection we provide for such communications, it would not be difficult to adopt different treatments for the two situations.

ALTERNATIVE 6: ATTORNEY DISCLOSURE REGARDING
WITNESSES NOT REQUIRED TO PROVIDE REPORTS

**Rule 26. Duty to Disclose:
General Provisions Governing Discovery**

(a) Required Disclosures

* * *

(2) *Disclosure of Expert Testimony*

(A) *In General; Disclosure Regarding Testimony of Certain Witnesses.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705, including a treating [physician] {health care professional}. For any such witness who is not required to provide a report under Rule 26(a)(2)(B), this disclosure must also state:

- (i)** the subject matter on which the witness is expected to provide evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii)** the substance of the facts and opinions to which the witness is expected to testify.¹⁸

One drafting issue left open on Aug. 12 is whether to substitute “health care professional” for “physician.” Since the mention of the treating physician refers to a specific and well-known problem, that may be reason to leave the redundant mention in the rule to refer only to doctors. Doctors are all that the New Jersey rule mentions. That would avoid the need to define a “health care professional.” That term would presumably include psychologists, for example. But there may be therapists of various types who are not so easily categorized. Because this question remains open, no effort has been made to revise the draft Committee Note below to deal with this possible change in language.

DRAFT COMMITTEE NOTE

Rule 26(a)(2)(A) is amended to mandate disclosures regarding the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B). Before 1993, an interrogatory seeking the identity of expert witnesses permitted inquiry about the

¹⁸ Based on the discussion on Aug. 17, I have dropped former (iii):

(iii) a summary of the grounds for each opinion.

The reason for deleting this provision is that it may be too onerous to require counsel to obtain this information from a treating physician. Moreover, the entire purpose of this disclosure provision is notice, and that does not make it essential to provide this sort of detail. The retained requirements of (ii) call for the substance of the facts and opinions to be presented, and that is thought to suffice to provide notice.

opinions to be offered by all such witnesses. The expert report requirement of Rule 26(a)(2)(B) - added in 1993 -- called for much more extensive information, but that rule exempted certain expert witnesses from providing a report at the same time it eliminated the former interrogatory practice. This amendment adds disclosure requirements regarding those exempted witnesses in Rule 26(a)(2)(A)(i) and (ii). These new provisions include information that formerly could be obtained by interrogatory. Under Rule 26(b)(4)(A), the depositions of these expert witnesses may be taken, using the information provided by this disclosure. The goal is to ensure fair notice of the expected expert testimony.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even though those witnesses are exempted from the report requirement. Reasoning that having a report before the deposition or trial testimony of all expert witnesses is desirable, these courts have disregarded the limitations on who must prepare a report under Rule 26(b)(2)(B). But with the addition of this disclosure requirement to provide advance information about the opinions of such witnesses, courts should no longer be tempted to overlook Rule 26(a)(2)(B)'s limitations on the full report requirement.

The amendment also notes that identification and disclosure may be required for a treating physician. This mention is included as a possibly unnecessary reminder because treating physicians often provide not only testimony about strictly historical facts but also evidence under Fed. R. Evid. 702, 703, or 705. Difficult issues can arise when such expert evidence is offered but the physician in question has not been identified as required by Rule 26(a)(2)(A). Treating physicians are not usually required to provide expert reports under Rule 26(a)(2)(B), but the disclosure requirements of Rule 26(a)(2)(A) apply to their testimony. The mention of treating physicians does not imply that other "fact" witnesses who will also be presenting expert opinions -- including other health care professionals -- are exempted from the identification or disclosure requirements of Rule 26(a)(2)(A).¹⁹

[Sometimes the person who will offer expert testimony also will be a "fact" witness -- often called a "hybrid expert." Additional issues may arise in such situations. First, if the person's deposition has already been taken as a "fact" witness, there may be an objection that it cannot be taken under Rule 26(b)(4)(A) because of the one-deposition limitation of Rule 30(a)(2)(A)(ii). In general, such objections should not be well-taken to the extent the deposition is limited to the opinions enumerated in the Rule 26(a)(1)(A) disclosure; otherwise a party could prevent an expert deposition by designating as its expert a fact witness who had already been deposed. But if the party who designated the witness can show that the original deposition fully explored the issues on which the opinion testimony will focus, that may be a ground for a protective order against a further deposition of the witness.

Second, the ten-deposition limit of Rule 30(a)(2)(A)(i) might be raised if a party who seeks to take the person's deposition after the Rule 26(a)(1)(A) designation has taken ten depositions already. If the designated expert was one of those ten, the expert deposition should be viewed as separate from the "fact" witness deposition for purposes of the ten-deposition limit; otherwise, parties might be deterred from designating as experts those who have already been deposed as fact witnesses. This treatment is consistent with regarding the expert deposition of the witness as separate from a prior deposition of the same person as a "fact" witness for purposes of the one-deposition rule.

¹⁹ This paragraph attempts to address the "health care professional" issue even if the rule mentions only doctors.

In regard to both types of Rule 30(a)(2)(A) issues, the parties should try to reach agreement, and in the absence of such agreement courts will need to design appropriate arrangements for the circumstances in individual cases.]²⁰

²⁰ The bracketed material is a very rough first effort at addressing issues that might properly be foreseen in the Note. Perhaps, however, it would be better to remain silent on them. But it could be better to propose different default views.

NOTES ON CONFERENCE CALL
DISCOVERY SUBCOMMITTEE
Aug. 17, 2006

On Aug. 17, 2007, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a telephone conference. Participants included Hon. David Campbell (Chair, Discovery Subcommittee), Hon. Mark Kravitz (Chair, Advisory Committee), Chilton Varner, Esq., Daniel Girard, Esq., Anton Valukas, Esq., Prof. Edward Cooper, John Rabiej of the Administrative Office of the U.S. Courts, and Prof. Richard Marcus.

Judge Campbell introduced the call by suggesting that the order of discussion might profitably be to start with the problem of guarding against intrusion into attorney-expert communications by first discussing the level of protection to be accorded those communications and then the best location for that protection. Then discussion could turn to the best handling of draft reports. Finally, the question of attorney disclosure for experts not required to provide reports could be examined. Detailed discussion about language -- particularly Committee Note language -- would be deferred until more basic issues could be resolved.

Attorney-expert communications

This topic was introduced with the explanation that the drafting followed up on the notion that there are three possible levels of protection -- the substantial need/undue hardship standard of Rule 26(b)(3)(A), the heightened protection provided in Rule 26(b)(3)(B) for mental impressions, and the exceptional circumstances protection of Rule 26(b)(4)(B) regarding discovery of information developed by experts who will not testify. The drafts offered methods of adopting these protections. First, drawing from Rule 26(b)(3), they proposed that discovery be allowed only when the party seeking discovery could satisfy the requirements of Rule 26(b)(3)(A), and then subject to the protections of (B) for "core" work product. Alternatively, in a footnote, this protection was summarized with rule language invoking Rule 26(b)(3), or alternatively by applying only the protection of (A) or the protection of (B). The invocation in the rule only of 26(b)(3) could be explained in the Committee Note as involving the two-step analysis provided in (A) and (B) of that rule. A second alternative was to draw on Rule 26(b)(4)(B) and permit discovery only in exceptional circumstances. Finally, a third alternative flatly forbade discovery.

Discussion began with the observation that one participant was initially drawn to the third alternative -- flatly forbidding discovery -- but that this initial impulse prompted misgivings about creating a "privilege" and complicating the handling of disclosure and inquiry at trial. This prompted the observation that the research done by Matt Hall, Judge Levi's Rules Clerk, suggested that the decisions don't indicate that there is a crucial difference between application of the protections of Rule 26(b)(3) and 26(b)(4)(B). To the contrary, the protections of Rule 26(b)(3)(A) are usually very difficult to satisfy; circumstances must be fairly exceptional to warrant discovery under 26(b)(3) even in the absence of core work product concerns. Another participant agreed, saying that this research was interesting and surprising. This prompted the observation that in many ways the issues involved under Rules 26(b)(3) and 26(b)(4) are distinct and involve a different vocabulary.

A related caselaw question was raised about whether the decisions since 1993 holding that attorney-expert communications were subject to discovery had been based on the provisions of 26(b)(3) or (b)(4). The response was that these decisions usually focus on the 1993 adoption of Rule 26(a)(2)(B) as decisive, particularly in light of the Committee Note that accompanied that amendment, rather than stressing Rule 26(b)(3). Indeed, the post-1993 decisions ordering discovery might be said to have concluded that the 1993 amendments were intended to override

the protections of Rule 26(b)(3), so that the amendment proposals now under discussion could serve as an antidote to the effects of the 1993 amendments.

An additional observation concerning the various possible levels of protection was that many lawyers would like the rule to provide certainty. Perhaps some would even value certainty over having a rule that embodied their preferred level of protection. At least some submissions to the Advisory Committee on this topic over the years have reflected that view. This prompted the reaction that much of the uncertainty resulted from a division in the cases about the implication of the 1993 amendments, which the current proposals could largely solve; lawyers should no longer have to worry about whether given judges would adhere to the majority "full disclosure" camp or the minority "protect core work product" camp. There was a caution, however, that these proposals (or, perhaps, any proposals we would be able to devise) would not eliminate all possible uncertainty. In particular, under any of them there could be debate about whether certain discovery inquiries sought "facts or data" considered by the expert. Such disputes could lead to discovery some would regard as properly to be eligible for protection under the provisions guarding attorney-expert communications.

Turning to the proposal to invoke Rule 26(b)(3) protections, it was observed that the rule limits protections to "documents and tangible things." Was the intention that the same limitation apply to lawyer-expert communications? If so, it would seem a relatively hollow protection. The response was that *Hickman v. Taylor* still applies to non-tangible work product; although the proper treatment of electronically stored information under the "documents and tangible things" provision of 26(b)(3) might present difficulties in some contexts, the goal here was to protect such communications in whatever form they might take. The reaction was that it would be important to make this clear in the Committee Note. This prompted the suggestion that one way of making it clear might be to say "including the protections of Rule 26(b)(3)" in the rule to show that there may be protections outside the rule even if technically it would not apply.

This discussion prompted the reaction that it is important to spell things out clearly, at least in the Note; do not leave a gray or fuzzy area. One reaction was that this will always have to be applied on a question-by-question basis. A related observation was that in a sense these changes eliminate uncertainty by foreclosing deposition or other inquiry that is, in form, all about lawyer-expert communications. Thus, "What did you and the lawyer say to one another" about a multitude of topics or occasions would not be allowed. But inquiry in the form of questions about the grounds for the opinions the witness would express at trial would usually be permissible. The concern about uncertainty, it was rejoined, meant that the Note should make clear that the amended rule adopts a bias against inquiry into lawyer-expert communications except in those instances when the standard for such inquiry -- whether derived from Rule 26(b)(3) or (b)(4) -- is satisfied.

Discussion shifted to questions of location of the protection. One possibility would be to treat communications as "core work product," so that putting the protection in Rule 26(b)(3)(B) might be desirable. That was suggested by a footnoted draft alternative to the 26(a)(2)(B) protection invoking the protections of (b)(3)(B). But that would raise questions about the "documents and tangible things" limitation of (b)(3), and also might seem to provide too much protection when communications did not involve any mental impressions of the lawyer. It was noted that there is reason to be uneasy with providing protection against discovery of the mental impressions or theories of the expert witness, for (at least insofar as those relate to the opinions to be expressed at trial) those seem very legitimate objects of discovery.

It was asked why one would consider invoking Rule 26(b)(3) rather than (b)(4), which is the rule dealing with expert witnesses. Shouldn't those be kept separate? The response was that

from 1970 to 1993 they had indeed been separate, and the “subject to Rule 26(b)(4)” language in Rule 26(b)(3)(A) reflects that division. Before 1993, work product and expert discovery were “hermetically sealed.” 26(b)(4) said that discovery regarding experts was permitted only as provided in (b)(4), so invoking (b)(3) in relation to that discovery would be unjustified. But the 1993 amendments changed things, and (b)(3) and (b)(4) issues overlap with regard to disclosure and discovery concerning expert witnesses at trial. The majority rule in the courts seems to be that the addition of the Rule 26(a)(2)(B) report requirement trumps (b)(3) protections because it calls for disclosure of the “data or other information” considered by the expert witness, particularly in light of the strong admonition in the Committee Note about loss of privilege with regard to anything given to the expert. The present amendments seek to change that course, and the question now is how best to calibrate the protection we would introduce against discovery or disclosure premised on what was added in 1993.

These comments prompted the observation that the right place for this protection -- whatever the protection may be -- is in Rule 26(b)(4)(A) because that is where the authority to take the deposition of the expert witness is provided, and this is a deposition problem. That prompted the response that this began as a Rule 26(b)(2)(B) problem, so it might best be addressed at its source. Moreover, other means of discovery might raise similar issues. Consider a subpoena on the expert seeking all drafts, e-mail and other items relating to the case, including all communications with the lawyer. Alternatively, an interrogatory might inquire into similar matters. It was noted that (b)(4)(A) is only about depositions, and (b)(4)(B) at least mentions interrogatories.

Another participant reacted by favoring placement in Rule 26(b)(3). The pending drafts included a possible provision in Rule 26(b)(3) that looked superior to other locations. That would apply to all discovery. But it would also heighten concerns about creating a new “privilege” and present difficulties with the “documents and tangible things” limitation of Rule 26(b)(3). A response was that the same job could be done by an amendment to Rule 26(b)(3)(B) while avoiding some difficulties. It was noted also that (b)(3) is not about experts; even if the “hermetic seal” between (b)(3) and (b)(4) was broken in 1993 there may be reason to hesitate about trying to use (b)(3) as a location for this purpose. Perhaps (b)(4) is the most logical place. That would avoid the “documents and tangible things” difficulty in Rule 26(b)(3). But perhaps it should be put into Rule 26(b)(4)(B), if the protection were to be the same as the exceptional circumstances provision that is found there.

That prompted the reaction that using 26(b)(4) might be desirable so long as it was made clear that the protection applied to all forms of discovery, and that it includes all testifying experts, whether or not they have to prepare reports.

Discussion turned to what direction the drafting on level of protection should take from this point. One starting point was that none seemed to favor adopting an absolute prohibition against discovery in any circumstances. That might make discovery regarding the work of testifying experts impossible to obtain even though discovery regarding the work of nontestifying experts could be obtained in exceptional circumstances.

As between the standards for allowing discovery in (b)(3) and (b)(4), one reaction was that the research suggested that there is actually little difference between the protection accorded by (b)(3) and (b)(4). But this may be due to the fact that since 1993 courts have often treated 26(a)(2)(B) as precluding protection with regard to testifying experts, so that the only circumstances in which there was even a possibility of protection were in the minority of courts that treated the core work product protection of Rule 26(b)(3)(B) still to be applicable. But Rule 26(b)(3) is more familiar, so using it is the standard would be preferable for that reason.

This observation prompted the concern that lawyers might often tell the judge that discovery was warranted because “I believe the witness was coached and I need access to these communications to show that happened.” The reaction was that the Note must be clear that this sort of argument is not sufficient to justify discovery.

Another reaction was that we still have essentially three sorts of issues presented -- the “substantial need” standard, the “exceptional circumstances” standard, and the “core” work product protection. One response was that in important ways, the last standard is the one that seems most legitimate. That would mean providing protection to all communications between expert and lawyer under Rule 26(b)(3)(B). Another participant urged that we should “get as close to absolute protection as possible.” At least discovery should be allowed for fraud on the court or in a waiver situation, but only in very limited circumstances otherwise. Perhaps all communications should be defined as core work product.

This prompted the question whether that applied also to communications such as “Where should we go for lunch?” Perhaps it is better to limit such stringent protections for communications whose content raises the concerns that underlie the adoption of (b)(3)(B) protections. It was also noted that there are cases that say core work product is never subject to discovery, and the Supreme Court in the *Upjohn v. U.S.* decision suggested this might be a valid view. The New Jersey approach is different; it invokes the New Jersey equivalent of Rule 26(b)(3) as the standard for obtaining discovery. In addition, treating the expert’s analytical activities as subject to this high level of protection would be inappropriate; at least there would be reason to limit the protections to the mental impressions, etc., of the lawyer.

Another participant asked whether others had experience with a rule making opinion work product absolutely immune to discovery. In California, by statute such material is absolutely immune, and it is also recognized as the property of the lawyer. These features of California law create odd distortions in some situations. This prompted the observation that there seems not to be a clear federal rule in caselaw on who is the owner of the work product protection. In addition, it was noted that with experts there might be the added complication in a situation in which the expert wants to make a disclosure -- does that infringe the attorney’s interest in the work product?

This discussion boiled down to a choice between (b)(3)(A) and (B) protection -- does (A) give too little with its “substantial need” test, and does (B) give too much, with a seemingly absolute prohibition for that which qualifies as reflecting the mental impressions of the lawyer. An alternative is for the rule to invoke the two-step protection of Rule 26(b)(3). That would mean that discovery of anything about lawyer-expert communications is allowed only on a showing of substantial need under (A) (which is not satisfied simply by saying “I think the expert was coached”) and when that showing is made attorney mental impressions are still protected under the provisions of (B).

This idea prompted the reaction “Why pick one or the other?” Another reaction was that “the protection should be based on what is being sought.” Another was that a more flexible standard for discovery might reduce somewhat the level of concern with fighting about what qualifies as “facts or data” considered by the expert -- the more difficult it is to go beyond that area that is subject to discovery the greater the temptation to push the limits of that provision.

Another participant said that a combined standard might work, providing that the Note makes it perfectly clear that the initial protections of (A) can’t be satisfied with the suspicion that coaching has occurred.

The consensus emerged that the orientation of further drafting should be to invoke the two-level standards of Rules 26(b)(3)(A) and (B) rather than an exceptional circumstances standard borrowed from Rule 26(b)(4)(B).

That left open the question where this provision should be put. A first reaction to that question was that Rule 26 has some provisions that appear in "surprise places." What we are talking about here is a limitation on discovery scope. Discovery scope is covered in Rule 26(b). Therefore that seems the right place for this provision to be inserted, and the most suitable place would be in Rule 26(b)(4) because that is the provision about experts.

That drew the response that including the provision in Rule 26(b)(3) would be better because that is about all types of discovery, not just depositions. In addition, it would be important to include "disclosure" at that point to undo the effects of the 1993 amendment.

The invocation of the 1993 amendment prompted the additional observation that the entire issue -- regarding discovery as well as disclosure -- was caused by the 1993 amendment to Rule 26(a)(2). Because that was the source of the problem, Rule 26(a)(2) would seem the most satisfactory place for a cure as well.

The resolution for current purposes was that further drafting should include efforts to include provisions in Rules 26(a)(2), (b)(3), and (b)(4). The protection would be based on the two-tiered provisions of Rule 26(b)(3). Issues warranting further attention included the draft's limitation of protection to the expert's communications with "retaining" counsel, and the "documents and other things" limitation of (b)(3). It may be that the latter could be solved in an amendment that made clear the new protection applies to communications "in whatever form" or "by whatever means."

Draft reports

Discussion of the handling of draft reports began with the question whether the standard for protection ought to differ from that used for attorney-expert communications. That prompted an immediate suggestion that one possibility was an absolute protection of draft reports. The sole purpose of an expert report is to equip the other side to cross-examine the expert. Some reports may be too sketchy to accomplish that goal, or may overlook topics on which the expert seeks to opine at trial. Motions to compel better reports or exclusion of certain testimony might be suitable responses to those concerns. But discovery of draft reports does nothing to accomplish the purpose of the report. Particularly if there is full discovery allowed of the facts or data considered by the expert and a residual opportunity on (rare) occasions to discover attorney-expert communications, there would be no value in allowing access also to draft reports. To this was added the idea that spoliation concerns may be very great so long as there is a possibility of discovery of draft reports. Every revision of a draft being composed on a computer would potentially be a new "draft." Obviously keeping all of those would be extremely cumbersome and perhaps impossible. No sensible set of rules would call for that.

This discussion prompted a question about the expert's notes and work papers. Should those be treated the same? To the extent they might be subject to discovery, that possibility could produce one of the undesirable behaviors these amendments were designed to change -- attorneys advising experts to take no notes. On the other hand, if the expert does five experiments and then picks one of them as the basis for the report, should there be an absolute prohibition on access to the fruits of those other experiments? One response was that proper protection of communications the expert had with the attorney (already covered in the previous discussion) would address the legitimate concerns. The remainder -- the results of the tests --

should be considered “facts or data” considered by the expert in reaching the opinions to be presented.

In rule language terms, this topic seems different from the draft report concern. The current draft includes a bracketed provision dealing with “preliminary analysis.” Should there be special protection for that material? A starting point is to recognize that the right to do adequate examination of the adversary’s expert witness must include inquiry into the analytical methods the expert considered and used in reaching the conclusions to be presented at trial. Anything that said that “preliminary analysis” is totally off limits for discovery would unduly hamper such inquiry. Indeed, particularly with experts who don’t have to provide a report, even with attorney disclosure (to be considered below) it is likely that direct examination would include some information about the preliminary analysis done by the expert so that the jury could have a full appreciation of the bases for the conclusions to be expressed. Therefore, the focus of any protection should be on documents or the like that contain or reflect preliminary analysis -- perhaps those should be protected so that experts won’t be deterred from taking notes, etc. But even then, there is a possibility that an expert -- particularly one who does not prepare a full draft report -- will affirmatively use some such materials to support the testimony offered. Should these materials be off limits to the other side then?

This discussion relates somewhat to the application of Rule 26(b)(3)(B)’s protections to attorney-expert communications. That protection extends to “mental impressions, conclusions, opinions, or legal theories.” On their face, some of these terms look like exactly what should be the legitimate focus of inquiry of the expert witness. There may sometimes be a difficult time determining whether materials should be considered a “draft report” that is not discoverable or memorializations of the expert’s process of analysis, which should be discoverable, but cutting off all inquiry into preliminary analysis would be harmful. These observations prompted the further thought that sometimes lawyers dwell overmuch on notes and the like, but that keeping those entirely out of bounds sounds counterproductive.

A counterargument was offered for purposes of discussion. The New Jersey lawyers said the expert’s opinion stood or fell on the substance of the opinion and, as a backdrop, on what was in the final report. The way to counter such a showing was not to sift through the work papers of the expert but to cross-examine the expert and counter with a better expert of one’s own. Moreover, there is a considerable incentive for lawyers to be thorough and comprehensive in presenting the basis and background for the expert’s report. Otherwise they run the risk that the expert may be excluded under *Daubert*, or that the expert’s conclusions are less persuasive than they would otherwise be, or that some opinions may be excluded for insufficient disclosure. Opening the door farther to permit access to work papers and the like is unlikely to be useful and likely to be a costly waste of time.

These observations prompted the response that opposing counsel may be unable to elicit adequate detail about the actual course of development of the expert’s opinion without the work papers -- the witness won’t attest to having considered the other three approaches. The reaction to this point was that one can then question the expert about the other three approaches and impeach the witness in that way, supporting the argument these approaches are valid with one’s own witness. Getting into details about the opposing expert’s use of these approaches is not important.

But would that be a ground for absolute protection for notes and work papers, it was asked? Why provide less protection for attorney communications with the expert than for the expert’s own notes? Shouldn’t it be the other way around? What the expert did matters more

than what the lawyer said. Perhaps, it was suggested, the best solution would be to apply work product protection to work papers.

It was pointed out that the draft language for inclusion in Rule 26(a)(2)(B) would make the level of protection parallel. It was observed that this approach might require some tough calls in some instances. One possible example of such a situation would be a case in which one side has no expert and seeks to use the other side's expert as the source of a concession that supports this side's case. A reaction was that this sort of situation happens all the time. But it was objected that we have limited reason to be sympathetic to the party who fails to obtain his own expert. And furthermore, this sort of argument may go against the general idea that discovery is not a way to gather expert opinions to support your own case. Instead, it is only a way to develop rebuttal to the expert opinions the other side will offer. In some cases, such a medical malpractice, there is a substantive requirement that parties present expert evidence supporting their case; it is dubious to say that they can use discovery to extract that element of their case from the other side's expert.

Finally, returning to the question of notes, it was emphasized that the Subcommittee has been told that due to the 1993 amendments the reality is that there are no notes, so there really is nothing to fight about. If our goal is to change the no-notes reality, we need to do so in a way that removes the stimulus for the no-notes practice.

It was suggested that one attitude toward these problems as a matter of drafting is to regard them as raising a question of location. Perhaps the draft reports provision should be in Rule 26(a)(2)(B), for that is where the report requirement is found. But then the discovery issues could be handled elsewhere, perhaps in Rule 26(b)(4).

For purposes of further drafting, the conclusion was to examine handling draft reports and work papers differently, and perhaps in different locations in the rules. Because this was not attempted in the current round of drafting, it remains an open issue for the next round.

Attorney disclosure for other experts

As a starting point, it was agreed that the proper placement for the disclosure provision is in Rule 26(a)(2)(A) rather than a new (C).

A second question was whether to make explicit mention of treating physicians in the rule, as is done in a bracketed phrase borrowed from the New Jersey rule. The first reaction was that it is helpful to include this reference to physicians here. That view was quickly seconded -- the problem of failure to identify the treating physician happens all the time. Alerting people to the need to do so in the rule is valuable.

These points prompted a more basic question about the wisdom of adding this new rule provision. Will there will be problems in some instances because lawyers will have difficulty obtaining the needed information from doctors to include in the disclosure? During the Scottsdale mini-conference in January, some lawyers said that doctors won't return their calls. That concern was one of the reasons why treating doctors were exempted from the report requirement in the first place. Although the attorney disclosure approach creates less difficulty, it may nonetheless be a sufficient problem to warrant considerable care.

One response was that eventually the lawyer is going to have to obtain this information. The final pretrial statement and/or Rule 26(a)(3) pretrial disclosure has to include some of this information. The lawyer will have to do this sometime. This just moves up the date a bit.

Moreover, the lawyer could do it over the phone or by e-mail. The idea of exempting treating doctors from this disclosure seemed unwise, and if they are covered it seemed better to say so in the rule.

Attention turned to what the disclosure must contain, and focused on proposed (iii), which called for “a summary of the grounds for each opinion.” Maybe that would be the most difficult piece for a lawyer to extract from a busy doctor. Perhaps that is not really necessary in addition to (i) and (ii), which require that the disclosure identify the subject matter and the substance of the facts and opinions to which the witness will testify.

One response was the providing the doctor’s records should suffice. But it was objected that quite often the doctor’s records do not include important matters. The doctor may be testifying that the patient will need to be examined every six months for the rest of his life. That could be important to the lawsuit, but not something that the doctor would put into the records.

It was asked whether leaving out (iii) would make disclosure too sketchy. The response was that it could be retained as a footnote for reconsideration later, but that the basic purpose of this disclosure was fair notice to the other side about what testimony it would be facing. Then the other side can make an intelligent decision whether to take the deposition of the witness.

A separate problem was whether “treating physician” is sufficient. How about a psychiatrist who is not a physician? An alternative is “health care professional” or something like that. But by definition the disclosure requirement is not limited to health care professionals, so perhaps treating physician could be left as the example in the rule, along with a Note that makes clear that all health care professionals and others who will offer Fed. R. Evid. 702 testimony are included.

Further drafting should be circulated in advance of the next conference call on September 12.

MEMO

To: Judges Rosenthal and Campbell, Professor Marcus
 Cc: Professor Cooper
 From: Matthew Hall
 Re: Rule 26
 Date: July 26, 2007

Judge Rosenthal and Professor Marcus asked me to research Rule 26 in order to provide background information for the Discovery Subcommittee's consideration of various drafting options for proposed language to protect lawyer-expert communications. This memo provides a brief survey of caselaw in two distinct but related areas: First, how have courts applied Rule 26(b)(3)'s work product protection to information shared with experts,¹ and second, how have courts applied Rule 26(b)(4)(B)'s protection against discovery of information known to non-testifying experts.

(A) Scope of Rule 26(b)(3)(A)-(B)'s work product protection

(1) Do Rules 26(b)(3)(A) and 26(b)(3)(B) protect information communicated to experts?

Some courts applying the 1993 version of Rule 26 have applied work product protection to "core" work product – that is, attorney mental impressions and the like – even if communicated to experts. These holdings rely on Rule 26(b)(3)(B), which states that even if discovery is ordered, the court must protect against disclosure of "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other

¹ For ease of reference as the Committee moves forward, any quotations of the Rule are from the restyled version of Rule 26, which becomes effective – barring Congressional action – on 12/1/07. Caselaw based on the earlier version will of course retain its value as authority after that date because the restyling is non-substantive.

representative concerning the litigation.” Other courts have held that any material given by an attorney to an expert is discoverable – either based on a holding that the specific expert report provision of 26(a)(2) trumps the more general work product provisions of 26(b)(3), or on a theory of waiver.

The leading case in the more protective camp is *Haworth, Inc. v. Herman Miller*, 162 F.R.D. 289 (W.D. Mich. 1995) (holding that discovery under Rule 26(a) was limited to facts known and opinions held by expert, and that attorney work product considered by expert was not discoverable), *see also, e.g., Estate of Chopper v. R. J. Reynolds Tobacco Co.*, 195 F.R.D. 648, 651 (N.D. Ia. 2000) (holding that opinion work product has near-absolute protection from discovery, even if shared with expert witness); *Nexus Prods. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999) (holding that core attorney work product considered by expert need not be disclosed under Rule 26(a)(2)); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 158, 164-65 (S.D. Ind. 1997) (“data considered by witness” that must be disclosed under 26(a)(2)(B) includes only factual materials, not core attorney work product considered by the expert); *Dominguez v. Syntex Labs., Inc.*, 149 F.R.D. 158, 164-65 (S.D. Ind. 1993) (permitting producing party to redact documents relied on by a testifying expert to excise counsel’s mental impressions).

Haworth and cases following it distinguish between factual materials and attorney mental impressions, and protect only the latter from discovery through expert reports and depositions. That is to say, I have found no post-1993 case suggesting that facts known by an expert may be protected as work product. Although there were some cases prior to 1993 that protected facts known to experts from discovery, the court in *Haworth* noted that the 1993 revisions to 26(b)(4) “repudiate the few decisions that have held an expert's

information privileged simply because of his status as an expert. They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine.” *Haworth, supra*, at 293 (citations omitted). *See also* 6 MOORE’S FEDERAL PRACTICE, § 26.70 (Matthew Bender 3d Ed. 2004) (noting that work product protection is intended to establish a “zone of privacy” around attorney mental processes, and that it does not protect from discovery the facts contained in work product documents).

Lastly, it is worth noting that even courts that generally protect communications between counsel and retained experts, permit such discovery where counsel actively participated in the expert’s opinion-formulation process. *See, e.g., Kennedy v. Baptist Mem. Hosp.*, 179 F.R.D. 520, 522 (N.D. Miss. 1998) (stating that, although communications between counsel and expert are generally protected from both disclosure and discovery, discovery will be permitted when counsel infiltrates into expert’s opinion formulation process). In *Kennedy*, a showing that the expert’s final report differed from a draft dated just a few days earlier was held to warrant discovery into the editing process, including information regarding attorney-expert communications.

Leading cases denying work product protection to information communicated to experts include the following: *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 29 (W.D.N.Y. 2002 (holding that disclosure requirement of Rule 26(a)(2) “trumps the substantial protection otherwise accorded opinion work product under Rule 26(b)(3),” and requires disclosure of any work product provided to expert); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305 (W.D. Va. 1998) (holding that work product provided to expert to be considered in formulation of opinion is discoverable, noting tension

between different sections of Rule 26); *BCF Oil Ref. v. Consolidated Edison Co.*, 171 F.R.D. 57, 65-66 (SDNY 1997) (holding that all facts considered by expert, including counsel's impressions, must be disclosed); *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997) (provision of work product to testifying expert waived protection); *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639-41 (N.D. Ind. 1996) (work product provided to expert to be considered in formulation of opinion is discoverable). Many of these cases rely on a pre-1993 case from the Northern District of California, holding that "written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product." *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 (ND Cal. 1991).²

² The Court in *Intermedics* described its holding, and the rationale therefor, as follows:

In sum, we are not persuaded that the rule we embrace, that communications from counsel to a testifying expert are discoverable to the extent that they relate to matters about which the expert will testify, poses a serious threat to the principal values that the work product doctrine was designed to protect. We are persuaded that this rule could significantly advance the interests that were intended to be promoted by paragraph (4) of Rule 26(b) of the Federal Rules of Civil Procedure and by Rules 702, 703, and 705 of the Federal Rules of Evidence. We hope that the rule we adopt here will enhance the reliability of the fact finding process and will promote public confidence in our adjudicatory system by decreasing the likelihood that lawyers will make improper use of expert witnesses, by enhancing the effectiveness of cross-examination, and by encouraging counsel to utilize experts in a way that is most helpful to the trier of fact.

For all the reasons set forth above, we hold that all communications from counsel to a testifying expert that relate to the subjects about which the expert will testify are discoverable

Id. at 397.

The view exemplified by the *Haworth* opinion has been championed by the MOORE'S FEDERAL PRACTICE treatise, which argues that the *Haworth* rule has several advantages:

- (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.

MOORE'S, *supra*, § 26.80[1][a].

(2) How easily may a party seeking discovery make the showing required under Rule 26(b)(3)(A)?

Assuming that a court has determined that certain information in the possession of an expert is subject to work product protection, Rick Marcus wondered how readily a party may nonetheless persuade the court to order discovery under the provisions of Rule 26(b)(3)(A)(i)-(ii). Restyled Rule 26(b)(3)(A) requires a party seeking discovery to show (i) that the discovery sought is “otherwise discoverable under Rule 26(b)(1),” and (ii) “that [the party] has substantial need for the materials to prepare its case, and cannot, without undue hardship, obtain their substantial equivalent by other means.” In practice, this standard is difficult, but not impossible, to meet.³

³ As an aside, the “substantial need” / “undue hardship” test has generally been applied to fact work product. Opinion work product has been accorded greater protection since long before the 1993 revisions to Rule 26. *Cf. Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981) (holding, under Rule 26, that discovery of opinion work product is “particularly disfavored,” and that it “cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.”). The *Upjohn* Court did not specify the requisite showing, and neither do the leading treatises, beyond stating that “when the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents dealing with such activities, even if they are opinion work product.” 6 Moore's, *supra*, § 26.70[5][e], n.82 (citing unusual case in which party placed his attorney's opinions in issue by designating the attorney as an expert witness); *cf. Upjohn, supra*, at 401-02 (“While we are not prepared at this juncture to say that such material is always protected

As an initial matter, I note that the cases that I have found applying this standard generally did not involve experts – perhaps because many courts have strictly limited the application of work product protection to information shared with testifying experts, which would render it unnecessary to reach this stage of the analysis. MOORE’S states that:

Common examples of essential materials include test results that cannot be duplicated, and photographs taken immediately after an accident when the accident scene has since changed. Another example of materials for which a ‘substantial need’ often exists are contemporaneous statements taken from, or made by, parties or witnesses.

6 Moore’s Federal Practice, § 26.70[5][c].

“Substantial need” is generally evaluated by reference to the importance of the evidence in the case, whereas the “undue hardship” inquiry focuses on whether the party seeking discovery has substantiated their inability to obtain the information sought or its equivalent.⁴ In practice, the “substantial need” and “undue hardship” standards appear to overlap to a degree, in that the existence of substantially equivalent evidence may defeat both elements. Most cases that I have found in treatises and in my independent research that apply the Rule 26(b)(3)(A) standard find that it has not been met. Cases finding that the standard has been met include: *Varuzza by Zarillo v. Bulk Materials, Inc.*, 169 F.R.D. 254, 257 (NDNY 1996) (holding that defendant established substantial need for

by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure”).

⁴ A showing that witnesses are unavailable or have forgotten the events in question may suffice to warrant discovery of documents memorializing such witness’ earlier statements, as may a showing that the evidence in question could only be re-created by extraordinarily expensive means. *See generally* 6 Moore’s, *supra*, § 26.70[5][d].

plaintiff's post-accident statement to insurance investigator, because plaintiff failed to recall numerous details concerning accident at deposition); *Rexford v. Olczak*, 176 F.R.D. 90, 93 (WDNY 1997) (in employment discrimination action, holding plaintiff's diary discoverable although allegedly prepared in anticipation of litigation, because no other contemporaneous records of events were known to exist); *Savoy v. Richard A. Carrier Trucking, Inc.*, 176 F.R.D. 10, 14 (D. Mass. 1997) (ordering discovery of witness statement taken shortly after accident where no other contemporaneous records known).⁵ Courts in at least the 3rd and 4th Circuits have held that recordings, such as surveillance tapes, will generally be held to be discoverable under this standard, because it is impossible to procure substantially equivalent evidence. *See, e.g., Evan v. Estell*, 203 F.R.D. 172, 173 (M.D. Pa. 2001); *Gutshall v. New Prime, Inc.*, 196 F.R.D. 43, 46 (W.D. Va. 2000).

In summary, the total number of cases that I have found ordering discovery of work product under Rule 26(b)(3)(A) is small, suggesting that – to answer Rick Marcus' question directly – it is no routine or simple matter for a party seeking discovery to obtain it under this rule. But it can be done, so long as the evidence is sufficiently important, and adequate substitutes are lacking.

⁵ In addition, some pre-1993 cases ordered discovery after applying a similar standard. *See, e.g., Reedy v. Lull Engineering Co.*, 137 F.R.D. 405, 407-08 (M.D. Fla. 1991) (no equivalent evidence of accident scene available because scene had changed substantially); *Zoller v. Conoco, Inc.*, 137 F.R.D. 9, 10 (W.D. La. 1991) (holding photographs of accident scene discoverable because scene had changed significantly since accident).

(B) Scope of Rule 26(b)(4)(B)'s provision barring, for the most part, discovery of facts known or opinions held by a non-testifying expert.

Rule 26(b)(4)(B) generally prohibits discovery into facts known or opinions held by non-testifying experts, and states that a party may obtain such discovery only: “(i) as provided in Rule 35(b), or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.” Rick asked what circumstances have been found to satisfy this “exceptional circumstances” requirement.

As with the “substantial need” provision in Rule 26(b)(3)(A)(ii), exceptional circumstances have been most commonly found in one of two situations: First, where the party seeking discovery is unable to obtain from other sources substantially equivalent information on a matter that is essential to the preparation of the case. A classic example occurs where the object or condition observed by the non-testifying expert is no longer observable by experts hired by the party seeking discovery. *See, e.g., Bank Brussels Lambert v. Chase Manhattan Bank*, 175 F.R.D. 34, 44-45 (SDNY 1997) (finding exceptional circumstances where company’s financial condition had deteriorated such that it would be nearly impossible to reconstruct company’s condition at time expert conducted its work); *see also Braun v. Lorillard, Inc.*, 84 F.3d 230, 236 (7th Cir. 1996) (finding exceptional circumstances where expert had tested tissue samples that no longer existed). Second, where it is possible to replicate the discovery, but only at prohibitive cost. *See Bank Brussels, supra*, at 44-45 (finding that, even if reconstruction of financial condition were possible, it would require cost-prohibitive 10,000 hour investigation).

In weighing whether the allegedly “exceptional” circumstances in a particular case warrant permitting the discovery, the court will weigh those circumstances against

the policies underlying Rule 26(b)(4)(B)'s general rule against such discovery, which include: the interest in allowing counsel to consult with experts without fear of generating information for use by the other side; the general premise of the adversary system that each side should prepare its case at its own expense; and the risk of prejudice to the party who retained the expert. *See* MOORE'S, *supra*, § 26.80[2]; *Bank Brussels, supra*, at 45 (finding that none of these considerations outweighed the exceptional circumstances shown).

In summary, the analysis of whether the circumstances are "exceptional" for purposes of 26(b)(4)(B) proceeds along the very same lines as the analysis of "substantial need" and "undue hardship" under 26(b)(3)(A)(ii). In both instances, the importance of the evidence and the strength of the showing that comparable evidence cannot otherwise be obtained are weighed against the general policy against discovery of work product.

MINI-CONFERENCE ON NEW JERSEY
EXPERT DISCOVERY PRACTICE

April 18, 2007
New York, NY

These notes describe the discussions during the Mini-Conference held by the Discovery Subcommittee of the Advisory Committee on Civil Rules regarding New Jersey state court expert discovery practice in New York on April 18, 2007. Members of the discovery Subcommittee present included Judge David Campbell (Chair), Chilton Varner, Daniel Girard, Anton Valukas, Peter Keisler and Theodore Hirt, as well as Prof. Richard Marcus (Special Reporter). Also present from the Advisory Committee were Judge Lee Rosenthal (Chair) and Prof. Edward Cooper (Reporter). Representing the Administrative Office were Peter McCabe, John Rabiej, James Ishida, and Jeffrey Barr. Also present, from the Federal Judicial Center, were Joseph Cecil and Thomas Willging. Invited participants to the conference included William Buckman, Douglas Eakeley, Jeffrey Greenbaum, John Zen Jackson, James Martin, Alan Medvin, Gary Potters, Ellen Relkin, Ezra Rosenberg, Christopher Seeger, and Richard Williams. Also present as an observer was Alfred Cortese.

Judge Rosenthal welcomed the invited participants, explaining that their input would be extremely valuable to the Committee in determining whether to consider revisions to federal-court expert discovery practices resembling the changes introduced in New Jersey state court practice. On behalf of the Discovery Subcommittee, Judge Campbell emphasized the value of receiving a hands-on report from counsel familiar with the recent changes in New Jersey practice.

At Judge Campbell's invitation, the various New Jersey lawyers introduced themselves and summarized their varying practice experiences. There was a broad range of experience. Some lawyers specialize in mass tort litigation, but there were representatives of both the plaintiff and defendant sides of such litigation. Others mainly handled plaintiffs' personal injury work, including medical malpractice. Some did insurance defense and coverage litigation. One specialized in plaintiffs' civil rights litigation. Another is with the New Jersey Attorney General's office and supervises litigation on behalf of all agencies, involving tort and employment litigation, and oversees litigation on both the defense and plaintiff side.

The overall topic was introduced as emerging from initial consideration of asserted problems with Rule 26(a)(2)(B)'s exemption from the report requirement for employees who do not regularly testify as experts, and then focusing on issues involved with treating doctors. Concern with those problems has been eclipsed, however, by more recent expressions of uneasiness about the intrusion of expert discovery into areas otherwise protected by privilege or work product. Before 1993, Rule 26 had only authorized an interrogatory about the contours of expert witness testimony. In many places depositions commonly followed, either by agreement or by court order, but the rule did not guarantee a right to take the expert witness's deposition. The 1993 amendments thus changed the rule very substantially by introducing disclosure, including a report that was much more comprehensive than the prior interrogatory answer, and by guaranteeing the right to take the expert witness's deposition after disclosure. The Committee Note accompanying the 1993 amendment said that privilege protection did not apply to what the expert was given by the lawyer or to their communications. The impact of prospective disclosure and discovery on free and productive communication between lawyers and the experts they hire prompted the ABA to adopt a resolution in 2006 recommending rule changes to insulate that interaction and to protect against discovery of experts' draft reports.

Judge Campbell then reported that, in general, it appeared that the majority of the participants in the Subcommittee's January mini-conference in Scottsdale, Ariz., had favored the ABA approach that would guard against intrusion into the collaborative relationship of the lawyer and the expert witness. At the same time, some lawyers strongly opposed these changes,

arguing that they would unduly constrict the opportunity to show that the witness was not the true source of the testimony being offered, and that the lawyer was really speaking through the witness.

The existence of this debate pointed up the value of receiving information from those who had been operating in a system governed by a rule resembling what the ABA was endorsing. The New Jersey changes of approximately five years ago seem to present just such a situation, so this mini-conference was intended to follow up on the questions left unresolved by the January event. The materials for this mini-conference outlined a number of questions on which the Subcommittee sought guidance. It seemed useful to consider four general topics during this conference: (1) the reasons for and the reception of the New Jersey rule change; (2) how the revised New Jersey rule was working; (3) potential problems that might arise if the Civil Rules were amended in a similar way, such as having lawyers ghost write expert reports and unduly limiting inquiry into the reports through depositions; and (4) the impact under the New Jersey practice of the conditional access it appears to authorize to lawyer-expert interactions, and whether that possibility undermined the protective provisions of the New Jersey rule.

Three of the participants were directly involved in the development of the New Jersey rule as members of the state's Civil Practice Committee, which recommends procedural changes to the state's Supreme Court, which in turn has authority to adopt such changes.

The background was that before 1993 the New Jersey practice was like the pre-1993 federal one -- "you could send an interrogatory." There was no mandatory disclosure. But the actual practice was nonetheless to provide written reports. With the 1993 change in federal practice, however, the New Jersey state court practice changed as well even though the rule had not changed. Depositions became more expensive, and often focused largely on what attorneys did in relation to the production of the report. This led to "uncomfortable constraints" on the side producing the report. One lawyer offered the example of a situation in which the expert had worked up a 165-page report and the lawyer went to the expert's office and made oral comments on the report before it had ever been printed. "I would not ask for drafts." Sometimes experts would come to the lawyers' offices with laptops on which they had electronic versions of their drafts. Alternatively, the experts would read the draft reports to the lawyers over the phone, and the lawyers would offer their comments. One concern was that if the lawyer's correction of simply factual matters were known that would make the expert look bad -- "you didn't even understand the facts, did you?" So lawyers would tell experts "Don't take notes. Just listen."

It was asked whether lawyers often stipulated around this potential intrusion. One attorney said he did not. "This was something you had to deal with." An example was the Adler case decided by Judge Walsh (who was the chair of the drafting subcommittee of the New Jersey civil practice committee that drafted the new New Jersey rule). In that case, an inexperienced expert actually printed off a draft report, and the judge felt he had to order it produced even though he thought that production in discovery should not be authorized. [In case it would be of use, a summary of this case is included in the Appendix to these notes.]

Given these difficulties, there seemed at that time to be three possibilities for New Jersey practice: (1) keep things as they were, (2) add protections against discovery, or (3) allow caselaw to develop on the topic. The eventual decision was that caselaw would not be a good solution, and that things should be changed. Hence the proposal for the new rule.

There was little dissent, if any, when the change was announced. Although there is usually no public hearing process for New Jersey rule changes unless there is controversy, there was a lot of publicity about this one. There were front-page articles in the New Jersey legal

papers. Lawyers knew this was being proposed. (At least one invited lawyer whose office is in Manhattan confirmed being aware of the proposal.) The change was viewed as welcome by attorneys across the board. Things had reached a point at which half the time in an expert deposition might be occupied with these essentially unimportant topics about the interaction with the lawyer. And lawyers had to spend a lot of time working on the initial development of the expert's reports.

It was asked whether experts ever did their initial reports by themselves -- without the lawyers' involvement. One attorney involved in the development of the rule said that "Now I want to collaborate because of discovery of drafts. Before discovery came up, I was more likely to leave the expert alone."

Another lawyer involved in the development of the new rule explained that the practice in New Jersey had been to produce reports and then take depositions. This contrasts with the practice in state court in New York, where expert discovery is usually limited to complex cases. It was recognized in New Jersey that the facts given to the expert were discoverable. But with the advent of the new federal practice under the 1993 amendment to the federal rule, depositions began to go through machinations about what was a draft. People would ask supplemental interrogatories -- "Did the expert prepare a draft?" One lawyer observed that "We tried to say it was work product, but the better argument was that it was not within our definition of work product." In toxic tort cases there would be seven or eight day depositions involving word-by-word analyses of reports and draft reports.

Another lawyer emphasized that this change in practice after 1993 produced significant discomfort. The first question would be "Did your lawyer . . ." That put the spotlight on the lawyer. Under the new rule, "you zero in on the substance of the report." "This rule furthers collegiality, and takes away the sideshow focusing on what the lawyer did."

It was asked whether these lawyers found themselves retaining a second set of experts due to the prospect of discovery. One attorney said that in bigger cases the client would sometimes insist on it to protect against discovery.

A question was raised about the amount of publicity of the rule change and the reaction to it. The response was that the New Jersey Civil Practice Committee has a two-year cycle on recommending rule changes that is well known. Lawyers know that every other January there will be a report on proposed new rules. The reports are published in the legal press. There are rarely hearings; they are only for topics that provoke great controversy. Although it is impossible to say who reads the newspaper reports carefully, there were articles in the New Jersey Lawyer and the New Jersey Law Journal. "This was well known and well publicized." There was no controversy.

Another lawyer seconded this view. "This was universally well-accepted." This lawyer recalled that before the rule change there was inquiry into drafts often; only once did anything of importance emerge. Since he represents public bodies, he never had two sets of experts, for that would be too costly. More generally, the practice before the New Jersey rule change produced problems for less wealthy clients.

Another attorney who represents plaintiffs in mass tort litigation reported that he often handles litigation with coordinated state-court and federal-court cases. He urges litigants in those cases to stipulate to the New Jersey practice for all the cases. Sometimes defense counsel will resist. He can't understand their resistance. To prepare for this conference, he talked to a

number of plaintiffs' attorneys. Nine out of ten say a draft of the report is not useful. It is just a way to attack defense counsel. That is not useful.

Another plaintiffs' lawyer volunteered that "Any time a lawyer's conduct becomes the focus, that is bad for the system." When the case involves an attack on an attorney, that is harmful. Jury consultants show that these attacks are not even useful; the juries know that the experts are retained by the lawyers and responsive to their objectives.

Because the New Jersey practice is that the facts used by the expert are discoverable, it was asked how the line is drawn between what is and is not discoverable. The response is that "There is a pretty clear line." A defense lawyer cited Franklin v. Milner, 375 A.2d 1244 (1977), a case in which the court parsed a letter to the expert to determine what constituted facts provided to the expert and what constituted work product. [In case it would be of use, a summary of this case is included in the Appendix to these notes.]

Another plaintiff's lawyer pointed out that in the Bextra and Celebrex MDL proceedings, pending in U.S. District Court in San Francisco, Judge Breyer by pretrial order had adopted the parties' stipulation to protect against discovery:

No Production of Drafts, Work Product, or Deliberative Process. With regard to exchange of expert reports, the parties hereby stipulate that draft reports need not be disclosed and that other writings between the expert and the counsel that reveal work product or deliberative communications between the expert and the attorneys need not be produced.

In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation, MDL No. 1699, Pretrial Order No. 21 paragraph 11 (March 16, 2007). By letter agreement, the parties extended this provision to cover oral communications between counsel and the experts. Initially, defendant Pfizer had balked at this stipulation, but it later agreed.

Bextra is the first mass tort with such a stipulation. One reason for the Bextra order was that there was a tight deadline for completing expert discovery. The expert witnesses were located around the world -- some in England and New Zealand. Without such an arrangement, counsel might think they have to travel to meet the witness, or insist the witness travel long distances to counsel's offices, to avoid creating discoverable drafts. This would be very time-consuming and wasteful, and particularly difficult with the schedule so tight. That is why there was such a stipulation.

This plaintiffs' mass tort lawyer sees no difficulty in probing the analytical basis for the expert's opinion without having draft reports.

Another plaintiffs' mass tort lawyer agreed. "If you ghost a report, the expert will be ripped apart."

Another attorney agreed. "You can address these issues with hypothetical questions -- Would your opinion change if . . ." I will get the expert's file, and also a privilege log of what's been held back. I can proceed from there. This lawyer added that ghostwriting of reports is not a problem. "This rule takes the pressure off. I can let the expert work up the report on her own." Nonetheless, this lawyer said "I'm very careful about what I give to my expert to keep things from being produced." He added that "not every communication is protected" because only the collaborative process is protected.

It was noted that under the New Jersey rule the protection is limited to the “collaborative process,” suggesting that a fair amount of interaction may not be protected. One lawyer offered a simple example: In an auto accident case, the lawyer sends the expert the police report. But the expert gets the direction of the defendant’s car wrong. The lawyer calls this mistake to the attention of the expert, who corrects it. The fact that the lawyer sent the expert the police report is subject to discovery. The fact that the expert made this mistake is not.

Should this matter? One attorney said that at trial it would be effective to say “You said the car was going south when it was going north. Were you equally careful with the rest of your analysis?” Another lawyer volunteered that a Daubert decision might be affected by this -- “You mean the ‘expert’ doesn’t know the difference between North and South?” But the common view of those present was that no legitimately important opportunity to challenge the expert’s testimony would be lost.

Another question was whether inserting an “escape hatch” into a protective rule permitting a court to order disclosure in exceptional circumstances would produce undesirable consequences. [It is worth noting that the New Jersey rule seems to say that discovery may be ordered if a standard like the one in Rule 26(b)(3) is met.]

One attorney responded that such a possibility “would chill the collaborative process.” Another noted that e-mail has become universal and necessary. Allowing intrusion into that can be crippling to effective work of attorneys. Another noted that allowing the possibility of access will cause motion practice for the court. Another noted that there is now a real problem with lack of collegiality between counsel. The New Jersey rule is a positive development, and it fosters collegial relations. There are fewer games of gotcha. We should craft rules that foster collegiality rather than gotcha behavior.

Another attorney turned to the concern about attorneys ghost-writing expert reports. At three levels, he felt there was not a problem:

First, this concern disregards the purpose of the expert report. The report does not have pristine independent importance. It was introduced because it is better than the an attorney’s interrogatory answer. The real goal is to give the other side a fair opportunity to inquire into the grounds for the expert’s opinion. That is possible without access to draft reports or to the collaboration between the lawyer and the expert. Ghost-writing a report simply won’t work without access. “The witness will be ripped up” if the report is somebody else’s work.

Second, most experts have integrity. They feel it’s their job to work up the analysis and do the report. That is also a pragmatic value because they should realize that if they can’t explain the results they will be ripped up.

Third, for some people there is a need for the lawyer’s help and focusing on that is distracting. For example, if an auto mechanic would not be comfortable writing up a report the lawyer can assist. Making a big deal out of that activity by the lawyer is not sensible.

Another lawyer (a plaintiffs’ lawyer) summed up the discussion -- “This is a cross-section of attorneys who are unanimous this has worked well. We say this is a shared view of all attorneys in New Jersey. And this is a bright line test that works for us.”

A defense lawyer agreed. “This has led to a sort of behavior change. We’re glad to be Jersey lawyers.” But this lawyer said that he would make one change. He would not cut off the protection as of the date that the final report is served. the plaintiffs’ lawyer who had just spoken

agreed -- the distinction in treatment between pre- and post-report communications with the expert was a problem.

A plaintiffs' mass tort lawyer mentioned that in some such cases plaintiff and defendant attorneys agree that the protection should not end with the service of the final report.

Another lawyer explained why this has been a good rule for lawyers -- "As an attorney, I don't have an obligation to go after this material. My client may want me to make the other lawyer's life more difficult, but now that I can't do so, and that temptation has been removed." He added that "Nobody bothers with the pre- and post-report distinction." Instead people respect the protection without regard to chronology.

It was asked whether there are any New Jersey cases interpreting this new rule. The answer is that there are not, and that the absence of interpretation shows that the rule is clear and is working. He added that introducing an escape hatch would have bad results.

This prompted the observation that the New Jersey rule seems already to have an escape hatch using the standard required to obtain access to work product. Don't New Jersey lawyers think they can get this? Why don't they try?

The initial response was that there is a body of law in New Jersey on access to the work of nontestifying experts, which is very difficult to justify. Another lawyer said that "exceptional circumstances" is an almost insurmountable obstacle to discovery. He added, however, that even that would undermine the protection provided by the rule. This prompted the remark that the rule seems to allow access on a less compelling showing, and the observation that it is interesting that people are not trying to gain access. The answer was that this was a result of the standard -- discovery is only allowed if you can't get what you are seeking from any other source.

A lawyer who practices in both New York and New Jersey added that "A lot of this is culture. It's a different feel over there."

After a break, another attorney sought to correct what he feared might be a misimpression -- that the New Jersey bar is so collegial that the practice in question was largely a cultural feature of that bar, not something that could be adopted elsewhere. Actually, New Jersey is right between New York and Philadelphia, and it is not different from a lot of other metropolitan areas.

At this point, two more attorneys joined the conference, and they were asked to offer their views on the New Jersey rule.

One, who represented civil rights plaintiffs and defendants in criminal cases, said he liked the rule. He usually represents people with limited means in suits against governmental agencies. He doesn't want to be sidetracked on a tangent regarding how many drafts there were. This sort of thing will delay the case. In the long run, it's more efficient and less of a burden for plaintiffs. He hasn't found smoking guns using the federal rule that would justify the negative features of that rule. He added that it's not always a good idea to depose the other side's expert. Why educate them? But it is essential to have an expert report; attorney disclosure is not an adequate substitute.

The other lawyer handles class actions and other complex civil litigation from a defense perspective. His experience is that the New Jersey rule is a good one. It's become popular enough that in federal class actions parties now stipulate to the New Jersey rule. He contrasted

the New Jersey approach to admissibility of scientific opinion testimony. There he would strongly urge adopting Daubert. [This elicited strong disagreement from plaintiff lawyers who said the vigorous disagreement on this issue showed that they don't agree with defense counsel on much more than the wisdom of the New Jersey rule under discussion in this conference.] But it's surprising how easy it is to persuade parties to stipulate to this discovery rule in multiparty federal cases. And he's seen no disadvantage in the Daubert process in doing so; it is possible to challenge the plaintiff's expert evidence without the more intrusive federal rule.

It was asked whether these attorneys have run into downsides to the New Jersey rule. One attorney offered that there is still a risk of waiver if the witness overtly relies on the lawyer. But in one case where that sort of issue arose he was able to avoid being immersed in side-issues as a result.

Another question was whether counsel retain draft reports. One response was that it's not so much that you have a file called "draft reports," but that you don't have an elaborate and protective relationship with your expert. Another said that "I want to know what will be in the report before the report is developed. It's unrealistic to say experts prepare their reports without attorneys."

Another attorney said that he communicates by e-mail with his experts, and they send him draft reports. He's sure he has them somewhere as a result.

Another lawyer noted that experts' behavior has not changed even if New Jersey lawyers' behavior has. Many experts testify across the land, not just in New Jersey.

Another attorney recalled a New Jersey federal judge who would often order that all draft expert reports be retained. "This would lead to settlement. Who can live with this?"

Returning to the question of an escape valve, it was noted that there seemed no enthusiasm for such a provision, but that there was unhappiness with limiting the protection to the pre-report stage. One attorney responded that the rule change was to avoid issues and another said the current exception is "an illusory exception."

Another lawyer said that he is still retaining drafts, but also that he spends a lot of time with experts before retaining them. "No matter what the rule says, I'll be very cautious. I don't need the protection of the rule. But I don't want this to be a distraction. And I've found few smoking guns, so I think it is mainly a harmful distraction."

Another inquiry was about the term "collaborative process" that appears in the rule. Was this a term of art before the rule? Is it defined anywhere?

This question prompted the response that the fact there are not reported cases shows that the rule is understood and is working. Another said that the Adler case introduced the phrase "collaborative process," and that Judge Walsh (who wrote that opinion) wrote it into the rule (as Chair of the subcommittee that produced the proposed rule).

Another lawyer volunteered that this rule facilitates getting the best possible experts. An example was a possible expert witness who was a high-ranking academic with many grant proposals and other concerns. Such a person will refuse to serve as a witness in a regime that requires the elaborate and pointless activities produced by the federal rule. The New Jersey rule, on the other hand, provides a way to recruit such a person.

Another attorney noted that the collaborative process is less likely to be important for the “professional” expert witness. It’s the people who don’t do this all the time who benefit from that collaboration. Another said “These are the experts we want. They hate this kind of sideshow. Sometimes we can’t get them under the federal rule.” Yet another illustrated with the sorts of struggles experts face under the federal rule -- “Do I have to preserve draft reports on Webex?”

Another question was whether the framers of the New Jersey rule thought about limiting discovery to items relied upon by the expert witness. The answer was that this was discussed and the broader “considered by” terminology was chosen to make the rule sweep more broadly. Another explained that the New Jersey practice was too narrow.

Another question was whether the New Jersey rule has resulted in time savings in depositions. One attorney said that a significant amount of time has been saved due to the rule. Another said that he had a “gut feeling” that there were time savings. Another added that the quality of the report was better, which could save time in depositions.

One lawyer noted, however, that “I talk to my expert more now, so that’s a larger cost. But you get a better report.” Another acknowledged that deposition preparation may be longer, so that there are probably not major cost savings.

A plaintiffs’ lawyer said that, in his cases, the deposition is shorter, although it may be that the defendant has to pay for a longer preparation session.

Another said the practice is more efficient, but added that it has not eliminated the need sometimes to hire a consulting expert.

A plaintiffs’ mass tort lawyer stressed that the rule saves time on turn-around. “Now we don’t have to go in person to talk to the expert.”

The conference ended at 3:45 p.m.

APPENDIX

Because several lawyers referred to the following two New Jersey cases, it seemed useful to include a summary of them.

Adler v. Shelton, 778 A.2d 1181 (N.J. Super. 2001), was decided by Judge Walsh, a member of the committee that drafted the New Jersey procedure on which the mini-conference focused. The dispute there was about the production of a draft report of a structural engineer. The suit claimed that defendant architects had misdesigned plaintiffs’ house. Plaintiffs had a roof leak and hired a contractor to deal with the problem. He in turn hired a structural engineer who concluded that plaintiffs’ home was in imminent danger of collapse and designed repairs to address what he thought were serious structural defects. Thus, the structural engineer started out as an actor or viewer who was brought into the situation by the contractor, not by a lawyer.

Plaintiffs then contacted a law firm, which hired the same structural engineer to assist them on expected litigation as well. The law firm filed a suit claiming that defendant architects (who designed plaintiffs’ house) negligently designed the house. The engineer prepared a report for the law firm that was provided to defendants. During his deposition, the structural engineer testified that he probably prepared a draft report but that he never kept drafts because “it just adds up to a lot of paperwork” to keep drafts. He acknowledged that he furnished plaintiffs’ law firm

with drafts once or twice, and that changes may have been made in response to lawyer comments to the manner of presentation in the report, but not to the content. Defense counsel asked the structural engineer to search for drafts but he reported back that he had not found any.

The matter might have rested there, but during the deposition of plaintiffs' contractor it turned out that he had one of the structural engineer's drafts. The reason seems to have to do with payments. The structural engineer was originally hired by the contractor, and billed his work on the house to the contractor. Contrary to the law firm's recommendation that they pay the structural engineer directly for his work on the litigation, plaintiffs continued to pay the contractor for all the structural engineer's work (including work on the litigation) and for that reason the contractor had a draft report from the structural engineer, which was submitted in connection with a billing for the litigation work. The contractor then produced the draft at his deposition. But because New Jersey guards against waiver for inadvertent disclosure this production did not waive any applicable protection. It did, however, bring to the fore the issue whether the draft should be produced, and defendants moved for production.

Judge Walsh concluded that the draft should be produced, drawing considerably on federal decisions to reach his conclusion. He noted the disagreements among federal courts on whether core work product provided to expert witnesses is discoverable and endorsed interaction between lawyers and their experts:

It is common knowledge that attorneys regularly work with their retained experts in preparing expert reports. It is good practice as well. Too much scrutiny of this *collaborative process* serves only to demonize the natural communicative process between an attorney and his or her retained expert. Ultimately, it does little to insure that the expert's opinion has been independently derived.

Id. at 1190 (emphasis added). He also quoted the Third Circuit's views from *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984):

Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory. Even if examination into the lawyer's role is permissible, . . . the marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong public policy against the disclosure of documents constituting the core attorney's work product.

Nonetheless, the judge held that the report in question had to be turned over (*id.* at 1192):

Here the facts plainly favor the draft report's production. [The law firm] played no role in the preparation of the draft. The law firm provided no information to the expert at least as far as the record before the court indicates. Even if it had, there is nothing to suggest that [the law firm] had shared any of its "opinion" work product with [the structural engineer]. . . . There is not even evidence that the draft report was produced as a result of collaborative efforts between [the law firm] and [the structural engineer]. There certainly is no dispute between the parties, nor could there be one, about the facts the expert considered, or at least relied upon, for his opinion here. Consequently, the court directs the disclosure of [the structural engineer's] draft report forthwith.

Franklin v. Milner, 375 A.2d 1244 (N.J. Super. 1977), was a medical malpractice action in which both plaintiffs and defendants hired expert medical witnesses to review and express

opinions about what the medical records showed. The parties then exchanged these reports. The discovery issue resulted when plaintiffs asked their medical expert to comment on the report of the defendants' expert, and plaintiff's expert did so in a letter to counsel that contained a number of observations about the expert's strategic views and recommendations. The letter was submitted to the court for in camera review in connection with defendants' demand that it be produced. The court went through the letter sentence by sentence and separated statements that were medical in nature from those that it viewed as legal in nature. For example:

The last two sentences in the first paragraph on the second page we consider argumentative, nonmedical comments entirely barren of expert opinion and of no evidential competence. They might suggest a line of inquiry for plaintiffs' counsel to pursue during trial, but cannot lead to discoverable evidence.

The last paragraph is Dr. Kanter's estimate of the prospects of concluding the case without a trial. It expresses a legal thought and repeats an observation made in his deposition that credibility is in issue.

Id. at 1248. More generally, the court noted:

It is common for experts to serve a dual role as prospective witnesses and as consultants to attorneys in preparing a case. In other jurisdictions the work-product protection has been preserved for those communications of an expert made in the capacity of an advisor in preparation for trial, although discovery can be had of the knowledge and opinions about which they are prepared to testify.

Id. at 1252. Because it felt that the doctor's strategic musings were not relevant or likely to lead to admissible evidence, the court held that they were not discoverable.

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

TABLE OF CONTENTS

Attendance.....	1
Introductory Remarks.....	2
Approval of the Minutes of the Last Meeting.....	5
Report of the Administrative Office.....	5
Report of the Federal Judicial Center.....	6
Report of the Time-Computation Subcommittee..	6
Reports of the Advisory Committees:	
Appellate Rules.....	11
Bankruptcy Rules.....	16
Civil Rules.....	21
Criminal Rules.....	24
Evidence Rules.....	42
Report on Standing Orders.....	49
Report on Sealing Cases.....	50
Next Committee Meeting.....	51

ATTENDANCE

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

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

Amendments for Publication

TIME COMPUTATION RULES

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

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

FED. R. CIV. P. 62.1

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

Informational Items

EXPERT-WITNESS DISCOVERY

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

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

ORAL REPORT ON THE CIVIL RULE 56 CONFERENCE

NOVEMBER 7, 2007

WASHINGTON, D.C.

ORAL REPORT BY THE FEDERAL JUDICIAL CENTER
RESEARCH ON CIVIL RULE 56

1. Proposed Rule 56

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

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

Rule 56. Summary Judgment

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

18 (c) **Procedures.**

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

FEDERAL RULES OF CIVIL PROCEDURE

- 44 (A) citations to particular parts of depositions,
 45 documents, electronically stored information,
 46 affidavits, stipulations (including those made
 47 for purposes of the motion only), admissions,
 48 interrogatory answers, or other materials; or
 49 (B) a showing that:
 50 (i) the materials cited to support the fact do
 51 not establish the absence of a genuine
 52 dispute; or
 53 (ii) no material can be cited to support the
 54 fact.
- 55 (6) **Filing Cited Materials.** A party must attach to a
 56 motion, response, or reply the cited parts of any
 57 factual materials that have not already been filed.
- 58 (7) **Brief.** A party must make its arguments of law and
 59 fact in a separate brief filed with the motion,
 60 response, or reply or at a time the court orders.

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

85 **(1)** defer consideration of the motion or deny it;

86 **(2)** allow time to obtain affidavits or to take discovery;

87 or

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

98 **(1)** grant partial summary judgment on a claim,
99 defense, or issue;

100 **(2)** enter an order or memorandum stating any material
101 fact — including an item of damages or other relief
102 — that is not genuinely in dispute and treating the
103 fact as established in the action; or

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

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

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

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

Rule 56. Summary Judgment

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

38 **(c) Procedures.**

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

69 (B) a showing that:

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

89 (3) issue any other appropriate order.

90 (e) Court Action. The court may:

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

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

FEDERAL RULES OF CIVIL PROCEDURE

95 (A) grant summary judgment for a nonmovant;

96 (B) grant or deny a motion for summary
97 judgment in whole or in part on grounds not

98 raised by the motion or response; or

99 (C) consider summary judgment on its own after
100 identifying for the parties material facts that
101 may not be genuinely in dispute.

102 (f) **When Opposing Affidavits Facts are Unavailable.** If
103 a ~~party opposing the motion~~ nonmovant shows by
104 affidavit that, for specified reasons, it cannot present
105 facts essential to justify its opposition, the court may:

106 (1) defer consideration of the motion or deny it the
107 motion;

108 (2) ~~order a continuance~~ allow time to obtain enable
109 affidavits to be obtained, depositions to be taken,
110 or other to take discovery ~~to be undertaken;~~ or

111 (3) issue any other just appropriate order.

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

139 (2) enter an order or memorandum stating any material
 140 fact — including an item of damages or other relief
 141 — that is not genuinely in dispute and treating the
 142 fact as established in the action; or

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

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

FEDERAL RULES OF CIVIL PROCEDURE

- 145 ~~— (1) *In General.* A supporting or opposing affidavit~~
 146 ~~must be made on personal knowledge, set out facts~~
 147 ~~that would be admissible in evidence, and show~~
 148 ~~that the affiant is competent to testify on the~~
 149 ~~matters stated. If a paper or part of a paper is~~
 150 ~~referred to in an affidavit, a sworn or certified copy~~
 151 ~~must be attached to or served with the affidavit.~~
 152 ~~The court may permit an affidavit to be~~
 153 ~~supplemented or opposed by depositions, answers~~
 154 ~~to interrogatories, or additional affidavits.~~
- 155 ~~— (2) *Opposing Party's Obligation to Respond.* When~~
 156 ~~a motion for summary judgment is properly made~~
 157 ~~and supported, an opposing party may not rely~~
 158 ~~merely on allegations or denials in its own~~
 159 ~~pleading; rather, its response must — by affidavits~~
 160 ~~or otherwise as provided in this rule — set out~~
 161 ~~specific facts showing a genuine issue for trial. If~~

FEDERAL RULES OF CIVIL PROCEDURE

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

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

FEDERAL RULES OF CIVIL PROCEDURE

3. *Proposed Committee Note*

COMMITTEE NOTE

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

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

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

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

4. Discussion of Proposed Rule Changes

Subdivision (a).

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

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

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

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

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

Subdivision (c)

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

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

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

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

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

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

Subdivision (d).

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

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

Other Subdivisions.

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

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

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

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

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

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

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

Conclusion

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

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

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

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

Purpose of Revision

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

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

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

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

Standard

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

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

Rule 56 Revision -2-

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

Rule 56 Revision -3-

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

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

Rule 56 Revision -4-

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 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

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

Rule 56 Revision -5-

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

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

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

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

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

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

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

Timing

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

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

Rule 56 Revision -6-

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

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

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

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

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

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

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

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

Rule 56 Revision -7-

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

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

Rule 56 Revision -8-

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

Rule 56 Revision -9-

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 56 Revision -10-

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

Rule 56 Revision -11-

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.

MEMORANDUM TO: Judge Michael Baylson

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

FROM: Jeffrey Barr and James Ishida

DATE: March 21, 2007

RE: Survey of District Court Local Summary Judgment Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵See Appendix.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Here is an example, taken from Judge Otero's "initial standing order":

18. Motions – Form and Length:

* * * * *

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

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

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

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

* * * * *

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

APPENDIX

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

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

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

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

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

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

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

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

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

LOCAL RULES¹ PROCEDURES re SUMMARY JUDGMENT PRACTICE IN FEDERAL DISTRICT COURTS

I. NUMBER OF SUMMARY JUDGMENT MOTIONS ALLOWED

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

II. TIME FOR FILING SUMMARY JUDGMENT MOTION

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

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

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

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

III. FORM OF MOTION FOR SUMMARY JUDGMENT

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

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

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

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

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

document.⁷

• FRCP 56(e):

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

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

⁷E.D. Cal. L.R. 56-1(a); D. Colo. LCivR 56.1 (voluminous exhibits discouraged. Parties to limit exhibits to essential portions of documents); D. Conn. Local Rule 56(a)1; D. Haw. LR 56.1(c) (only relevant excerpts); N.D. Ill. LR 56.1(a)(3); D. Kans. Rule 56.1(a); D. Mass. Rule 56.1; W.D. N.Y. L.R. 56.1(d) (all cited authority must be separately filed and served as an appendix to the statement of material facts); D. Ore. LR 56.1(c)(3) (the party must file excerpts of the document, not the entire document); W.D. Pa. LR 56.1 (B)(3) (must be included in an appendix but need not include the entire document. Excerpts to cited documents are acceptable); D. S.D. LR 56.1(A) (may also append a summary but must make the original documents available to the opposition); W.D. 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).

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

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

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

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

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

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

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

IV. SERVICE OF MOTION

- A. In General.¹⁴

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

V. OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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

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

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

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

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

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

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

B. Time Limit. There is much variation among the districts.¹⁶

C. Page limitation. There is some variation among the districts.¹⁷

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

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

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

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

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

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

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

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

VII. HEARING AND ORAL ARGUMENT

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

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

²²D. Alaska LR 7.1(d)(2).

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

VIII. PRO SE LITIGANTS

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

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

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

TABLE OF CONTENTS

Attendance.....	1
Introductory Remarks.....	2
Approval of the Minutes of the Last Meeting.....	5
Report of the Administrative Office.....	5
Report of the Federal Judicial Center.....	6
Report of the Time-Computation Subcommittee..	6
Reports of the Advisory Committees:	
Appellate Rules.....	11
Bankruptcy Rules.....	16
Civil Rules.....	21
Criminal Rules.....	24
Evidence Rules.....	42
Report on Standing Orders.....	49
Report on Sealing Cases.....	50
Next Committee Meeting.....	51

ATTENDANCE

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

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

SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

Amendments for Final Approval by the Judicial Conference

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

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

NOTICE PLEADING: THE AGENDA AFTER *TWOMBLY*

Introduction

On May 21, 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 550 U.S. _____. At the time a jaded academic might have viewed the opinion as simply one more entry in the variegated catalogue of decisions that in alternative sequence deny "heightened pleading" standards outside explicit rule or statute and then seem, surreptitiously, to impose heightened pleading standards. The *Twombly* opinion, indeed, seems to combine both elements. Any temptation to take this view is confounded by the outpouring of lower-court decisions following in *Twombly's* wake. A few months of concentrated attention do not suffice to establish the decision's long-term impact. It would be premature to launch Rule 8 amendments, either for fear that the pleading bar has been raised too high or to secure the bar and perhaps raise it higher still. Barring truly drastic changes, time will be required both to determine what changes have emerged in pleading standards and to evaluate them. As so often, developed practice will provide the surest guide to the need for Rules amendments and, if a need emerges, to the shape of effective amendments. Much of the burden of developing the new practices — if indeed new practices emerge — will fall on the practicing bar. But the pace of the rulemaking process ensures that this burden must be born at least for several years. Delay is not indifference.

If it be accepted that it would not be wise to attempt immediate Rule 8 revision, there are powerful reasons to advance Rule 8 back to a more active place on the Advisory Committee's agenda. If discovery has been on the agenda almost constantly for the last 40 years, notice pleading has been on the agenda for at least 20 years — longer if Rule 11 is included. Concerns about the role of discovery have led repeatedly to thoughts that perhaps the failure to establish a fully satisfactory discovery practice justifies reconsideration of the basic notice pleading part of the package. The Court's invitation to reinterpret present Rule 8 explicitly reflects similar concerns about the role of pleading as a protection against overblown discovery. The immediate response in the lower courts provides assurance that a variety of approaches will be taken, not only in pleading standards as such but also in more assertive efforts to manage the early stages of discovery to facilitate more detailed pleading or summary judgment. If substantial uniformity emerges, there may be no occasion to revise Rule 8 or any other rule. But amendments must at least be considered if disuniformity persists after the initial period of adjustment. Active attention has become important. And it may soon enough be possible to call on the Federal Judicial Center for help in devising empirical studies to help sort through developing practice and its consequences.

Recent Committee History

Pleading practices have been on the agenda for many years. In 1988 the Advisory Committee considered a proposal to abrogate the Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. The defendant would be required to answer on the merits, and then seek dismissal either by a Rule 12(c) motion for judgment on the pleadings or by a Rule 56 motion for summary judgment. An opportunity for "any necessary discovery" would be required before a ruling even on a Rule 12(c) motion. The Committee sought research help from the Federal Judicial Center. The result was Willging, "Use of Rule 12(b)(6) in Two Federal District Courts" (Federal Judicial Center 1989). The study found that Rule 12(b)(6) motions were filed in 13% of the cases in the sample. The motions were granted in 6% of the cases; in 5% of the cases the result was dismissal either of the entire action or dismissal as to one or more defendants. In 3% of the cases the result was dismissal of the entire action. The proposal to abrogate Rule 12(b)(6) was later withdrawn.

Pleading standards were again brought to the agenda by discussion at the May 1993 Advisory Committee meeting, and were the subject of occasional discussion over the following years. Rule 15 amendment practice was studied in depth, leading to recently published amendment proposals.

Discussion of notice pleading as such in part responded to Supreme Court decisions. More recently pleading has been considered along with discovery and summary judgment. The inquiry was bold enough to extend to the fundamental "package" that sought to subordinate pleading to discovery as a means of developing and exchanging fact information, relying on summary judgment for protection against positions of claim or defense that do not merit trial. The bold inquiry did not lead to bold action. Fundamental reconsideration of notice pleading has been deferred in the hope that less drastic approaches will meet whatever problems may persist. The alternative of developing particular pleading requirements for specific substantive areas also was deferred, despite the implicit invitations in Supreme Court observations that any departures from the notice pleading standard must be provided by statute or court rule. Substance-specific standards will be difficult to develop without a keen appreciation of actual practice needs in any field that might be taken on. There also is a risk that substance-specific standards might encroach on the premise that Enabling Act rules must not abridge, enlarge, or modify any substantive right. Finally, attention turned to proposals to expand the Rule 12(e) motion for a more definite statement. A number of alternative drafts were considered at the September 2006 Committee meeting, focusing on more definite statements that would pave the way for disposition under Rule 12(b), (c), or (f), or that would support pretrial management in more general terms. The discussion reflected a balance between enthusiasm for some means to go beyond the generality of the pleadings and reluctance to add a new opportunity for "roadblock" motions. The conclusion was that these proposals might be further considered by the Rule 56 Subcommittee in conjunction with revision of Rule 56. Immediate Subcommittee action does not seem likely.

Twombly

The Twombly opinion is open to many interpretations. There was no room to doubt what the two Sherman Act conspiracy claims were. The plaintiffs, consumers of telephone services, alleged that the four incumbent local exchange carriers had conspired to do two things. One was to adopt terms for dealing with competitive local exchange carriers that effectively defeated the purposes of the 1996 Telecommunications Act by thwarting the entry of new local-exchange competition. The second was to refrain from entering each others' territories by themselves becoming competitive local exchange carriers. The "nature" of the claims, 127 S.Ct. at 1965 n. 3, was clear. The question was instead whether the complaint provided sufficient "grounds" for the claims by pleading "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal conspiracy," 127 S.Ct. at 1965. The link between pleading and discovery was thus forged early in the opinion. The link was further shaped as the opinion progressed. Emphasizing the burdens of discovery in complex antitrust litigation and the difficulties of judicial management, the single most frequently used label — perhaps to become a "test" — looks for "plausibility." An early statement looks for "factual enhancement" that crosses "the line between possibility and plausibility of 'entitlement to relief.'" 127 S.Ct. at 1966.

It is tempting to predict that eventually the Twombly opinion will come to stand for a context-specific test that looks for sufficiently detailed fact allegations to make it plausible to move beyond the bare pleadings into the potentially expensive discovery stage. The effect of context could be measured by a variety of factors that shape expectations of discovery burdens. Lower demonstrations of plausibility might suffice when discovery does not threaten to consume vast resources, while greater detail would be required when discovery seems likely to prove costly. Context also might be shaped, although perhaps not explicitly, by the nature of the substantive claim. The element of agreement required to establish an antitrust "conspiracy" is confused in theory and may be exquisitely difficult to establish in practice. The structure of many markets enables parallel conduct that might reflect conduct that can be characterized as "agreement," but also might reflect successful independent oligopoly rationalization. An allegation that is easy to allege but costly to discover and difficult to prove may encounter higher plausibility barriers. Simple familiarity with

the law and frequent experience with litigation under it also may count — the bare allegation of "negligence" in Form 9 (to become Form 11) suffices because court and counsel know full well how to manage a negligence action. There is strong reason to believe that courts now measure the sufficiency of pleadings by responding to all of these influences, and that adoption of a "plausibility" test will make the process somewhat more open and may encourage more deliberate pursuit of the process.

It is almost as tempting to make a different prediction. The Twombly opinion may come to be seen as specific — specific not to antitrust pleading in general, but specific to the particular problems presented by claims that rest on the agreement component of a § 1 "contract, combination in the form of trust or otherwise, or conspiracy."

Either of these predictions seems reasonable. The complex Twombly opinion, however, invites speculation at least as much as prediction. The catalogue of phrases that can be built out of the opinion is intriguing. One phrase or another can be made to point in almost any direction. A partial catalogue illustrates the possibilities:

"a conclusory allegation of agreement at some unspecified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement."

"The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"

"The border in [a court of appeals case] was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability."

A case should be disposed of at the point of minimum expenditure by parties and court "when the allegations in the complaint, however true, could not raise a claim of entitlement to relief."

Quoting a court of appeals, the costs of federal antitrust litigation "'counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim.'"

"Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence.'"

In *Conley v. Gibson*, the Court said that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." "This 'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard. * * * On such a focused and literal reading * * *, a wholly conclusory statement of claim would survive a motion to

dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." The complaint in this case "does not set forth a single fact in a context that suggests an agreement. * * * It seems fair to say that this approach to pleading would dispense with any showing of "a reasonably founded hope" 'that a plaintiff would be able to make a case.' The "no set of facts" language has confused and divided courts and commentators. The Conley complaint in fact amply stated a claim for relief. "[T]his familiar observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. * * * Conley * * * described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."

"[B]efore proceeding to discovery, a complaint must allege facts suggestive of illegal conduct."

The complaint in Twombly describes parallel conduct and asserts agreement, but the "few stray references" to agreement "are merely legal conclusions resting on the prior allegations." "The pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." Form 9, in alleging negligence, also alleges a specific time and place. The Twombly complaint "furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." Nothing in the complaint "invests either the action or inaction alleged with a plausible suggestion of conspiracy." [It is natural for each of the defendants, acting independently, to resist competition from new local carriers; "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway * * *."]

"[W]e do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of * * * Rule * * * 9. * * * On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. [Rule] 9(b)-(c). Here, our concern is not that the allegations in the complaint were insufficiently 'particular[ized], * * *; rather, the complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible."

"[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

Phrases will be picked out from this array and from other parts of the opinion. It is clear that the "no set of facts" hyperbole of the Conley opinion has been abolished. Many statements suggest a requirement that facts be pleaded — if not the "fact pleading" of the Codes, still something more than mere "conclusions." Apparent approval of the barebones allegation of "negligence" indicates that the line between "fact" and "[legal] conclusion" will depend on the context. So the opinion variously refers to "enough fact to raise a reasonable expectation that discovery will reveal evidence"; "factual enhancement" to cross "the line between possibility and plausibility of entitlement to relief"; "facts adequate to show illegality"; the lines between "the conclusory and the factual," and "between the factually neutral and the factually suggestive"; "fact in a context that suggests agreement"; "facts suggestive of illegal conduct"; "merely legal conclusions"; and "not *

* * heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."

Beyond the search for some fact component, the opinion distinguishes between the "nature" of the claim and the "grounds." (Remember that Rule 8(a)(1) requires a short and plain statement of the "grounds" for jurisdiction, while (2) does not refer to "grounds" in stating the claim.) The complaint must show that the pleader is entitled to relief — in itself an observation that is easily anchored in 8(a)(2)'s "a short and plain statement of the claim showing that the pleader is entitled to relief." Something must show "an entitlement to relief," also an observation clearly anchored in the rule text. There must be a "reasonable likelihood that the plaintiffs can construct a claim" — an observation that seems to mean that a plaintiff must state a claim and also show a chance of "constructing it." There must be a reasonably founded hope that discovery will reveal "relevant" evidence — this does not seem to look for a prospect that discovery will reveal sufficient evidence, but only relevant evidence. So to of a reasonably founded hope the plaintiff will be able to make a case.

All of this could be reduced to a simple proposition, similar to one of the suggestions made early in the Committee's renewed consideration of notice pleading. Rule 8(a)(2) has it right. It requires not merely a short and plain statement, but a statement "showing that the pleader is entitled to relief." The suggestion was that some innocuous word might be added as a justification for publishing an amended rule with a Committee Note saying "and we really mean it. There must be some showing sufficient to justify moving beyond the pleadings to the next stage. The showing may be adjusted to the apparent costs of proceeding to discovery and other pretrial work, and may be integrated with focused and limited resort to discovery and other pretrial work in a process that requires some initial success in discovery to justify better focused pleading and further discovery." The antitrust context of the Twombly decision is fully consistent with this view.

Erickson (and Tellabs)

The Twombly decision was not the last word on pleading in the October 2006 Term. Two subsequent decisions fill out the picture.

Erickson v. Pardus, 2007, 127 S.Ct. 2197, is more general. The Court granted review and vacated on the certiorari papers. The plaintiff prisoner, proceeding pro se, alleged that he had been improperly withdrawn from treatment for hepatitis C, and alleged that nontreatment caused continued damage to his liver and was endangering his life. The court of appeals affirmed dismissal, finding no more than "conclusory allegations" that suspension of treatment caused harm independent of the harm that would result from hepatitis C itself. The Supreme Court ruled that the allegations were not "too conclusory" for pleading purposes. The allegation that removal from treatment endangered the plaintiff's life "alone was enough to satisfy Rule 8(a)(2)." Quoting Twombly, the Court said:

Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."

The Court went on to note that the claim was "bolstered" by more specific allegations in attachments to the complaint and in later filings. It also noted that a pro se complaint is held to less stringent standards than a formal pleading drafted by a lawyer.

It is often difficult to know just what to make of a summary disposition on the certiorari papers. The potential effect of the Erickson decision could easily be limited by the indulgence extended to pro se pleadings. It also could be limited by the manifest cogency of a claim that

suspension of hepatitis C treatment for a minimum period of 18 months may lead to further liver damage and perhaps worse. At the same time, this selective quotation from the Twombly opinion could imply that the Twombly decision is, after all, specific to antitrust cases and perhaps is more specific still, looking only to conspiracy claims founded on parallel behavior. The steadfast denial of "heightened pleading" in the Twombly opinion could provide further support for this interpretation.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 2007, 127 S.Ct. 2499, is more limited. The Private Securities Litigation Reform Act of 1995 requires that a complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." "The inquiry is inherently comparative." It is not enough that a reasonable inference of "scienter" can be drawn. The pleaded facts satisfy the test "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." This part of the opinion does not speak to pleadings governed by general notice-pleading standards. But another part may be more relevant. The Court ruled that this reading of the statute "does not impinge upon the Seventh Amendment right to jury trial." Here the opinion could be read to say only that when Congress creates a statutory claim — as in the securities laws — Congress "has power to prescribe what must be pleaded to state the claim." For that matter, the Leatherman decision recognized that heightened pleading requirements can be created by court rule, such as Civil Rule 9(b). The statute does not require the plaintiff to plead more than she would be required to prove at trial. (This part of the opinion seems to go further: the plaintiff need only plead facts making the inference of scienter at least as likely as any plausible opposing inference; at trial, the plaintiff must demonstrate that scienter is more likely than not. The pleading test thus falls somewhat short of the directed verdict standard.)

The Courts of Appeals Confront Twombly

Reaction to the Twombly decision has been immediate and universal. Electronic research accounts counted the first thousand cases citing Twombly by early September. No doubt the count will climb past two thousand by the time of the November meeting. The appellate opinions alone counted up rapidly, although perforce in appeals from decisions rendered before Twombly was decided. This pervasive fascination may reflect an eagerness for guidance in notice pleading stemming from long-continued uncertainty as well as the centrality of the Supreme Court and the complexity of the opinion. If a brief period suffices to show the importance of the decision and the range of possibilities it opens up, however, more time will be needed to reach any settled account of actual consequences. The time has not yet come for an exhaustive accounting of even the appellate decisions. But it is helpful to consider a small set of illustrations drawn from different circuits. The illustrations show that thoughtful proceduralists find that Twombly opens many possible approaches.

The Second Circuit: Iqbal

Pride of place in the early returns belongs to *Iqbal v. Hasty*, 2d Cir.2007, 490 F.3d 143. The appeal was argued in October 2006. The decision was entered on June 14, 2007, barely more than three weeks after the Twombly decision. The court managed, in this brief period, to provide not only a thorough review of the perplexities it found in the Twombly opinion but also a careful application of the standard it found there — a "plausibility" test of pleading.

A brief summary is even more inadequate with respect to the Iqbal decision than with respect to the Twombly case. It is easy to frame the Twombly pleading problem in abstract terms. Not so for Iqbal. "Iqbal is a Muslim Pakistani currently residing in Pakistan." His complaint alleged that two months after he was arrested and placed in the general prison population he was moved to a

newly created "Administrative Maximum Housing Unit" for no reason other than designation by the FBI as a person "of high interest" in "investigation into the events of 9/11." In addition to the onerous general terms of confinement, the complaint alleged many acts of individual injury, including beatings, repeated strip and body-cavity searches, inadequate food, interference with prayer, delay in delivering legal mail, and the like. In addition to a wide array of constitutional and statutory claims the complaint presented particularly thorny problems with respect to official immunity and the responsibility of such high officials as the Attorney General and the Director of the FBI for acts playing out in the remote reaches of the Bureau of Prisons hierarchy. In the end, most of the allegations were found sufficient to withstand a motion to dismiss.

The discussion of "pleading requirements" in *Iqbal* begins with a review of the familiar cases, including those that reject "heightened pleading" requirements. 490 F.3d at 153-155. Then attention turns to *Twombly*, 490 F.3d at 155-159. The court recognized that a "narrow view" could be taken, limiting the *Twombly* decision to the specific context of an antitrust conspiracy claim based on nothing more than allegations of parallel conduct in a market structured to facilitate parallelism without agreement. The opinion, however, through "several, not entirely consistent, signals," indicates an intent "to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson*."

Judge Newman then quoted many of the phrases in the *Twombly* opinion that "point toward a new and heightened pleading standard." Disavowal of the "no set of facts" language in *Conley v. Gibson* was the beginning. (Later, 490 F.3d at 157 n. 7, the opinion notes that this language "has been cited by federal courts at least 10,000 times in a wide variety of contexts.") The Supreme Court discounted the ability of careful case management to weed out failing cases early in the discovery process. The opinion seems to adopt a "plausibility" standard.

On the other hand, there are grounds for limiting the possible reach of the *Twombly* opinion. The Court explicitly disclaimed "heightened pleading." The *Erickson* decision is in this same vein. Form 9 (Style Form 11) was noted approvingly, although the Court "took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent." The emphasis on the burdens of antitrust discovery might imply that special pleading tests apply in antitrust actions. And the *Erickson* opinion says that a pleading need not include specific facts to satisfy Rule 8(a)(2).

"These conflicting signals create some uncertainty as to the intended scope of the Court's decision." But at least some of the language discussing Rule 8 in general terms "seems to be so integral to the rationale of the Court's parallel conduct holding as to constitute a necessary part of that holding." The conclusion, then, is that

[T]he Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility" standard, which obliges a pleader to amplify a claim with some allegations in those contexts where such amplification is needed to render the claim plausible.

Finally, the court expressed some lingering regret that heightened pleading could not be required in cases posing issues of the sort presented to it involving official immunity and "supervisory involvement." It suggested that Civil Rule 12(e) more definite statements might be required; that when a complaint passes the plausibility threshold "some limited and tightly controlled reciprocal discovery" might be used — focusing on interrogatories and requests to admit before depositions — to maintain control; and that summary judgment after carefully targeted discovery may provide important additional protection.

Judge Cabranes concurred, fully joining the opinion but also suggesting that it might be better to develop a pleading system that gives better effect to the purposes of official immunity. 490 F.3d at 178-179.

In some ways the most important lesson of the Iqbal opinion goes beyond the immensely valuable recognition and resolution of the complex details of the Twombly opinion. Application of the plausibility test ascribed to Twombly led the court through many pages of closely reasoned analysis. The task set by this upward adjustment in notice pleading standards will often be onerous. The work may be repaid, both for court and the parties, by reductions in the other work required to dispose of ill-founded claims or defenses without trial. But it will be hard work.

Other Circuit Examples

Seventh Circuit

Soon after the Twombly decision the Seventh Circuit affirmed denial of a motion to dismiss after accepting jurisdiction under § 1292(b). Judge Posner begins the opinion with a description that might seem to foretell reversal: "The complaint is a hideous sprawling mess * * *. We have found it difficult and in many instances impossible to ascertain the nature of the charges. * * * [T]he defendants can hardly be blamed for wanting to strangle the monster in its crib." Many pages are then devoted to the conclusion that the judge should have required greater specification of the acts claimed to violate state law in order to apply the proper standards of federal preemption. At the close, it is suggested that the district court might also want to consider whether any portions of the complaint should be dismissed for failure "to comply with the recent pleading standard announced by the Supreme Court" in Twombly. After noting that the Court had "rejected the hitherto canonical formula of *Conley v. Gibson*," the opinion concludes on this note: "The present case is not an antitrust case, but the district court will want to determine whether the complaint contains 'enough factual matter (taken as true)' to provide the minimum notice of the plaintiffs' claim that the Court believes a defendant entitled to." In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation, 7th Cir.2007, 491 F.3d 638, 641, 648-649. This passage implies that the pleading standard has somehow been changed, now requiring "enough factual matter" to give "minimum notice" of the claim.

Two months later Judge Wood wrote an opinion in a case that did not challenge the ruling that the third amended complaint failed to state a claim. The only issue was whether it was an abuse of discretion — it was not — to deny leave to file a fourth amended complaint after more than four years of pleading practice. At the close of the opinion, however, the court quotes Twombly and then describes Erickson as a decision "clarif[y]ing" that Twombly did not signal a switch to fact-pleading in the federal courts." Erickson teaches that specific facts are not necessary; all that is required is fair notice of what the claim is and the grounds on which it rests. "Taking Erickson and Twombly together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 7th.Cir.2007, 2007 WL 2406859 *4.

Tenth Circuit

The multiple references to plausibility in the Twombly opinion seem to encourage reliance on "plausibility" as the new definition of notice pleading. A clear illustration is provided in an opinion by Judge Paul Kelly, *Ridge at Red Hawk, L.L.C. v. Schneider*, 10th Cir.2007, 493 F.3d 1174. Noting that Twombly has retired Conley's "no set of facts" test that had guided Tenth Circuit decisions, the court quotes two of the Twombly references to plausibility and concludes:

[T]he mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.

The questions raised in the Ridge at Red Hawk case did not provide an occasion for illumination of test that looks for "a reasonable likelihood of mustering factual support" for a claim. Four days later a different panel, of which Judge Kelly was a member, affirmed another dismissal for failure to state a claim. This time, after announcing a search for "plausibility in th[e] complaint," the court suggested that while "the Supreme Court was not clear on the articulation of the proper standard for a Rule 12(b)(6) dismissal," the Twombly and Erickson decisions together "suggest that courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." The court went on to say that it would have affirmed under its earlier approach as well as under the new approach. *Alvarado v. KOB-TV, L.L.C.*, C.A.10th, 2007, 493 F.3d 1210, 1215 n. 2. (The pleadings included comprehensive fact allegations, perhaps making it easier to conclude that there was little room to imagine further facts that might constitute a claim.) Combining these approaches, the proposed test may be that some level of specific allegations is needed to establish a reasonable likelihood of mustering factual support. Ten days after that, however, the "plausibility" test was again quoted in text, with a footnote observation that the Erickson decision shows that specific facts are not needed, but only fair notice of what the claim is and the grounds upon which it rests. *TON Services, Inc. v. Qwest Corp.*, C.A.10th, 2007, 493 F.3d 1225, 1236.

Federal Circuit

The Federal Circuit decision in *McZeal v. Sprint Nextel Corp.*, Fed.Cir., 2007 WL 2683705, applies the "lesser standard" suitable for a pro se plaintiff. Dismissal for failure to state a claim was reversed both as to a patent infringement claim and a trademark infringement claim. Relying on Form 16, the court concluded "that a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend," and "is not required to specifically include each element of the claims of the asserted patent." As to Twombly, the Court's direction to forget the "no set of facts" language in *Conley v. Gibson* is offset by the Court's favorable quotation of other parts of the *Conley* opinion. "This does not suggest that Bell Atlantic changed the pleading requirement of * * * Rule * * * 8 as articulated in *Conley*." n. 4. "By ruling in *McZeal*'s favor, we do not condone his method of pleading. * * * [W]here pleadings are sufficient, yet it appears almost a certainty to the court that the facts alleged cannot be proved to support a legal claim, a motion to dismiss for failure to state a claim must nevertheless be overruled." Summary judgment is the proper procedure. (Judge Dyk dissented as to the patent infringement claim, reading the complaint to rely on the doctrine of equivalents and urging that Twombly "makes clear that * * * conclusory allegations of infringement under the doctrine of equivalents are insufficient." As to Form 16, "[o]ne can only hope that the rulemaking process will eventually result in eliminating the form, or at least revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.")

Impact on The Scope of Discovery

Rule 26(b)(1) defines the presumptive scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense." Beyond that point, the court may order discovery of any matter relevant to the subject matter involved in the action for good cause. The 2000 Committee Note explaining adoption of the distinction between "claim or defense" and "subject matter" says there is "no entitlement to discovery to develop new claims or defense that are not already identified in the pleadings." Various observers predicted various reactions to the change. Some hoped that it

would encourage more detailed pleading in order to ensure a broad scope for "lawyer-managed" discovery. Some expected that any tendency to specific pleading would be matched by the addition of broad general claims designed for the same purpose. Whatever the effects may have been, it will be important to remember the links between pleading and the scope of discovery in watching the effects of the Twombly decision on pleading practice. Enhanced pleading may have desirable consequences on discovery management by the parties, their lawyers, and the court. To the extent that this happens, continuing concerns about the scope of discovery may be mollified.

Westlaw.

127 S.Ct. 1955

Page 1

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)



Bell Atlantic Corp. v. Twombly
U.S., 2007.

Supreme Court of the United States
BELL ATLANTIC CORPORATION et al.,
Petitioners,
v.
William TWOMBLY et al.
No. 05-1126.

Argued Nov. 27, 2006.
Decided May 21, 2007.

Background: Consumers brought putative class action against incumbent local exchange carriers (ILECs) alleging antitrust conspiracy, in violation of the Sherman Act, both to prevent competitive entry into local telephone and Internet service markets and to avoid competing with each other in their respective markets. The United States District Court for the Southern District of New York, Gerald Lynch, J., 313 F.Supp.2d 174, dismissed complaint for failure to state a claim upon which relief could be granted. The United States Court of Appeals for the Second Circuit, 425 F.3d 99, reversed. The Supreme Court granted certiorari.

Holdings: The Supreme Court, Justice Souter, held that:

- (1) stating a claim under Sherman Act's restraint of trade provision requires a complaint with enough factual matter, taken as true, to suggest that an agreement was made;
- (2) an allegation of parallel business conduct and a bare assertion of conspiracy will not alone suffice to state a claim under the Sherman Act;
- (3) dismissal for failure to state a claim upon which relief may be granted does not require appearance,

beyond a doubt, that plaintiff can prove no set of facts in support of claim that would entitle him to relief, abrogating *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; and

(4) consumers' allegations of parallel conduct were insufficient to state a claim.

Judgment of the Court of Appeals reversed and remanded.

Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined in part.

West Headnotes

[1] Antitrust and Trade Regulation 29T ↪537

29T Antitrust and Trade Regulation

29TVI Antitrust Regulation in General

29TVI(B) Cartels, Combinations, Contracts, and Conspiracies in General

29Tk537 k. In General. Most Cited Cases

Because Sherman Act's restraint of trade provision does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. Sherman Act, § 1, 15 U.S.C.A. § 1.

[2] Antitrust and Trade Regulation 29T ↪975

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk973 Evidence

29Tk975 k. Admissibility. Most Cited Cases

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

127 S.Ct. 1955

Page 2

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting an offense under the Sherman Act's restraint of trade provision. Sherman Act, § 1, 15 U.S.C.A. § 1.

[3] Antitrust and Trade Regulation 29T ⇐537

29T Antitrust and Trade Regulation

29TVI Antitrust Regulation in General

29TVI(B) Cartels, Combinations, Contracts, and Conspiracies in General

29Tk537 k. In General. Most Cited Cases

Conscious parallelism with respect to business behavior, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions, is not in itself unlawful under Sherman Act's restraint of trade provision. Sherman Act, § 1, 15 U.S.C.A. § 1.

[4] Antitrust and Trade Regulation 29T ⇐537

29T Antitrust and Trade Regulation

29TVI Antitrust Regulation in General

29TVI(B) Cartels, Combinations, Contracts, and Conspiracies in General

29Tk537 k. In General. Most Cited Cases

An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct on part of defendants is not entitled to a directed verdict. Sherman Act, § 1, 15 U.S.C.A. § 1.

[5] Antitrust and Trade Regulation 29T ⇐977(2)

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk973 Evidence

29Tk977 Weight and Sufficiency

29Tk977(2) k. Restraints and Misconduct in General. Most Cited Cases
Proof of a conspiracy under Sherman Act's restraint of trade provision must include evidence tending to

exclude the possibility of independent action. Sherman Act, § 1, 15 U.S.C.A. § 1.

[6] Federal Civil Procedure 170A ⇐2484

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2484 k. Antitrust and Price Discrimination Cases. Most Cited Cases

At the summary judgment stage, an offer of conspiracy evidence by a plaintiff alleging violation of Sherman Act's restraint of trade provision must tend to rule out the possibility that the defendants were acting independently. Sherman Act, § 1, 15 U.S.C.A. § 1.

[7] Federal Civil Procedure 170A ⇐673

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(B) Complaint

170AVII(B)1 In General

170Ak673 k. Claim for Relief in General. Most Cited Cases

Federal Civil Procedure 170A ⇐1772

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)3 Pleading, Defects In, in General

170Ak1772 k. Insufficiency in General. Most Cited Cases

While a complaint attacked by a motion to dismiss for failure to state a claim upon which relief can be granted does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[8] Federal Civil Procedure 170A ⇐1772

170A Federal Civil Procedure

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

127 S.Ct. 1955

Page 3

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)3 Pleading, Defects In, in
General
170Ak1772 k. Insufficiency in
General. Most Cited Cases

Federal Civil Procedure 170A ⚡1835

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1835 k. Matters Deemed
Admitted. Most Cited Cases
To survive a motion to dismiss for failure to state a claim upon which relief can be granted, factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[9] Federal Civil Procedure 170A ⚡673

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(B) Complaint
170AVII(B)1 In General
170Ak673 k. Claim for Relief in
General. Most Cited Cases
While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant set out in detail the facts upon which he bases his claim, the general rule governing pleadings still requires a showing, rather than a blanket assertion, of entitlement to relief; without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

[10] Antitrust and Trade Regulation 29T ⚡972(4)

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk972 Pleading

29Tk972(2) Complaint

29Tk972(4) k. Conspiracy or Combination. Most Cited Cases

Stating a claim under Sherman Act's restraint of trade provision requires a complaint with enough factual matter, taken as true, to suggest that an agreement was made; asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage, but simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. Sherman Act, § 1, 15 U.S.C.A. § 1.

[11] Federal Civil Procedure 170A ⚡1773

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)3 Pleading, Defects In, in
General

170Ak1773 k. Clear or Certain Nature of Insufficiency. Most Cited Cases

A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

[12] Antitrust and Trade Regulation 29T ⚡972(4)

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk972 Pleading

29Tk972(2) Complaint

29Tk972(4) k. Conspiracy or Combination. Most Cited Cases

An allegation of parallel business conduct and a bare assertion of conspiracy will not suffice to state a claim under Sherman Act's restraint of trade provision; without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not

127 S.Ct. 1955

Page 4

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

supply facts adequate to show illegality. Sherman Act, § 1, 15 U.S.C.A. § 1.

[13] Antitrust and Trade Regulation 29T 972(4)

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk972 Pleading

29Tk972(2) Complaint

29Tk972(4) k. Conspiracy or

Combination. Most Cited Cases

When allegations of parallel conduct are set out in order to make a claim under the Sherman Act's restraint of trade provision, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. Sherman Act, § 1, 15 U.S.C.A. § 1.

[14] Federal Civil Procedure 170A 674

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(B) Complaint

170AVII(B)1 In General

170Ak674 k. Theory of Claim. Most Cited Cases

Federal Civil Procedure 170A 1773

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)3 Pleading, Defects In, in General

170Ak1773 k. Clear or Certain Nature of Insufficiency. Most Cited Cases

Dismissal for failure to state a claim upon which relief may be granted does not require appearance, beyond a doubt, that plaintiff can prove no set of facts in support of claim that would entitle him to relief, although once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint; abrogating *Conley v. Gibson*, 355 U.S.

41, 78 S.Ct. 99, 2 L.Ed.2d 80. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[15] Antitrust and Trade Regulation 29T 972(4)

29T Antitrust and Trade Regulation

29TXVII Antitrust Actions, Proceedings, and Enforcement

29TXVII(B) Actions

29Tk972 Pleading

29Tk972(2) Complaint

29Tk972(4) k. Conspiracy or

Combination. Most Cited Cases

Consumers' allegations that, by virtue of parallel conduct, incumbent local exchange carriers (ILECs) entered into a contract, combination, or conspiracy to prevent competitive entry into their local telephone and Internet service markets, and agreed not to compete with one another, failed to state claim for violation of Sherman Act's restraint of trade provision, as claim essentially rested on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. Sherman Act, § 1, 15 U.S.C.A. § 1.

[16] Evidence 157 11

157 Evidence

157I Judicial Notice

157k11 k. Historical Facts. Most Cited Cases

Where antitrust complaint quoted portion of statement of one defendant's chief executive officer (CEO) to suggest that defendants conspired together, district court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

[17] Federal Civil Procedure 170A 31

170A Federal Civil Procedure

170AI In General

170AI(B) Rules of Court in General

170AI(B)2 Rules of Civil Procedure

170Ak31 k. In General. Most Cited Cases

127 S.Ct. 1955

Page 5

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

Broadening of a Federal Rule of Civil Procedure can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation.

[18] Federal Civil Procedure 170A 633.1

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak633.1 k. In General. Most Cited Cases

On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than that required by general rule governing pleadings. Fed.Rules Civ.Proc.Rules 8, 9(b-c), 28 U.S.C.A.

1958 Syllabus ^{FN}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The 1984 divestiture of the American Telephone & Telegraph Company's (AT & T) local telephone business left a system of regional service monopolies, sometimes called Incumbent Local Exchange Carriers (ILECs), and a separate long-distance market from which the ILECs were excluded. The Telecommunications Act of 1996 withdrew approval of the ILECs' monopolies, "fundamentally restructur[ing] local telephone markets" and "subject[ing] [ILECs] to a host of duties intended to facilitate market entry." *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835. It also authorized them to enter the long-distance market. "Central to the [new] scheme [was each ILEC's] obligation ... to share its network with competitive local exchange carriers (CLECs)." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402, 124 S.Ct. 872, 157 L.Ed.2d 823.

Respondents (hereinafter plaintiffs) represent a class of subscribers of local telephone and/or high speed Internet services in this action against petitioner ILECs for claimed violations of § 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The complaint alleges that the ILECs conspired to restrain trade (1) by engaging in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs; and (2) by agreeing to refrain from competing against one another, as indicated by their common failure to pursue attractive business opportunities in contiguous markets and by a statement by one ILEC's chief executive officer that competing in another ILEC's territory did not seem right. The District Court dismissed the complaint, concluding that parallel business conduct allegations, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions. Reversing, the Second Circuit held that plaintiffs' parallel conduct allegations were sufficient to withstand a motion to dismiss because the ILECs failed to show that there is no set of facts that would permit plaintiffs to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

Held:

1. Stating a § 1 claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Pp. 1963 - 1970.

(a) Because § 1 prohibits "only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628, "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement," *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 98 L.Ed. 273. While a showing of parallel "business

127 S.Ct. 1955

Page 6

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

behavior is admissible circumstantial evidence from which" agreement may be inferred, it falls short of "conclusively establish[ing] agreement or ... itself constitut[ing] a Sherman Act offense." *Id.*, at 540-541, 74 S.Ct. 257. The inadequacy of showing parallel conduct or interdependence, without more, *1959 mirrors the behavior's ambiguity: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Thus, this Court has hedged against false inferences from identical behavior at a number of points in the trial sequence, e.g., at the summary judgment stage, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538. Pp. 1963 - 1964.

(b) This case presents the antecedent question of what a plaintiff must plead in order to state a § 1 claim. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Applying these general standards to a § 1 claim, stating a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A parallel conduct allegation

gets the § 1 complaint close to stating a claim, but without further factual enhancement it stops short of the line between possibility and plausibility. The requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with " 'a largely groundless claim' " from " 'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.' " *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347, 125 S.Ct. 1627, 161 L.Ed.2d 577. It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. That potential expense is obvious here, where plaintiffs represent a putative class of at least 90 percent of subscribers to local telephone or high-speed Internet service in an action against America's largest telecommunications firms for unspecified instances of antitrust violations that allegedly occurred over a 7-year period. It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest. Plaintiffs' main argument against the plausibility standard at the pleading stage is its ostensible conflict with a literal reading of *Conley's* statement construing Rule 8: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S., at 45-46, 78 S.Ct. 99. The "no set of facts" language has been questioned, criticized, and explained away long enough by courts and commentators, *1960 and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley* described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival. Pp. 1964 - 1970.

2. Under the plausibility standard, plaintiffs' claim of conspiracy in restraint of trade comes up short.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

127 S.Ct. 1955

Page 7

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

First, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct, not on any independent allegation of actual agreement among the ILECs. The nub of the complaint is the ILECs' parallel behavior, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience. Nothing in the complaint invests either the action or inaction alleged with a plausible conspiracy suggestion. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, the District Court correctly found that nothing in the complaint intimates that resisting the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on preserving its regional dominance. The complaint's general collusion premise fails to answer the point that there was no need for joint encouragement to resist the 1996 Act, since each ILEC had reason to try and avoid dealing with CLECs and would have tried to keep them out, regardless of the other ILECs' actions. Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act to enter into their competitors' territories, leaving the relevant market highly compartmentalized geographically, with minimal competition. This parallel conduct did not suggest conspiracy, not if history teaches anything. Monopoly was the norm in telecommunications, not the exception. Because the ILECs were born in that world, doubtless liked it, and surely knew the adage about him who lives by the sword, a natural explanation for the noncompetition is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same. Antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim. This analysis does not run counter to *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1, which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination." Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the

plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed. Pp. 1970 - 1974.

425 F.3d 99, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, except as to Part IV.

Stephen M. Shapiro, Kenneth S. Geller, Richard J. Favretto, Mayer, Brown, Rowe & Maw LLP, Washington, D.C., Laura J. Coleman, J. Henry Walker, Marc W.F. Galonsky, Ashley Watson, Atlanta, Georgia, for BellSouth Corporation.

Timothy Beyer, Brownstein Hyatt & Farber, P.C., Denver, Colorado, *1961 Cynthia P. Delaney, Denver, Colorado, Counsel for Qwest Communications International Inc.

Michael K. Kellogg, Mark C. Hansen, Aaron M. Panner, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, D.C., Javier Aguilar, William M. Schur, San Antonio, Texas, for AT&T Inc. (formerly SBC Communications Inc.).

Richard G. Taranto, Farr & Taranto, Washington, D.C., Paul J. Larkin, Jr., David E. Wheeler, Robert J. Zastrow, Arlington, Virginia, Dan K. Webb, Charles B. Molster III, Winston & Strawn LLP, Chicago, Illinois, for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation).

Marc A. Topaz, Joseph H. Meltzer, Schiffrin & Barroway, LLP, Radnor, PA, J. Douglas Richards, Michael M. Buchman, Milberg Weiss Bershad & Schulman LLP, New York, NY, for Respondents. For U.S. Supreme Court briefs, see: 2006 WL 2474079 (Pet.Brief) 2006 WL 3089915 (Resp.Brief) 2006 WL 3265610 (Reply.Brief)

Justice SOUTER delivered the opinion of the Court. Liability under § 1 of the Sherman Act, 15 U.S.C. § 1, requires a "contract, combination ..., or conspiracy, in restraint of trade or commerce." The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications

127 S.Ct. 1955

Page 8

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

I

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT & T) local telephone business was a system of regional service monopolies (variously called "Regional Bell Operating Companies," "Baby Bells," or "Incumbent Local Exchange Carriers" (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), 110 Stat. 56, which "fundamentally restructure[d] local telephone markets" and "subject[ed] [ILECs] to a host of duties intended to facilitate market entry." *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market. See 47 U.S.C. § 271.

"Central to the [new] scheme [was each ILEC's] obligation ... to share its network with competitors," *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004), which came to be known as "competitive local exchange carriers" (CLECs), Pet. for Cert. 6, n. 1. A CLEC could make use of an ILEC's network in any of three ways: by (1) "purchas[ing] local telephone services at wholesale rates for resale to end users," (2) "leas[ing] elements of the [ILEC's] network 'on an unbundled basis,' " or (3) "interconnect[ing] its own facilities with the [ILEC's] network." *Iowa Utilities Bd.*, *supra*, at 371, 119 S.Ct. 721 (quoting 47 U.S.C. § 251(c)). Owing to the "considerable expense and effort" required to make unbundled network elements available to rivals at wholesale prices, *Trinko*, *supra*, at 410, 124 S.Ct. 872, the ILECs vigorously litigated the scope of the sharing

obligation imposed by the 1996 Act, with the result that the Federal Communications Commission (FCC) three times revised its *1962 regulations to narrow the range of network elements to be shared with the CLECs. See *Covad Communications Co. v. FCC*, 450 F.3d 528, 533-534 (C.A.D.C.2006) (summarizing the 10-year-long regulatory struggle between the ILECs and CLECs).

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all "subscribers of local telephone and/or high speed internet services ... from February 8, 1996 to present." Amended Complaint in No. 02 CIV. 10220(GEL) (SDNY) ¶ 53, App. 28 (hereinafter Complaint). In this action against petitioners, a group of ILECs,^{FN1} plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U.S.C. § 1, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

FN1. The 1984 divestiture of AT & T's local telephone service created seven Regional Bell Operating Companies. Through a series of mergers and acquisitions, those seven companies were consolidated into the four ILECs named in this suit: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (successor-in-interest to Bell Atlantic Corporation). Complaint ¶ 21, App. 16. Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States. *Id.*, ¶ 48, App. 26.

The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs "engaged in parallel conduct" in their

127 S.Ct. 1955

Page 9

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

respective service areas to inhibit the growth of upstart CLECs. Complaint ¶ 47, App. 23-26. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. *Ibid.* According to the complaint, the ILECs' "compelling common motivatio[n]" to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; "[h]ad any one [ILEC] not sought to prevent CLECs ... from competing effectively ..., the resulting greater competitive inroads into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct." *Id.*, ¶ 50, App. 26-27.

Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure "meaningfully [to] pursu[e]" "attractive business opportunit[ies]" in contiguous markets where they possessed "substantial competitive advantages," *id.*, ¶¶ 40-41, App. 21-22, and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC "might be a good way to turn a quick dollar but that doesn't make it right," *id.*, ¶ 42, App. 22.

The complaint couches its ultimate allegations this way:

"In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information *1963 and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id.*, ¶ 51,

App. 27.^{FN2}

FN2. In setting forth the grounds for § 1 relief, the complaint repeats these allegations in substantially similar language:

"Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Act." *Id.*, ¶ 64, App. 30-31.

The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The District Court acknowledged that "plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement," but emphasized that "while '[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, ...] 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.'" 313 F.Supp.2d 174, 179 (2003) (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541, 74 S.Ct. 257, 98 L.Ed. 273 (1954); alterations in original). Thus, the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that "ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." 313 F.Supp.2d, at 179. The District Court found plaintiffs' allegations of parallel ILEC actions to discourage competition inadequate because "the behavior of each ILEC in resisting the incursion of

127 S.Ct. 1955

Page 10

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id.*, at 183. As to the ILECs' supposed agreement against competing with each other, the District Court found that the complaint does not "alleg[e] facts ... suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests, and consequently [does] not rais[e] an inference that [the ILECs'] actions were the result of a conspiracy." *Id.*, at 188.

The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal." 425 F.3d 99, 114 (2005) (emphasis in original). Although the Court of Appeals took the view that plaintiffs must plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," it then said that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Ibid.*

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, 547 U.S. ----, 126 S.Ct. 2965, 165 L.Ed.2d 949 (2006), and now reverse.

II

A

[1][2][3] Because § 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade ... but only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), "[t]he crucial question" is

whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express," *Theatre Enterprises*, 346 U.S., at 540, 74 S.Ct. 257. While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or ... itself constitut[ing] a Sherman Act offense." *Id.*, at 540-541, 74 S.Ct. 257. Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993); see 6 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1433a, p. 236 (2d ed.2003) (hereinafter *Areeda & Hovenkamp*) ("The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act § 1"); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L.Rev. 655, 672 (1962) ("[M]ere interdependence of basic price decisions is not conspiracy").

[4][5][6] The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. See, e.g., AEI-Brookings Joint Center for Regulatory Studies, Epstein, *Motions to Dismiss Antitrust Cases: Separating Fact from Fantasy*, Related Publication 06-08, pp. 3-4 (2006) (discussing problem of "false positives" in § 1 suits). Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, see *Theatre Enterprises*, *supra*; proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, see *Monsanto Co. v. Spray-Rite Service Corp.*, 465

127 S.Ct. 1955

Page 11

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984); and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B

[7][8][9] This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (C.A.7 1994), a plaintiff's obligation to provide the *1965 "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed.2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"),^{FN3} on the assumption that all the allegations in the complaint are true (even if doubtful in fact), see, e.g., *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations");

Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

FN3. The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. See *post*, at 1979 (opinion of STEVENS, J.) (pleading standard of Federal Rules "does not require, or even invite, the pleading of facts"). While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (emphasis added), Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

[10][11][12][13] In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.^{FN4} And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely." *Ibid.* In identifying facts that are suggestive enough

127 S.Ct. 1955

Page 12

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

to render a § 1 conspiracy plausible, we have the benefit *1966 of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

FN4. Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard. See, e.g., 6 Areeda & Hovenkamp ¶ 1425, at 167-185 (discussing “parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties”); Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N.Y.L. S. L.Rev. 881, 899 (1979) (describing “conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement”). The parties in this case agree that “complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason” would support a plausible inference of conspiracy. Brief for Respondents 37; see also Reply Brief for Petitioners 12.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with)

agreement reflects the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.” A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of “entitle[ment] to relief.” Cf. *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (C.A.1 1999) (“[T]erms like ‘conspiracy,’ or even ‘agreement,’ are border-line: they might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement, ... but a court is not required to accept such terms as a sufficient basis for a complaint”).^{FN5}

FN5. The border in *DM Research* was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability.

We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with “ ‘a largely groundless claim’ ” be allowed to “ ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’ ” *Id.*, at 347, 125 S.Ct. 1627 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975)). So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, “ ‘this basic

127 S.Ct. 1955

Page 13

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.' " 5 Wright & Miller § 1216, at 233-234 (quoting *Daves v. Hawaiian Dredging Co.*, 114 F.Supp. 643, 645 (D.Hawai 1953)); see also *Dura*, *supra*, at 346, 125 S.Ct. 1627; *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. *1967 *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." See also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (C.A.7 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N.Y. & U. L.Rev. 1887, 1898-1899 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed). That potential

expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," *post* at 1975, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, e.g., Easterbrook, Discovery as Abuse, 69 B.U.L.Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves"). And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," *post*, at 1975; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "reasonably founded hope that the [discovery] process will reveal relevant evidence' " to support a § 1 claim. *Dura*, 544 U.S., at 347, 125 S.Ct. 1627 (quoting *Blue Chip Stamps*, *supra*, at 741, 95 S.Ct. 1917; alteration in *Dura*).^{FN6}

FN6. The dissent takes heart in the reassurances of plaintiffs' counsel that discovery would be " 'phased' " and "limited to the existence of the alleged conspiracy and class certification." *Post*, at ----24. But determining whether some illegal agreement may have taken place between unspecified persons at different

127 S.Ct. 1955

Page 14

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to the kind of line drawing and case management that the dissent envisions. Perhaps the best answer to the dissent's optimism that antitrust discovery is open to effective judicial control is a more extensive quotation of the authority just cited, a judge with a background in antitrust law. Given the system that we have, the hope of effective judicial supervision is slim: "The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not-cannot-know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive' discovery except in theory, because in practice we lack essential information." Easterbrook, Discovery as Abuse, 69

B.U.L.Rev. 635, 638-639 (1989).

***1968** [14] Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises, Monsanto*, and *Matsushita*, and their main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing Rule 8. Justice Black's opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S., at 45-46, 78 S.Ct. 99. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard, see 425 F.3d, at 106, 114 (invoking *Conley's* "no set of facts" language in describing the standard for dismissal).^{FN7}

FN7. The Court of Appeals also relied on Chief Judge Clark's suggestion in *Nagler v. Admiral Corp.*, 248 F.2d 319 (C.A.2 1957), that facts indicating parallel conduct alone suffice to state a claim under § 1. 425 F.3d, at 114 (citing *Nagler, supra*, at 325). But *Nagler* gave no explanation for citing *Theatre Enterprises* (which upheld a denial of a directed verdict for plaintiff on the ground that proof of parallelism was not proof of conspiracy) as authority that pleading parallel conduct sufficed to plead a Sherman Act conspiracy. Now that *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), and *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), have made it clear that neither

127 S.Ct. 1955

Page 15

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy, it is time for a fresh look at adequacy of pleading when a claim rests on parallel action.

On such a focused and literal reading of *Conley's* "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint *1969 does not set forth a single fact in a context that suggests an agreement. 425 F.3d, at 106, 114. It seems fair to say that this approach to pleading would dispense with any showing of a " 'reasonably founded hope' " that a plaintiff would be able to make a case, see *Dura*, 544 U.S., at 347, 125 S.Ct. 1627 (quoting *Blue Chip Stamps*, 421 U.S., at 741, 95 S.Ct. 1917); Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. See, e.g., *Car Carriers*, 745 F.2d, at 1106 ("*Conley* has never been interpreted literally") and, "[i]n practice, a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory" (internal quotation marks omitted; emphasis and omission in original); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (C.A.9 1989) (tension between *Conley's* "no set of facts" language and its acknowledgment that a plaintiff must provide the "grounds" on which his claim rests); *O'Brien v. DiGrazia*, 544 F.2d 543, 546, n. 3 (C.A.1 1976) ("[W]hen a plaintiff ... supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional ... action into a substantial one"); *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 42-43 (C.A.6 1988) (quoting *O'Brien's* analysis); Hazard, From Whom No Secrets Are

Hid, 76 Tex. L.Rev. 1665, 1685 (1998) (describing *Conley* as having "turned Rule 8 on its head"); Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L.Rev. 433, 463-465 (1986) (noting tension between *Conley* and subsequent understandings of Rule 8).

We could go on, but there is no need to pile up further citations to show that *Conley's* "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. See *Sanjuan*, 40 F.3d, at 251 (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint"); accord, *Swierkiewicz*, 534 U.S., at 514, 122 S.Ct. 992; *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249-250, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.^{FN8}

FN8. Because *Conley's* " 'no set of facts' " language was one of our earliest statements about pleading under the Federal Rules, it is no surprise that it has since been "cited as authority" by this Court and others. *Post*, at 1978. Although we have not previously explained the circumstances

127 S.Ct. 1955

Page 16

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

and rejected the literal reading of the passage embraced by the Court of Appeals, our analysis comports with this Court's statements in the years since *Conley*. See *Dura*, 544 U.S., at 347, 125 S.Ct. 1627 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975)); (requiring " 'reasonably founded hope that the [discovery] process will reveal relevant evidence' " to support the claim (alteration in *Dura*)); *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) ("It is not ... proper to assume that [the plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged"); *Wilson v. Schnettler*, 365 U.S. 381, 383, 81 S.Ct. 632, 5 L.Ed.2d 620 (1961) ("In the absence of ... an allegation [that the arrest was made without probable cause] the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause to believe that he had committed ... a narcotics offense"). Nor are we reaching out to decide this issue in a case where the matter was not raised by the parties, see *post*, at 1979, since both the ILECs and the Government highlight the problems stemming from a literal interpretation of *Conley's* "no set of facts" language and seek clarification of the standard. Brief for Petitioners 27-28; Brief for United States as *Amicus Curiae* 22-25; see also Brief for Respondents 17 (describing "[p]etitioners and their amici" as mounting an "attack on *Conley's* 'no set of facts' standard").

The dissent finds relevance in Court of Appeals precedents from the 1940s, which allegedly gave rise to *Conley's* "no set of facts" language. See *post*, at 1979 - 1981.

Even indulging this line of analysis, these cases do not challenge the understanding that, before proceeding to discovery, a complaint must allege facts suggestive of

illegal conduct. See, e.g., *Leimer v. State Mut. Life Assur. Co.*, 108 F.2d 302, 305 (C.A.8 1940) (" '[I]f, in view of what is alleged, it can reasonably be conceived that the plaintiffs ... could, upon a trial, establish a case which would entitle them to ... relief, the motion to dismiss should not have been granted' "); *Continental Collieries, Inc. v. Shober*, 130 F.2d 631, 635 (C.A.3 1942) ("No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it"). Rather, these cases stand for the unobjectionable proposition that, when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. Cf. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a district court weighing a motion to dismiss asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

III

[15] When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. *Supra*, at 1962 - 1963. Although in form a few stray statements speak directly of agreement, ^{FN9} on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that [the

127 S.Ct. 1955

Page 17

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their ... markets and have agreed not to compete with one another.” Complaint ¶ 51, App. 27.^{FN10} The nub of the *1971 complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.^{FN11}

FN9. See Complaint ¶¶ 51, 64, App. 27, 30-31 (alleging that ILECs engaged in a “contract, combination or conspiracy” and agreed not to compete with one another).

FN10. If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by Rule 8. Apart from identifying a seven-year span in which the §

1 violations were supposed to have occurred (*i.e.*, “[b]eginning at least as early as February 6, 1996, and continuing to the present,” *id.*, ¶ 64, App. 30), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of “bare allegation” that survives a motion to dismiss. *Post*, at 1977. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context

would have little idea where to begin.

FN11. The dissent's quotations from the complaint leave the impression that plaintiffs directly allege illegal agreement; in fact, they proceed exclusively via allegations of parallel conduct, as both the District Court and Court of Appeals recognized. See 313 F.Supp.2d 174, 182 (S.D.N.Y.2003); 425 F.3d 99, 102-104 (C.A. 2005).

We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, see *id.*, ¶ 47, App. 23-24, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

The complaint makes its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one CLEC in an ILEC's territory “would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories.” *Id.*, ¶ 50, App. 26-27. But, its logic aside, this general premise still fails to answer the point that there was just no need for joint encouragement to resist the 1996 Act; as the District Court said, “each ILEC has reason to want to avoid dealing with CLECs”

127 S.Ct. 1955

Page 18

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

and "each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." 313 F.Supp.2d, at 184; cf. *Kramer v. Pollock-Krasner Foundation*, 890 F.Supp. 250, 256 (S.D.N.Y.1995) (while the plaintiff "may believe the defendants conspired ..., the defendants' allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy").^{FN12}

FN12. From the allegation that the ILECs belong to various trade associations, see Complaint ¶ 46, App. 23, the dissent playfully suggests that they conspired to restrain trade, an inference said to be "buttressed by the common sense of Adam Smith." *Post*, at 1985 - 1986, 1987 - 1988.

If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag.

*1972 Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was supposedly passed in the " 'hop[e] that the large incumbent local monopoly companies ... might attack their neighbors' service areas, as they are the best situated to do so.' " Complaint ¶ 38, App. 20 (quoting Consumer Federation of America, *Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, p. 12 (Feb.2000)). Contrary to hope, the ILECs declined " 'to enter each other's service territories in any significant way, ' " Complaint ¶ 38, App. 20, and the local telephone and high speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with "

especially attractive business opportunities" in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was "strongly suggestive of conspiracy." *Id.*, ¶ 40, App. 21.

But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. See *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 477-478, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) (describing telephone service providers as traditional public monopolies). The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

[16][17][18] In fact, the complaint itself gives reasons to believe that the ILECs would see their best interests in keeping to their old turf. Although the complaint says generally that the ILECs passed up "especially attractive business opportunit[ies]" by declining to compete as CLECs against other ILECs, Complaint ¶ 40, App. 21, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period,^{FN13} and *1973 the complaint is replete with indications that any CLEC faced nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act, *id.*, ¶ 47; App. 23-26. Not only that, but even without a monopolistic tradition and the peculiar difficulty of mandating shared networks, "[f]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." Areeda & Hovenkamp ¶

127 S.Ct. 1955

Page 19

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

307d, at 155 (Supp.2006) (commenting on the case at bar). The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim.^{FN14}

FN13. The complaint quoted a reported statement of Qwest's CEO, Richard Notebaert, to suggest that the ILECs declined to compete against each other despite recognizing that it " 'might be a good way to turn a quick dollar.' " ¶ 42, App. 22 (quoting Chicago Tribune, Oct. 31, 2002, Business Section, p. 1). This was only part of what he reportedly said, however, and the District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. See Fed. Rule Evid. 201.

Notebaert was also quoted as saying that entering new markets as a CLEC would not be "a sustainable economic model" because the CLEC pricing model is "just ... nuts." Chicago Tribune, Oct. 31, 2002, Business Section, p. 1 (cited at Complaint ¶ 42, App. 22). Another source cited in the complaint quotes Notebaert as saying he thought it "unwise" to "base a business plan" on the privileges accorded to CLECs under the 1996 Act because the regulatory environment was too unstable. Chicago Tribune, Dec. 19, 2002, Business Section, p. 2 (cited at Complaint ¶ 45, App. 23).

FN14. In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished " 'by the process of amending the Federal Rules, and not by judicial interpretation.' "

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)). On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Fed. Rules Civ. Proc. 9(b)-(c). Here, our concern is not that the allegations in the complaint were insufficiently "particular[ized]", *ibid.*; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.

Plaintiffs say that our analysis runs counter to *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792[, 93 S.Ct. 1817, 36 L.Ed.2d 668] (1973)." They argue that just as the prima facie case is a "flexible evidentiary standard" that "should not be transposed into a rigid pleading standard for discrimination cases," *Swierkiewicz, supra*, at 512, 122 S.Ct. 992, "transpos[ing] 'plus factor' summary judgment analysis woodenly into a rigid Rule 12(b)(6) pleading standard ... would be unwise," Brief for Respondents 39. As the District Court correctly understood, however, "*Swierkiewicz* did not change the law of pleading, but simply re-emphasized ... that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." 313 F.Supp.2d, at 181 (citation and footnote omitted). Even though *Swierkiewicz*'s pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court of Appeals dismissed his complaint for failing to allege certain additional facts that *Swierkiewicz* would need at the trial stage

127 S.Ct. 1955

Page 20

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

to support his claim in the absence of direct evidence of discrimination. *Swierkiewicz*, 534 U.S., at 514, 122 S.Ct. 992. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that *Swierkiewicz* allege "specific facts" beyond *1974 those necessary to state his claim and the grounds showing entitlement to relief. *Id.*, at 508, 122 S.Ct. 992.

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

* * *

The judgment of the Court of Appeals for the Second Circuit is reversed, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice GINSBURG joins except as to Part IV, dissenting.

In the first paragraph of its 24-page opinion the Court states that the question to be decided is whether allegations that "major telecommunications providers engaged in certain parallel conduct unfavorable to competition" suffice to state a violation of § 1 of the Sherman Act. *Ante*, at 1961. The answer to that question has been settled for more than 50 years. If that were indeed the issue, a summary reversal citing *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954), would adequately resolve this case. As *Theatre Enterprises* held, parallel conduct is circumstantial evidence admissible on the issue of conspiracy, but it is not itself illegal. *Id.*, at 540-542, 74 S.Ct. 257.

Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted

independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. Plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not "plausible" provide a legally acceptable reason for dismissing the complaint? I think not.

Respondents' amended complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." Amended Complaint in No. 02 CIV. 10220(GEL) (SDNY) ¶ 51, App. 27 (hereinafter Complaint).

The complaint explains that, contrary to Congress' expectation when it enacted the 1996 Telecommunications Act, and consistent with their own economic self-interests, petitioner Incumbent Local Exchange Carriers (ILECs) have assiduously avoided infringing upon each other's markets and have refused to permit nonincumbent competitors to access their networks. The complaint quotes Richard Notebaert, the former CEO of one such ILEC, as saying that competing in a neighboring ILEC's territory "might be a good way to turn a quick dollar but that doesn't make it right." *Id.*, ¶ 42, App. 22. Moreover, respondents allege that petitioners "communicate amongst themselves" through numerous industry associations. *Id.*, ¶ 46, App. 23. In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* violation of the Sherman Act. See Report*1975 of the Attorney General's National Committee to Study the Antitrust Laws 26 (1955).

Under rules of procedure that have been well settled since well before our decision in *Theatre Enterprises*, a judge ruling on a defendant's motion

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

127 S.Ct. 1955

Page 21

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

to dismiss a complaint, "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); see *Overstreet v. North Shore Corp.*, 318 U.S. 125, 127, 63 S.Ct. 494, 87 L.Ed. 656 (1943). But instead of requiring knowledgeable executives such as Notebaert to respond to these allegations by way of sworn depositions or other limited discovery-and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement-the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway," *ante*, at 1971; that "there was just no need for joint encouragement to resist the 1996 Act," *ante*, at 1971; and that the "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing," *ante*, at 1972.

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners "agreed not to compete with one another" is not just one of "a few stray statements," *ante*, at 1970; it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns

merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

I

Rule 8(a)(2) of the Federal Rules requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The rule did not come about by happenstance and its language is not inadvertent. The English experience with Byzantine special pleading rules-illustrated by the hypertechnical Hilary rules of 1834 ^{FN1}-made obvious*1976 the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N.Y. Laws pp. 497, 521. Substantially similar language appeared in the Federal Equity Rules adopted in 1912. See Fed. Equity Rule 25 (requiring "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence").

FN1. See 9 W. Holdsworth, *History of English Law* 324-327 (1926).

127 S.Ct. 1955

Page 22

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead "facts" rather than "conclusions," a distinction that proved far easier to say than to apply. As commentators have noted,

"it is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence,' and 'conclusions.' Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described." Weinstein & Distler, Comments on Procedural Reform: Drafting Pleading Rules, 57 Colum. L.Rev. 518, 520-521 (1957).

See also Cook, Statements of Fact in Pleading Under the Codes, 21 Colum. L.Rev. 416, 417 (1921) (hereinafter Cook) ("[T]here is no logical distinction between statements which are grouped by the courts under the phrases 'statements of fact' and 'conclusions of law' "). Rule 8 was directly responsive to this difficulty. Its drafters intentionally avoided any reference to "facts" or "evidence" or "conclusions." See 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, p. 207 (3d ed.2004) (hereinafter Wright & Miller) ("The substitution of 'claim showing that the pleader is entitled to relief' for the code formulation of the 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions' ...").

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz*, 534 U.S., at 514, 122 S.Ct. 992 ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim"). Charles E. Clark, the "principal draftsman" of the Federal Rules,^{FN2} put it thus:

FN2. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).

"Experience has shown ... that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." The *1977 New Federal Rules of Civil Procedure: The Last Phase-Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A.B.A.J. 976, 977 (1937) (hereinafter Clark, New Federal Rules).

The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, a complaint for negligence. As relevant, the Form 9 complaint states only: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Form 9, Complaint for Negligence, Forms App., Fed. Rules Civ. Proc., 28 U.S.C.App., p. 829 (hereinafter Form 9). The complaint then describes the plaintiff's injuries and demands judgment. The asserted ground for relief—namely, the defendant's negligent driving—would have been called a " 'conclusion of law' " under the code pleading of old. See, e.g., Cook 419. But that bare allegation suffices under a system that "restrict[s] the pleadings to the task of general notice-giving and invest[s] the deposition-discovery process with a vital role in the preparation for trial." ^{FN3} *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 91 L.Ed. 451 (1947); see also *Swierkiewicz*, 534 U.S., at 513, n. 4, 122 S.Ct. 992 (citing Form 9 as an example of " 'the simplicity and brevity of statement which the rules contemplate' "); *Thomson v. Washington*, 362 F.3d 969, 970 (C.A.7 2004) (Posner, J.) ("The federal rules replaced fact pleading with notice pleading").

FN3. The Federal Rules do impose a "particularity" requirement on "all averments of fraud or mistake," Fed. Rule

127 S.Ct. 1955

Page 23

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

Civ. Proc. 9(b), neither of which has been alleged in this case. We have recognized that the canon of *expresio unius est exclusio alterius* applies to Rule 9(b). See *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

II

It is in the context of this history that *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), must be understood. The *Conley* plaintiffs were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing for a unanimous Court, Justice Black rejected the union's claim as foreclosed by the language of Rule 8. *Id.*, at 47-48, 78 S.Ct. 99. In the course of doing so, he articulated the formulation the Court rejects today: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*, at 45-46, 78 S.Ct. 99.

Consistent with the design of the Federal Rules, *Conley's* "no set of facts" formulation permits outright dismissal only when proceeding to discovery or beyond would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process. Today, however, in its explanation of a decision to dismiss a complaint that it regards as a fishing expedition, the Court scraps *Conley's* "no set of facts" language. Concluding that the phrase has been "questioned, criticized, and explained away long enough," *ante*, at 1969, the Court dismisses it as careless composition.

*1978 If *Conley's* "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzl[ed] the profession for 50 years," *ibid.*, has been cited as authority in a dozen opinions of this Court and four separate writings.^{FN4} In not one of those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion is the first by any Member of this Court to express any doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears "beyond doubt" that "no set of facts" in support of the claim would entitle the plaintiff to relief.^{FN5}

FN4. *SEC v. Zandford*, 535 U.S. 813, 818, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993); *Brower v. County of Inyo*, 489 U.S. 593, 598, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); *Hughes v. Rowe*, 449 U.S. 5, 10, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (*per curiam*); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980); *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (*per curiam*); *Haines v. Kerner*, 404 U.S. 519, 521, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (*per curiam*); *Jenkins v. McKeithen*, 395 U.S. 411, 422, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969) (plurality opinion); see also *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 554, 105 S.Ct. 1487, 84 L.Ed.2d

127 S.Ct. 1955

Page 24

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

494 (1985) (Brennan, J., concurring in part and dissenting in part); *Hoover v. Ronwin*, 466 U.S. 558, 587, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984) (STEVENS, J., dissenting); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 561, n. 1, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) (Marshall, J., dissenting); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 55, n. 6, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (Brennan, J., concurring in judgment).

FN5. See, e.g., *EB Invs., LLC v. Atlantis Development, Inc.*, 930 So.2d 502, 507 (Ala.2005); *Department of Health & Social Servs. v. Native Village of Curyung*, 151 P.3d 388, 396 (Alaska 2006); *Newman v. Maricopa Cty.*, 167 Ariz. 501, 503, 808 P.2d 1253, 1255 (App.1991); *Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 385-386 (Colo.2001) (en banc); *Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 312 (D.C.2006); *Hillman Constr. Corp. v. Wainer*, 636 So.2d 576, 578 (Fla.App.1994); *Kaplan v. Kaplan*, 266 Ga. 612, 613, 469 S.E.2d 198, 199 (1996); *Wright v. Home Depot U.S.A.*, 111 Hawai'i 401, 406, 142 P.3d 265, 270 (2006); *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005); *Fink v. Bryant*, 2001-CC-0987, p. 4 (La.11/28/01), 801 So.2d 346, 349; *Gagne v. Cianbro Corp.*, 431 A.2d 1313, 1318-1319 (Me.1981); *Gasior v. Massachusetts Gen. Hospital*, 446 Mass. 645, 647, 846 N.E.2d 1133, 1135 (2006); *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 893 (Miss.2006); *Jones v. Montana Univ. System*, 337 Mont. 1, 7, 155 P.3d 1247, 1254 (2007); *Johnston v. Nebraska Dept. of Correctional Servs.*, 270 Neb. 987, 989, 709 N.W.2d 321, 324 (2006); *Blackjack Bonding v. Las Vegas Munic. Ct.*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000); *Shepard v. Ocwen Fed. Bank*, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006); *Rose v. United Equitable Ins. Co.*, 2001 ND 154, ¶ 10, 632 N.W.2d 429, 434;

State ex rel. Turner v. Houk, 112 Ohio St.3d 561, 562, 2007-Ohio-814, ¶ 5, 862 N.E.2d 104, 105(per curiam); *Moneypenney v. Dawson*, 2006 OK 53, ¶ 2, 141 P.3d 549, 551; *Gagnon v. State*, 570 A.2d 656, 659 (R.I.1990); *Osloond v. Farrier*, 2003 SD 28, ¶ 4, 659 N.W.2d 20, 22(per curiam); *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn.1986); *Association of Haystack Property Owners v. Sprague*, 145 Vt. 443, 446, 494 A.2d 122, 124 (1985); *In re Coday*, 156 Wash.2d 485, 497, 130 P.3d 809, 815 (2006) (en banc); *Haines v. Hampshire Cty. Comm'n*, 216 W.Va. 499, 502, 607 S.E.2d 828, 831 (2004); *Warren v. Hart*, 747 P.2d 511, 512 (Wyo.1987); see also *Malpiede v. Townson*, 780 A.2d 1075, 1082-1083 (Del.2001) (permitting dismissal only "where the court determines with reasonable certainty that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint" (internal quotation marks omitted)); *Canel v. Topinka*, 212 Ill.2d 311, 318, 288 Ill.Dec. 623, 818 N.E.2d 311, 317 (2004) (replacing "appears beyond doubt" in the *Conley* formulation with "is clearly apparent"); *In re Young*, 522 N.E.2d 386, 388 (Ind.1988)(per curiam) (replacing "appears beyond doubt" with "appears to a certainty"); *Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 614 (Iowa 2003) (holding that a motion to dismiss should be sustained "only when there exists no conceivable set of facts entitling the non-moving party to relief"); *Pioneer Village v. Bullitt Cty.*, 104 S.W.3d 757, 759 (Ky.2003) (holding that judgment on the pleadings should be granted "if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief"); *Corley v. Detroit Bd. of Ed.*, 470 Mich. 274, 277, 681 N.W.2d 342, 345 (2004)(per curiam) (holding that a motion for judgment on the pleadings should be granted only "if no factual development could possibly justify

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

127 S.Ct. 1955

Page 25

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

recovery' "); *Oberkramer v. Ellisville*, 706 S.W.2d 440, 441 (Mo.1986) (en banc) (omitting the words "beyond doubt" from the *Conley* formulation); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990) (holding that a motion to dismiss is appropriate "only if it clearly appears that [the plaintiff] can prove no set of facts in support of his claim"); *NRC Management Servs. Corp. v. First Va. Bank-Southwest*, 63 Va. Cir. 68, 70, 2003 WL 23540085 (2003) ("The Virginia standard is identical [to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it ").

*1979 Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of petitioners. I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process-a rulemaking process-for revisions of that order. See 28 U.S.C. §§ 2072-2074 (2000 ed. and Supp. IV).

Today's majority calls *Conley's* " 'no set of facts' " language "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Ante*, at 1969. This is not and cannot be what the *Conley* Court meant. First, as I have explained, and as the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.^{FN6} The "pleading standard" label the majority gives to what it reads into the *Conley* opinion-a statement of the permissible factual support for an adequately pleaded complaint-would not, therefore, have impressed the *Conley* Court itself. Rather, that Court would have understood the majority's remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate. Second, it is pellucidly clear that the *Conley* Court was

interested in what a complaint *must* contain, not what it *may* contain. In fact, the Court said without qualification that it was "appraising the *sufficiency* of the complaint." *1980355 U.S., at 45, 78 S.Ct. 99 (emphasis added). It was, to paraphrase today's majority, describing "the minimum standard of adequate pleading to govern a complaint's survival," *ante*, at 1969.

FN6. The majority is correct to say that what the Federal Rules require is a " 'showing' " of entitlement to relief. *Ante*, at 1965, n. 3. Whether and to what extent that "showing" requires allegations of fact will depend on the particulars of the claim.

For example, had the amended complaint in this case alleged *only* parallel conduct, it would not have made the required "showing." See *supra*, at 1974. Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of "bareness" with which the Federal Rules are concerned. A plaintiff's inability to persuade a district court that the allegations actually included in her complaint are "plausible" is an altogether different kind of failing, and one that should not be fatal at the pleading stage.

We can be triply sure as to *Conley's* meaning by examining the three Court of Appeals cases the *Conley* Court cited as support for the "accepted rule " that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S., at 45-46, 78 S.Ct. 99. In the first case, *Leimer v. State Mut. Life Assur. Co. of Worcester, Mass.*, 108 F.2d 302 (C.A.8 1940), the plaintiff alleged that she was the beneficiary of a life insurance plan and that the insurance company

127 S.Ct. 1955

Page 26

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

was wrongfully withholding proceeds from her. In reversing the District Court's grant of the defendant's motion to dismiss, the Eighth Circuit noted that court's own longstanding rule that, to warrant dismissal, " 'it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.' " *Id.*, at 305 (quoting *Winget v. Rockwood*, 69 F.2d 326, 329 (C.A.8 1934)).

The *Leimer* court viewed the Federal Rules—specifically Rules 8(a)(2), 12(b)(6), 12(e) (motion for a more definite statement), and 56 (motion for summary judgment)—as reinforcing the notion that “there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.” 108 F.2d, at 306. The court refuted in the strongest terms any suggestion that the unlikelihood of recovery should determine the fate of a complaint: “No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint.” *Ibid.*

The Third Circuit relied on *Leimer's* admonition in *Continental Collieries, Inc. v. Shober*, 130 F.2d 631 (1942), which the *Conley* Court also cited in support of its “no set of facts” formulation. In a diversity action the plaintiff alleged breach of contract, but the District Court dismissed the complaint on the ground that the contract appeared to be unenforceable under state law. The Court of Appeals reversed, concluding that there were facts in dispute that went to the enforceability of the contract, and that the rule at the pleading stage was as in *Leimer*: “No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it.” 130 F.3d, at 635.

The third case the *Conley* Court cited approvingly was written by Judge Clark himself. In *Dioguardi v. Durning*, 139 F.2d 774 (C.A.2 1944), the *pro se*

plaintiff, an importer of “tonics,” charged the customs inspector with auctioning off the plaintiff's former merchandise for less than was bid for it—and indeed for an amount equal to the plaintiff's own bid—and complained that two cases of tonics went missing three weeks before the sale. The inference, hinted at by the averments but never stated in so many words, was that the defendant fraudulently denied the plaintiff his rightful claim to the tonics, which, if true, would have violated federal law. Writing six years after the adoption of the Federal Rules he held the lead rein in drafting, Judge Clark said that the defendant

“could have disclosed the facts from his point of view, in advance of a trial if he *1981 chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting.” *Id.*, at 775.

As any civil procedure student knows, Judge Clark's opinion disquieted the defense bar and gave rise to a movement to revise Rule 8 to require a plaintiff to plead a “ ‘cause of action.’ ” See 5 Wright & Miller § 1201, at 86-87. The movement failed, see *ibid.*; *Dioguardi* was explicitly approved in *Conley*; and “[i]n retrospect the case itself seems to be a routine application of principles that are universally accepted,” 5 Wright & Miller § 1220, at 284-285.

In light of *Leimer*, *Continental Collieries*, and *Dioguardi*, *Conley's* statement that a complaint is not to be dismissed unless “no set of facts” in support thereof would entitle the plaintiff to relief is hardly “puzzling,” *ante*, at 1969. It reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process. *Conley's* language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts.

We have consistently reaffirmed that basic understanding of the Federal Rules in the half

127 S.Ct. 1955

Page 27

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

century since *Conley*. For example, in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), we reversed the Court of Appeals' dismissal on the pleadings when the respondents, the Governor and other officials of the State of Ohio, argued that petitioners' claims were barred by sovereign immunity. In a unanimous opinion by then-Justice Rehnquist, we emphasized that "[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*" *Id.*, at 236, 94 S.Ct. 1683 (emphasis added).

The *Rhodes* plaintiffs had "alleged generally and in conclusory terms" that the defendants, by calling out the National Guard to suppress the Kent State University student protests, "were guilty of wanton, wilful and negligent conduct." *Krause v. Rhodes*, 471 F.2d 430, 433 (C.A.6 1972). We reversed the Court of Appeals on the ground that "[w]hatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure," were not barred by the Eleventh Amendment because they were styled as suits against the defendants in their individual capacities. 416 U.S., at 238, 94 S.Ct. 1683.

We again spoke with one voice against efforts to expand pleading requirements beyond their appointed limits in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Writing for the unanimous Court, Chief Justice Rehnquist rebuffed the Fifth Circuit's effort to craft a standard for pleading municipal liability that accounted for "the enormous expense involved today in litigation," *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1057 (1992) (internal quotation marks omitted), by requiring a plaintiff to "state with

factual detail and *1982 particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Leatherman*, 507 U.S., at 167, 113 S.Ct. 1160 (internal quotation marks omitted). We found this language inconsistent with Rules 8(a)(2) and 9(b) and emphasized that motions to dismiss were not the place to combat discovery abuse: "In the absence of [an amendment to Rule 9(b)], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.*, at 168-169, 113 S.Ct. 1160.

Most recently, in *Swierkiewicz*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1, we were faced with a case more similar to the present one than the majority will allow. In discrimination cases, our precedents require a plaintiff at the summary judgment stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting evidentiary burdens imposed under the framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). *Swierkiewicz* alleged that he had been terminated on account of national origin in violation of Title VII of the Civil Rights Act of 1964. The Second Circuit dismissed the suit on the pleadings because he had not pleaded a prima facie case of discrimination under the *McDonnell Douglas* standard.

We reversed in another unanimous opinion, holding that "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Swierkiewicz*, 534 U.S., at 511, 122 S.Ct. 992. We also observed that Rule 8(a)(2) does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

and issues and to dispose of unmeritorious claims.” *Id.*, at 512, 122 S.Ct. 992; see Brief for United States et al. as *Amici Curiae* in *Swierkiewicz v. Sorema N. A.*, O.T.2001, No. 00-1853, p. 10 (stating that a Rule 12(b)(6) motion is not “an appropriate device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint” (internal quotation marks omitted)).^{FN7}

FN7. See also 5 Wright & Miller § 1202, at 89-90 (“[P]leadings under the rules simply may be a general summary of the party’s position that is sufficient to advise the other party of the event being sued upon, to provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel, and to indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this; indeed, history shows that no more can be performed successfully by the pleadings” (footnotes omitted)).

As in the discrimination context, we have developed an evidentiary framework for evaluating claims under § 1 of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Under *Matsushita*, a plaintiff’s allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants. In order to survive a Rule 56 motion, a § 1 plaintiff “must present evidence ‘that tends to exclude*1983 the possibility’ that the alleged conspirators acted independently.” *Id.*, at 588, 106 S.Ct. 1348 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). That is, the plaintiff “must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action.” 475 U.S., at 588, 106 S.Ct. 1348.

Everything today’s majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage. The majority rejects the complaint in this case because—in light of the fact that the parallel conduct alleged is consistent with ordinary market behavior—the claimed conspiracy is “conceivable” but not “plausible,” *ante*, at 1974. I have my doubts about the majority’s assessment of the plausibility of this alleged conspiracy. See Part III, *infra*. But even if the majority’s speculation is correct, its “plausibility” standard is irreconcilable with Rule 8 and with our governing precedents. As we made clear in *Swierkiewicz* and *Leatherman*, fear of the burdens of litigation does not justify factual conclusions supported only by lawyers’ arguments rather than sworn denials or admissible evidence.

This case is a poor vehicle for the Court’s new pleading rule, for we have observed that “in antitrust cases, where ‘the proof is largely in the hands of the alleged conspirators,’... dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.” *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) (quoting *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962)); see also *Knuth v. Erie-Crawford Dairy Cooperative Assn.*, 395 F.2d 420, 423 (C.A.3 1968) (“The ‘liberal’ approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all the details and specific facts relied upon cannot properly be set forth as part of the pleadings”). Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney’s fees for successful plaintiffs indicates that Congress intended to encourage, rather than discourage, private enforcement of the law. See *Radovich v. National Football League*, 352 U.S. 445, 454, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957) (“

127 S.Ct. 1955

Page 29

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75;709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

Congress itself has placed the private antitrust litigant in a most favorable position In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws"). It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.

The same year we decided *Conley*, Judge Clark wrote, presciently,

"I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally *and antitrust cases in particular*." Special Pleading in the "Big Case"? in Procedure-The Handmaid of Justice 147, 148 (C. Wright & H. Reasoner eds.1965) (hereinafter *1984 Clark, Special Pleading in the Big Case) (emphasis added).

In this "Big Case," the Court succumbs to the temptation that previous Courts have steadfastly resisted.^{FN8} While the majority assures us that it is not applying any " 'heightened' " pleading standard, see *ante*, at 1973, n. 14, I shall now explain why I have a difficult time understanding its opinion any other way.

FN8. Our decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), is not to the contrary. There, the plaintiffs failed adequately to allege loss causation, a required element in a private securities fraud action. Because it alleged nothing more than that the prices of the securities the plaintiffs purchased were artificially inflated, the *Dura* complaint failed to "provide the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [alleged] misrepresentation." *Id.*, at 347,

125 S.Ct. 1627. Here, the failure the majority identifies is not a failure of notice-which "notice pleading" rightly condemns-but rather a failure to satisfy the Court that the agreement alleged might plausibly have occurred. That being a question not of *notice* but of *proof*, it should not be answered without first hearing from the defendants (as apart from their lawyers).

Similarly, in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), in which we also found an antitrust complaint wanting, the problem was not that the injuries the plaintiffs alleged failed to satisfy some threshold of plausibility, but rather that the injuries *as alleged* were not "the type that the antitrust statute was intended to forestall." *Id.*, at 540, 103 S.Ct. 897; see *id.*, at 526, 103 S.Ct. 897 ("As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged").

III

The Court does not suggest that an agreement to do what the plaintiffs allege would be permissible under the antitrust laws, see, e.g., *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526-527, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). Nor does the Court hold that these plaintiffs have failed to allege an injury entitling them to sue for damages under those laws, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-490, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Rather, the theory on which the Court permits dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.

As the Court explains, prior to the enactment of the

127 S.Ct. 1955

Page 30

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

Telecommunications Act of 1996 the law prohibited the defendants from competing with each other. The new statute was enacted to replace a monopolistic market with a competitive one. The Act did not merely require the regional monopolists to take affirmative steps to facilitate entry to new competitors, see *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004); it also permitted the existing firms to compete with each other and to expand their operations into previously forbidden territory. See 47 U.S.C. § 271. Each of the defendants decided not to take the latter step. That was obviously an extremely important business decision, and I am willing to presume that each company acted entirely independently in reaching that decision. I am even willing to entertain the majority's belief that any agreement among the companies was unlikely. But the plaintiffs allege in three places in their complaint, ¶¶ 4, 51, 64, App. 11, 27, 30, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court *1985 recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)." *Ante*, at 1965.

The majority circumvents this obvious obstacle to dismissal by pretending that it does not exist. The Court admits that "in form a few stray statements in the complaint speak directly of agreement," but disregards those allegations by saying that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel conduct. *Ante*, at 1970. The Court's dichotomy between factual allegations and "legal conclusions" is the stuff of a bygone era, *supra*, at 1976 - 1977. That distinction was a defining feature of code pleading, see generally Clark, *The Complaint in Code Pleading*, 35 Yale L.J. 259 (1925-1926), but was conspicuously abolished when the Federal Rules were enacted in 1938. See *United States v. Employing Plasterers Assn. of Chicago*, 347 U.S. 186, 188, 74 S.Ct. 452, 98 L.Ed. 618 (1954) (holding, in an antitrust case, that the Government's allegations of effects on interstate commerce must

be taken into account in deciding whether to dismiss the complaint "[w]hether these charges be called 'allegations of fact' or 'mere conclusions of the pleader' "); *Brownlee v. Conine*, 957 F.2d 353, 354 (C.A.7 1992) ("The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, ... so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliché means, does not automatically condemn it"); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3-4 (C.A.9 1963) ("[O]ne purpose of Rule 8 was to get away from the highly technical distinction between statements of fact and conclusions of law ..."); *Oil, Chemical & Atomic Workers Int'l Union v. Delta*, 277 F.2d 694, 697 (C.A.6 1960) ("Under the notice system of pleading established by the Rules of Civil Procedure, ... the ancient distinction between pleading 'facts' and 'conclusions' is no longer significant"); 5 Wright & Miller § 1218, at 267 ("[T]he federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties"). "Defendants entered into a contract" is no more a legal conclusion than "defendant negligently drove," see Form 9; *supra*, at 1977. Indeed it is less of one.^{FN9}

FN9. The Court suggests that the allegation of an agreement, even if credited, might not give the notice required by Rule 8 because it lacks specificity. *Ante*, at 1970 - 1971, n. 10. The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a Rule 12(e) motion for a more definite statement. See *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Petitioners made no such motion and indeed have conceded that "[o]ur problem with the current complaint is not a lack of specificity, it's quite specific." Tr. of Oral Arg. 14. Thus, the fact that "the pleadings mentioned no specific time, place, or persons involved in the alleged conspiracies," *ante*, at 1971, n. 10, is, for our purposes, academic.

127 S.Ct. 1955

Page 31

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

Even if I were inclined to accept the Court's anachronistic dichotomy and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." Many years ago a truly great economist perceptively observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, in 39 Great Books of the Western World 55 (R. Hutchins & M. Adler eds.1952). I am not so cynical as to accept that sentiment at face value, but I need not do so here. Respondents' complaint *1986 points not only to petitioners' numerous opportunities to meet with each other, Complaint ¶ 46, App. 23,^{FN10} but also to Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right,"*id.*, ¶ 42, App. 22. What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would be in his company's economic self-interest to compete with its brethren, he had agreed with his competitors not to do so. According to the complaint, that is how the Illinois Coalition for Competitive Telecom construed Notebaert's statement, *id.*, ¶ 44, App. 22 (calling the statement "evidence of potential collusion among regional Bell phone monopolies to not compete against one another and kill off potential competitors in local phone service"), and that is how Members of Congress construed his company's behavior, *id.*, ¶ 45, App. 23 (describing a letter to the Justice Department requesting an investigation into the possibility that the ILECs' "very apparent non-competition policy" was coordinated).

FN10. The Court describes my reference to the allegation that the defendants belong to various trade associations as "playfully" suggesting that the defendants conspired to restrain trade. *Ante*, at 1971 - 1972, n. 12.

Quite the contrary: an allegation that competitors meet on a regular basis, like

the allegations of parallel conduct, is consistent with-though not sufficient to prove-the plaintiffs' entirely serious and unequivocal allegation that the defendants entered into an unlawful agreement. Indeed, if it were true that the plaintiffs "rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs,"*ante*, at 1970, there would have been no purpose in including a reference to the trade association meetings in the amended complaint.

Perhaps Notebaert meant instead that competition would be sensible in the short term but not in the long run. That's what his lawyers tell us anyway. See Brief for Petitioners 36. But I would think that no one would know better what Notebaert meant than Notebaert himself. Instead of permitting respondents to ask Notebaert, however, the Court looks to other quotes from that and other articles and decides that what he meant was that entering new markets as a CLEC would not be a "sustainable economic model." *Ante*, at 1972 - 1973, n. 13. Never mind that-as anyone ever interviewed knows-a newspaper article is hardly a verbatim transcript; the writer selects quotes to package his story, not to record a subject's views for posterity. But more importantly the District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor.^{FN11} See *Allen v. Wright*, 468 U.S. 737, 768, n. 1, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The inference the statement supports-that simultaneous decisions by ILECs not even to attempt to poach customers from one another once the law authorized them to do so were the product of an agreement-sits comfortably within the realm of possibility. That is all the Rules require.

FN11. It is ironic that the Court seeks to justify its decision to draw factual inferences in the defendants' favor at the pleading stage by citing to a rule of evidence, *ante*, at 1972 - 1973, n. 13. Under Federal Rule of Evidence 201(b), a

127 S.Ct. 1955

Page 32

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

judicially noticed fact “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

Whether Notebaert's statements constitute evidence of a conspiracy is hardly beyond reasonable dispute.

To be clear, if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint *1987 without requiring the defendants to answer the charge that they “have agreed not to compete with one another and otherwise allocated customers and markets to one another.” ^{FN12} ¶ 51, App. 27. Even a sworn denial of that charge would not justify a summary dismissal without giving the plaintiffs the opportunity to take depositions from Notebaert and at least one responsible executive representing each of the other defendants.

FN12. The Court worries that a defendant seeking to respond to this “conclusory” allegation “would have little idea where to begin.” *Ante*, at 1971, n. 10. A defendant could, of course, begin by either denying or admitting the charge.

Respondents in this case proposed a plan of “ ‘phased discovery’ ” limited to the existence of the alleged conspiracy and class certification. Brief for Respondents 25-26. Two petitioners rejected the plan. *Ibid*. Whether or not respondents' proposed plan was sensible, it was an appropriate subject for negotiation.^{FN13} Given the charge in the complaint-buttressed by the common sense of Adam Smith-I cannot say that the possibility that joint discussions*1988 and perhaps some agreements played a role in petitioners' decisionmaking process is so implausible that dismissing the complaint before any defendant has denied the charge is preferable to granting respondents even a minimal

opportunity to prove their claims. See Clark, New Federal Rules 977 (“[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function”).

FN13. The potential for “sprawling, costly, and hugely time-consuming” discovery, *ante*, at 1967, n. 6, is no reason to throw the baby out with the bathwater. The Court vastly underestimates a district court's case-management arsenal. Before discovery even begins, the court may grant a defendant's Rule 12(e) motion; Rule 7(a) permits a trial court to order a plaintiff to reply to a defendant's answer, see *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); and Rule 23 requires “rigorous analysis” to ensure that class certification is appropriate, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); see *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (C.A.2 2006) (holding that a district court may not certify a class without ruling that each Rule 23 requirement is met, even if a requirement overlaps with a merits issue). Rule 16 invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders, at which the parties may discuss, *inter alia*, “the elimination of frivolous claims or defenses,” Rule 16(c)(1); “the necessity or desirability of amendments to the pleadings,” Rule 16(c)(2); “the control and scheduling of discovery,” Rule 16(c)(6); and “the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems,” Rule 16(c)(12). Subsequently, Rule 26 confers

127 S.Ct. 1955

Page 33

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them. See 523 U.S., at 598-599, 118 S.Ct. 1584. Indeed, Rule 26(c) specifically permits a court to take actions “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope.

In short, the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations for their plausibility *vel non* without requiring an answer from the defendant.

See *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 206, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) (“Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation”). And should it become apparent over the course of litigation that a plaintiff’s filings bespeak an *in terrorem* suit, the district court has at its call its own *in terrorem* device, in the form of a wide array of Rule 11 sanctions. See Rules 11(b), (c) (authorizing sanctions if a suit is presented “for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation”); see *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) (holding that Rule 11 applies to a represented party who signs a pleading, motion, or other papers, as well as to attorneys); *Atkins v. Fischer*, 232 F.R.D. 116, 126 (D.D.C.2005) (“As possible sanctions pursuant to Rule 11, the court has an arsenal of options at its

disposal”).

I fear that the unfortunate result of the majority’s new pleading rule will be to invite lawyers’ debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar—among whom “lament” as to inadequate judicial supervision of discovery is most “common,” see *ante*, at 1967—should lobby for this state of affairs.

But “we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public.” Clark, Special Pleading in the Big Case 152. As we did in our prior decisions, we should have instructed them that their remedy was to seek to amend the Federal Rules—not our interpretation of them.^{FN14} See *Swierkiewicz*, 534 U.S., at 515, 122 S.Ct. 992; *Crawford-El v. Britton*, 523 U.S. 574, 595, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); *Leatherman*, 507 U.S., at 168, 113 S.Ct. 1160.

FN14. Given his “background in antitrust law,” *ante*, at 1968, n. 6, Judge Easterbrook has recognized that the most effective solution to discovery abuse lies in the legislative and rulemaking arenas. He has suggested that the remedy for the ills he complains of requires a revolution in the rules of civil procedure:

“Perhaps a system in which judges pare away issues and focus on investigation is too radical to contemplate in this country—although it prevailed here before 1938, when the Federal Rules of Civil Procedure were adopted. The change could not be accomplished without abandoning notice pleading, increasing the number of judicial officers, and giving them more authority If we are to rule out judge-directed discovery, however, we must be prepared to pay the piper. Part of the price is the high cost of unnecessary discovery—impositional and otherwise.” *Discovery as Abuse*, 69 B.U.L.Rev. 635, 645 (1989).

127 S.Ct. 1955

Page 34

127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267
(Cite as: 127 S.Ct. 1955)

IV

Just a few weeks ago some of my colleagues explained that a strict interpretation of the literal text of statutory language is essential to avoid judicial decisions that are not faithful to the intent of Congress. *Zuni Public School Dist. No. 89 v. Department of Education*, 550 U.S. ----, ----, 127 S.Ct. 1534, 167 L.Ed.2d 449 (2007) (SCALIA, J., dissenting). I happen to believe that there are cases in which other tools of construction are more reliable than text, but I agree of course that congressional intent should guide us in matters of statutory interpretation. *Id.*, at 1534, 127 S.Ct. 1534 (STEVENS, J., concurring). This is a case in which the intentions of the drafters of three important sources of law—the Sherman Act, the Telecommunications Act of 1996, and the Federal Rules of Civil Procedure—all point unmistakably in the same direction, yet the Court marches resolutely the other way. Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond *1989 to any congressional command is glaringly obvious.

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery. *Ante*, at 1966 - 1967. Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their Rule 12(b) motion have far exceeded the cost of limited discovery, or that those discovery costs would burden respondents as well as petitioners,^{FN15} that concern would not provide an adequate justification for this law-changing decision. For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly serious factual allegations, that could account for this stark break from precedent.

FN15. It would be quite wrong, of course, to assume that dismissal of an antitrust case after discovery is costless to plaintiffs.

See Fed. Rule Civ. Proc. 54(d)(1) (“[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs”).

If the allegation of conspiracy happens to be true, today's decision obstructs the congressional policy favoring competition that undergirds both the Telecommunications Act of 1996 and the Sherman Act itself. More importantly, even if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental-and unjustified-change in the character of pretrial practice.

Accordingly, I respectfully dissent.

U.S., 2007.

Bell Atlantic Corp. v. Twombly
127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267

END OF DOCUMENT

Westlaw.

127 S.Ct. 2197

Page 1

127 S.Ct. 2197, 167 L.Ed.2d 1081, 75 USLW 3643, 07 Cal. Daily Op. Serv. 6362, 2007 Daily Journal D.A.R. 8015,

20 Fla. L. Weekly Fed. S 317

(Cite as: 127 S.Ct. 2197)

Erickson v. Pardus
U.S., 2007.

Supreme Court of the United States
William ERICKSON, Petitioner,
v.
Barry J. PARDUS et al.
No. 06-7317.

Decided June 4, 2007.

Background: Prisoner brought a pro se § 1983 suit against prison medical officials, alleging deliberate indifference to his serious medical needs, in violation of his Eighth Amendment rights. The United States District Court for the District of Colorado, 2006 WL 650131, dismissed, and the prisoner appealed. The United States Court of Appeals for the Tenth Circuit, 198 Fed.Appx. 694, 2006 WL 2640394, affirmed. Prisoner filed petition for writ of certiorari.

Holding: The Supreme Court held that prisoner properly alleged that he suffered substantial harm.

Certiorari granted, judgment vacated, and case remanded.

Justice Scalia would have denied petition for writ of certiorari.

Justice Thomas filed dissenting opinion.

West Headnotes

[1] Civil Rights 78 ↪ 1395(7)

78 Civil Rights

78III Federal Remedies in General

78k1392 Pleading

78k1395 Particular Causes of Action

78k1395(7) k. Prisons and Jails; Probation and Parole. Most Cited Cases

State prisoner's pro se § 1983 complaint, alleging that termination of his treatment for hepatitis C was endangering his life and that he was still in need of treatment for the disease, gave prison officials fair notice of prisoner's claim of substantial harm, supportive of claim of deliberate indifference to his serious medical needs, in violation of Eighth Amendment. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

[2] Federal Civil Procedure 170A ↪ 673

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(B) Complaint

170AVII(B)1 In General

170Ak673 k. Claim for Relief in General.

Most Cited Cases

Under the notice pleading standard, specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

[3] Federal Civil Procedure 170A ↪ 1835

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)5 Proceedings

170Ak1827 Determination

170Ak1835 k. Matters Deemed

Admitted. Most Cited Cases

When ruling on a defendant's motion to dismiss for failure to state a claim, a judge must accept as true all of the factual allegations contained in the complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

127 S.Ct. 2197

Page 2

127 S.Ct. 2197, 167 L.Ed.2d 1081, 75 USLW 3643, 07 Cal. Daily Op. Serv. 6362, 2007 Daily Journal D.A.R. 8015,
20 Fla. L. Weekly Fed. S 317

(Cite as: 127 S.Ct. 2197)

[4] Federal Civil Procedure 170A 657.5(1)

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak654 Construction

170Ak657.5 Pro Se or Lay Pleadings

170Ak657.5(1) k. In General. Most

Cited Cases

A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. Fed.Rules Civ.Proc.Rule 8(a)(2), (f), 28 U.S.C.A.

***2197 PER CURIAM.**

Imprisoned by the State of Colorado and alleging violations of his Eighth and Fourteenth Amendment protections against cruel and unusual punishment, William Erickson, the petitioner in this Court, filed suit against prison officials in the United States District Court for the District of Colorado. He alleged that a liver condition resulting from hepatitis C required a treatment program that officials had commenced but then wrongfully terminated, *2198 with life-threatening consequences. Deeming these allegations, and others to be noted, to be "conclusory," the Court of Appeals for the Tenth Circuit affirmed the District Court's dismissal of petitioner's complaint. 198 Fed.Appx. 694, 698 (2006). The holding departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review. We vacate the court's judgment and remand the case for further consideration.

Petitioner was incarcerated in the Limon Correctional Facility in Limon, Colorado, where respondents Barry Pardus and Dr. Anita Bloor were working as prison officials. After Dr. Bloor removed petitioner from the hepatitis C treatment he had been receiving, petitioner sued under 42 U.S.C. § 1983, complaining, *inter alia*, that Dr. Bloor had violated his Eighth Amendment rights by demonstrating deliberate indifference to his serious medical needs. See, e.g., Estelle v. Gamble, 429 U.S. 97, 104-105, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) ("[D]eliberate indifference to serious medical

needs of prisoners constitutes the unnecessary and wanton infliction of pain ... proscribed by the Eighth Amendment," and this includes "indifference ... manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed" (footnotes and internal quotation marks omitted)); see also Helling v. McKinney, 509 U.S. 25, 35-37, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993).

Petitioner based his claim on the following allegations, which we assume to be true for purposes of review here: Officials at Colorado's Department of Corrections (Department) diagnosed petitioner as requiring treatment for hepatitis C. After completing the necessary classes and otherwise complying with the protocols set forth by the Department, petitioner began treatment for the disease. The treatment, which would take a year to complete, involved weekly self-injections of medication by use of a syringe. Soon after petitioner began this treatment, prison officials were unable to account for one of the syringes made available to petitioner (and other prisoners) for medical purposes. Upon searching, they found it in a communal trash can, modified in a manner suggestive of use for injection of illegal drugs. Prisoner Complaint in Civ. Action No. 05-CV-00405-LTB-MJW (D.Colo.), p. 3 (hereinafter Petitioner's Complaint).

Prison officials, disbelieving petitioner's claim not to have taken the syringe, found that his conduct constituted a violation of the Colorado Code of Penal Discipline for possession of drug paraphernalia. Letter from Anthony A. DeCesaro to William Erickson (Sept. 30, 2004), attached to Petitioner's Complaint. This conduct, according to the officials, led to the "reasonable inference" that petitioner had intended to use drugs, so the officials removed petitioner from his hepatitis C treatment. *Ibid.* "The successful treatment of Hepatitis C is incumbent upon the individual remaining drug and alcohol free to give the liver a better chance of recovery," they indicated, *ibid.*, an explanation they later offered to defend against petitioner's allegations of cruel and unusual punishment, see Defendants' Motion to Dismiss in Civ. Action No.

127 S.Ct. 2197

Page 3

127 S.Ct. 2197, 167 L.Ed.2d 1081, 75 USLW 3643, 07 Cal. Daily Op. Serv. 6362, 2007 Daily Journal D.A.R. 8015, 20 Fla. L. Weekly Fed. S 317

(Cite as: 127 S.Ct. 2197)

05-CV-00405-LTB-MJW, p. 10. Assuming that a person in the course of this treatment takes illicit drugs, the prison's protocol mandates a waiting period of one year followed by a mandatory drug education class lasting six months. Brief in Opposition 4. Petitioner therefore could face a delay of some 18 months before he would be able to restart treatment.

***2199** [1] In his complaint petitioner alleged Dr. Bloor had “removed [him] from [his] hepatitis C treatment” in violation of department protocol, “thus endangering [his] life.” Petitioner's Complaint 2. Petitioner attached to the complaint certain grievance forms. In these he claimed, among other things, he was suffering from “continued damage to [his] liver” as a result of the nontreatment. Colorado Dept. of Corrections Offender Grievance Form (June 30, 2004). The complaint requested relief including damages and an injunction requiring that the Department treat petitioner for hepatitis C “under the standards of the treatment [protocol] established by [the Department].” Petitioner's Complaint 8.

Three months after filing his complaint, and well before the District Court entered a judgment against him, petitioner filed a Motion for Expedited Review Due to Imminent Danger, in Civ. Action No. 05-B-405 (MJW) (D.Colo.). Indicating it was “undisputed” that he had hepatitis C, that he met the Department's standards for treatment of the disease, and that “furtherance of this disease can cause irreversible damage to [his] liver and possible death,” petitioner alleged that “numerous inmates” in his prison community had died of the disease and that he was “in imminent danger” himself “due to [the Department's] refusal to treat him.” *Ibid.* He had identified similar allegations in an earlier filing, explaining that “his liver is suffering irreversible damage” due to the decision to remove him from treatment and that he “will suffer irreparable damage if his disease goes untreated.” Plaintiff's Objections to the Magistrate's Recommendations in Civ. Action No. 05-CV-00405-LTB-MJW, p. 3.

Respondents answered these filings with a motion to dismiss. The Magistrate Judge recommended, as relevant, that the District Court dismiss the complaint

on the ground it failed to allege Dr. Bloor's actions had caused petitioner “substantial harm.” Recommendation on Defendants' Motion To Dismiss, p. 12. The District Court issued a short order indicating its agreement with the Magistrate Judge and dismissing the complaint.

The Court of Appeals affirmed. It quoted extensively from the Magistrate Judge's discussion of “substantial harm” before holding that petitioner had made “only conclusory allegations to the effect that he has suffered a cognizable independent harm as a result of his removal from the [hepatitis C] treatment program.” 198 Fed.Appx., at 698. Acknowledging decisions by courts that have found Eighth Amendment violations when delays in medical treatment have involved “life-threatening situations and instances in which it is apparent that delay would exacerbate the prisoner's medical problems” (and that have, moreover, indicated the Eighth Amendment “protects against future harm to an inmate”), *id.*, at 697 (internal quotation marks omitted), the court nevertheless found petitioner's complaint deficient: Petitioner had, according to the court, failed to “allege that as a result of the discontinuance of the treatment itself shortly after it began or the interruption of treatment for approximately eighteen months he suffered any harm, let alone substantial harm, [other] than what he already faced from the Hepatitis C itself,” *id.*, at 698 (internal quotation marks omitted). Having reached this conclusion, the court saw no need to address whether the complaint alleged facts sufficient to support a finding that Dr. Bloor had made her decisions with a “sufficiently culpable state of mind.” *Id.*, at 697, 698 (internal quotation marks omitted).

It may in the final analysis be shown that the District Court was correct to grant respondents' motion to dismiss. ***2200** That is not the issue here, however. It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered “a cognizable independent harm” as a result of his removal from the hepatitis C treatment program. *Id.*, at 698.

127 S.Ct. 2197

Page 4

127 S.Ct. 2197, 167 L.Ed.2d 1081, 75 USLW 3643, 07 Cal. Daily Op. Serv. 6362, 2007 Daily Journal D.A.R. 8015, 20 Fla. L. Weekly Fed. S 317

(Cite as: 127 S.Ct. 2197)

[2][3] Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary; the statement need only “ ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ ” *Bell Atlantic Corp. v. Twombly*, 550 U.S. ----, ----, 127 S.Ct. 1955, 167 L.Ed.2d 929, ---- (2007) (slip op., at 7-8) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, *supra*, at ----, 127 S.Ct. 1955 (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed *hepatitis C* medication was “endangering [his] life.” Petitioner's Complaint 2. It alleged this medication was withheld “shortly after” petitioner had commenced a treatment program that would take one year, that he was “still in need of treatment for this disease,” and that the prison officials were in the meantime refusing to provide treatment. *Id.*, at 3, 4. This alone was enough to satisfy *Rule 8(a)(2)*. Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings.

[4] The Court of Appeals' departure from the liberal pleading standards set forth by *Rule 8(a)(2)* is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed *pro se* is “to be liberally construed,” *Estelle*, 429 U.S., at 106, 97 S.Ct. 285, and “a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,” *ibid.* (internal quotation marks omitted). Cf. *Fed. Rule Civ. Proc. 8(f)* (“All pleadings shall be so construed as to do substantial justice”).

Whether petitioner's complaint is sufficient in all respects is a matter yet to be determined, for respondents raised multiple arguments in their motion to dismiss. In particular, the proper application of the controlling legal principles to the facts is yet to be determined. The case cannot, however, be dismissed on the ground that petitioner's allegations of harm were too conclusory to put these matters in issue. Certiorari and leave to proceed *in forma pauperis* are granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA would deny the petition for a writ of certiorari.

Justice THOMAS, dissenting.

I have repeatedly stated that the Eighth Amendment's prohibition on cruel and unusual punishment historically concerned only injuries relating to a criminal sentence. *Farmer v. Brennan*, 511 U.S. 825, 861, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)*2201 (opinion concurring in judgment); *Helling v. McKinney*, 509 U.S. 25, 42, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (dissenting opinion); *Hudson v. McMillian*, 503 U.S. 1, 18-20, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (dissenting opinion). But even applying the Court's flawed Eighth Amendment jurisprudence, “I would draw the line at actual, serious injuries and reject the claim that exposure to the *risk* of injury can violate the Eighth Amendment.” *Helling*, *supra*, at 42, 113 S.Ct. 2475 (THOMAS, J., dissenting).

Consistent with these views, I would affirm the judgment of the Court of Appeals. I respectfully dissent.

U.S., 2007.

Erickson v. Pardus

127 S.Ct. 2197, 167 L.Ed.2d 1081, 75 USLW 3643, 07 Cal. Daily Op. Serv. 6362, 2007 Daily Journal D.A.R. 8015, 20 Fla. L. Weekly Fed. S 317

END OF DOCUMENT

Westlaw.

490 F.3d 143

490 F.3d 143

(Cite as: 490 F.3d 143)

Page 1

▷

Iqbal v. Hasty
C.A.2,2007.

United States Court of Appeals, Second Circuit.

Javaid IQBAL, Plaintiff-Appellee,

v.

Dennis HASTY, former Warden of the Metropolitan Detention Center, Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons, John Ashcroft, former Attorney General of the United States, Robert Mueller, Director of the Federal Bureau of Investigation, David Rardin, former Director of the Northeast Region of the Bureau of Prisons, Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division, Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons, Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation, Defendants-Appellants.

Docket Nos. 05-5768-CV (L), 05-5844-CV (con), 05-6379-CV (con), 05-6352-CV (con), 05-6386-CV (con), 05-6358-CV (con) 05-6388-CV (con).

Heard: Oct. 4, 2006.

Decided: June 14, 2007.

Background: Muslim Pakistani pretrial detainee brought action against current and former government officials, alleging that they took a series of unconstitutional actions against him in connection with his confinement under harsh conditions after separation from the general prison population. The United States District Court for the Eastern District of New York, John Gleeson, J., 2005 WL 2375202, denied in part defendants' motions to dismiss on the ground of qualified immunity, and defendants appealed.

Holdings: The Court of Appeals, Jon O. Newman, Circuit Judge, held that:

(1) exigent circumstances of the post-9/11 context did not diminish detainee's right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches or other clearly established constitutional rights;

(2) detainee's procedural due process right to avoid more than six months' detention in administrative segregation without a hearing was not clearly established in 2001;

(3) detainee's complaint sufficiently stated a substantive due process claim against federal officials; and

(4) warden was not entitled to qualified immunity on detainee's First Amendment claim for interference with religious practices.

Affirmed in part, reversed in part, and remanded.

José A. Cabranes, Circuit Judge, filed concurring opinion.

* * * * *

Before: NEWMAN, CABRANES, and SACK, Circuit Judges.

JON O. NEWMAN, Circuit Judge.

These interlocutory appeals present several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11. Several current and former government officials from the Department of Justice, the Federal Bureau of Investigation ("FBI"), and the Bureau of Prisons ("BOP") appeal from the September 27, 2005, Order of the District Court for the Eastern District of New York (John Gleeson, District Judge) denying in part their motions to dismiss on the ground of qualified immunity. See Elmaghraby v. Ashcroft, No. 04 CV 1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) ("Dist. Ct. op.").

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 2

Plaintiff-Appellee Javaid Iqbal alleges that the Defendants-Appellants took a series of unconstitutional actions against him in connection with his confinement under harsh conditions at the Metropolitan Detention Center ("MDC") in Brooklyn, after separation from the general prison population. We conclude that the defense of qualified immunity, to the extent rejected by the District Court, cannot be sustained as to any Defendants at this preliminary stage of the litigation except as to the claim of violation of procedural due process rights, and we therefore affirm in part, reverse in part, and remand.

Background

Parties. Iqbal is a Muslim Pakistani currently residing in Pakistan. Iqbal's co-plaintiff was Ehad Elmaghraby, a Muslim Egyptian. After Judge Gleeson's ruling on the motions to dismiss, the United States settled Elmaghraby's claims by payment of \$300,000.

Four groups of Defendants have filed appeals from Judge Gleeson's order. The first group consists of former Attorney General John Ashcroft and current FBI Director Robert Mueller. The second group consists of Michael Rolince, former Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and Kenneth Maxwell, former Assistant Special Agent in Charge of the FBI's New York Field Office (the "FBI Defendants"). The third group consists of former BOP officials: Kathleen Hawk Sawyer, former BOP Director; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; and Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons (the "BOP Defendants"). The fourth appeal was filed by Dennis Hasty, former MDC Warden. Other Defendants include Michael Zenk, MDC Warden at the time the lawsuit was filed, other MDC staff, and the United States.

Factual allegations. The complaint alleges the following facts, which are assumed to be true for purposes of the pending appeals, as we are required to do in reviewing a ruling on a motion to dismiss. See Hill v. City of New York, 45 F.3d 653, 657 (2d

Cir.1995). The Plaintiff was arrested by agents of the FBI and the Immigration and Naturalization Service on November*148 2, 2001.^{FN1} Following his arrest, he was detained in the MDC's general prison population until January 8, 2002, when he was removed from the general prison population and assigned to a special section of the MDC known as the Administrative Maximum Special Housing Unit ("ADMAX SHU"), where he remained until he was reassigned to the general prison population at the end of July 2002. On this appeal, we consider only claims concerning the Plaintiff's separation from the general prison population and confinement thereafter in the ADMAX SHU. We do not consider the legality of his arrest or his initial detention in the MDC.

^{FN1.} The complaint does not identify the charges on which Iqbal was arrested, but Judge Gleeson's opinion states that he was charged with conspiracy to defraud the United States and fraud with identification. Dist. Ct. op. at *1 n. 1.

The complaint further alleges that in the months after 9/11, the FBI arrested and detained thousands of Arab Muslim men as part of its investigation into the events of 9/11. The fact of their detention, its duration, and the conditions of confinement depended on whether those arrested were classified as "of high interest." Many of these men, including the Plaintiff, were classified as "of high interest" solely because of their race,^{FN2} religion, and national origin and not because of any involvement in terrorism. In the New York City area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was investigating a 9/11 lead were classified as "of high interest." The FBI Defendants were responsible for making these classifications for detainees arrested in the New York City area, including the Plaintiff.

^{FN2.} Iqbal is a Muslim and a Pakistani, but not an Arab. Nevertheless, his claim is fairly to be understood as alleging unlawful treatment based on his ethnicity, even if not technically on a racial classification. And his

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 3

allegations of what was done to Arab Muslims are fairly understood to mean that unlawful actions were taken against him because officials believed, perhaps because of his appearance and his ethnicity, that he was an Arab.

The complaint further alleges that Ashcroft and Mueller approved a policy of holding detainees “of high interest” in highly restrictive conditions until they were “cleared” by the FBI. In early October, BOP Defendant Cooksey, with the knowledge of BOP Defendant Sawyer, directed that all detainees “of high interest” be held in the most restrictive conditions possible. FBI officials were aware that the BOP was relying on this classification to hold detainees in restrictive conditions.

The complaint further alleges that soon after 9/11, the MDC created within the MDC an ADMAX SHU, the BOP’s most restrictive type of confinement, to house the detainees “of high interest.” The procedures for handling ADMAX SHU detainees were developed by MDC staff, at the request of Defendant Hasty. ADMAX SHU detainees were permitted to leave their cells only one hour each day, and all legal and social interactions were non-contact. Movement outside their cells required handcuffs and leg irons and four-officer escorts. Movement inside their cells was monitored by video cameras. For many weeks, the detainees were subject to a communications blackout.

The complaint further alleges that the MDC did not conduct any review of the detainees’ segregation in the ADMAX SHU. Instead, the detainees remained in the ADMAX SHU until the FBI approved their release to the general population. As a result, numerous detainees were held in the ADMAX SHU for extended periods *149 of time even though there was no evidence linking them to terrorism.

The complaint further alleges that the Plaintiff was transferred to the ADMAX SHU on January 8, 2002. He was kept in solitary confinement. Until March, the lights in his cell were left on almost 24 hours a day, and MDC staff deliberately turned on air conditioning during the winter and heating during the summer. MDC staff left the Plaintiff in the open-air recreation

area for hours when it was raining and then turned on the air conditioner when he returned to his cell. Whenever the Plaintiff was removed from his cell, he was handcuffed and shackled. The Plaintiff was not provided with adequate food and lost 40 pounds while in custody. MDC staff called him, among other things, a “terrorist” and a “Muslim killer.”

The complaint further alleges that the Plaintiff was brutally beaten by MDC guards on two occasions: upon his transfer to the ADMAX SHU in January 2002 and again in March. Following the March beating, the Plaintiff was denied medical care for two weeks even though he was in excruciating pain. He was also subjected to daily strip and body-cavity searches. The March beating was prompted by the Plaintiff’s protestations to a fourth consecutive strip and body-cavity search in the same room. MDC staff interfered with the Plaintiff’s prayers, routinely confiscated his Koran, and refused to permit him to participate in Friday prayer services. They also interfered with the Plaintiff’s communications with his defense attorney, for example, by disconnecting the phone if the Plaintiff complained about his conditions of confinement and delaying his receipt of legal mail for up to two months.

The Plaintiff pled guilty on April 22, 2002, and was sentenced on September 17, 2002. He was released from the ADMAX SHU at the end of July 2002, after pleading guilty but before sentencing. Judge Gleeson considered the Plaintiff to be a pretrial detainee throughout his entire time in the ADMAX SHU. *Dist. Ct. op.* at *15 n. 14. The Plaintiff was released from the MDC on January 15, 2003, and thereafter was removed to Pakistan (a fact not in the complaint but undisputed).

Litigation in the District Court. The Plaintiff (and his co-plaintiff) commenced this action in May 2004. Their complaint asserted twenty-one causes of action, including both statutory claims and constitutional tort claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The causes of action, and the Defendants against whom they were asserted, are set forth in the margin.^{FN3}

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 4

FN3. The claims, in the order set forth in the complaint, are:

1. Fifth Amendment substantive due process claim based on the conditions of confinement: Hasty and MDC staff.
2. Fifth Amendment procedural due process claim based on confinement in the ADMAX SHU: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.
- 3-4. Fifth and Eighth Amendments excessive force claims: Hasty and MDC staff.
5. Sixth Amendment interference with right to counsel claim: Hasty and MDC staff.
- 6-7. Fifth and Eighth Amendments denial of medical treatment claims: MDC staff (not at issue on this appeal).
8. Eighth Amendment conditions of confinement claim: Hasty and MDC staff.
9. Fourth Amendment unreasonable search claim based on strip and body-cavity searches: BOP Defendant Sawyer (but not other BOP Defendants), Hasty, and MDC staff.
10. First Amendment claim based on interference with religious practice: Hasty and MDC staff.
11. First Amendment claim based on religious discrimination: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.
12. Fifth Amendment race-based equal protection claim: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.
13. Religious Freedom Restoration Act ("RFRA") claim based on conditions of confinement: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.
- 14-15. RFRA claims based on interference with religious practice and excessive force: Hasty and MDC staff.
- 16-17. 42 U.S.C. § 1985(3) claims for conspiracy to deprive the Plaintiff of equal protection on the grounds of religion, race, and national origin: Ashcroft and Mueller, BOP Defendants, Hasty, and MDC staff.

18-20. Federal Tort Claims Act ("FTCA") claims for assault and battery, negligent denial of medical treatment, intentional infliction of emotional distress: United States.

21. Alien Tort Claims Act ("ATCA") claim: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

*150 Ashcroft and Mueller, the FBI Defendants, the BOP Defendants, Hasty, the MDC Warden, and an MDC medical assistant ^{FN4} filed motions to dismiss on the grounds that (1) a *Bivens* action was precluded by "special factors," (2) they were protected by qualified immunity, (3) the supervisory defendants were not alleged to have sufficient personal involvement, and (4) Ashcroft, Mueller, the FBI Defendants, and the BOP Defendants were not subject to personal jurisdiction in New York. In addition, the United States moved to be substituted as the defendant on the ATCA claim (Count 21) and for dismissal of that claim.

FN4. Zenk, the MDC Warden at the time the lawsuit was filed, and the MDC medical assistant are not appealing Judge Gleeson's ruling.

With a few exceptions, Judge Gleeson denied the motions to dismiss. He first rejected Ashcroft's argument that "special factors," namely the post-9/11 context, precluded a *Bivens* action in this case. See *Dist. Ct. op.* at *14. Judge Gleeson then turned to the substance of the Plaintiff's *Bivens* claims. He denied Hasty's motion to dismiss the conditions of confinement claims (Counts One and Eight), concluding that the Plaintiff had adequately alleged (1) illegitimate reasons for the conditions of his confinement and (2) Hasty's personal involvement. See *id.* at *15-*17. He also found adequate allegations of Hasty's personal involvement in the claims of excessive force (Counts Three and Four), interference with the Plaintiff's right to counsel (Count Five), unreasonable strip searches (Count Nine), and interference with the Plaintiff's exercise of religion (Count Ten). See *id.* at *22, *27, *28. However, he found the allegations insufficient to support the personal involvement of BOP Defendant Sawyer in the unreasonable strip searches and

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 5

dismissed this claim against her. *See id.* at *27.

With respect to the procedural due process claim (Count Two), Judge Gleeson found that the Plaintiff had alleged both a deprivation of a liberty interest that involved “atypical and significant” hardships compared to the conditions in the general prison population and the absence of any due process protections, that the Plaintiff’s right was clearly established, and that he could not assess the objective reasonableness of the Defendants’ actions as a matter of law at this stage of the litigation. *See id.* at *18-*20. He also found that the Plaintiff had adequately alleged the personal involvement of all the Defendants, observing that “the post-September 11 context provide[d] support for [the P]laintiffs’ assertions that [the D]efendants were involved in creating and/or implementing the detention policy under which [the P]laintiffs were confined without due process.”*151 *See id.* at *20-*21. Finally, with respect to the procedural due process claim, he limited the first stage of discovery to the issue of the Defendants’ personal involvement in the alleged denial of due process. *See id.* at *21.

With respect to the Plaintiff’s *Bivens* claims of race and religious discrimination (Counts 11 and 12), Judge Gleeson ruled that the Plaintiff’s allegations that he was confined in significantly harsher conditions solely because of his race and religion were sufficient to state a cause of action. *See id.* at *29. He also concluded that the Plaintiff had adequately alleged the personal involvement of Ashcroft and Mueller, the FBI Defendants, and Hasty. *See id.* However, because the Plaintiff had not alleged that the BOP Defendants were involved in the challenged classification in any way, Judge Gleeson concluded that the Plaintiff had not alleged the personal involvement of the BOP Defendants, and he dismissed these claims against them. *See id.*

Turning to the Plaintiff’s statutory claims, Judge Gleeson dismissed the RFRA claims against all the Defendants, concluding that they were entitled to qualified immunity because it was not clearly established that RFRA applied to federal government officials. *See id.* at *30-*31. He also dismissed the ATCA claim after first having substituted the United

States for the individual defendants. *See id.* at *34-*35. Finally, he denied the motions to dismiss the section 1985(3) conspiracy claims, rejecting the Defendants’ arguments that it was not clearly established that section 1985 applied to federal officers and concluding that the Plaintiff had adequately alleged the Defendants’ personal involvement, except with respect to the allegation that the BOP Defendants had conspired to subject the Plaintiff to unreasonable strip searches. *See id.* at *32-*33.

Discussion

The Defendants appeal from the District Court’s order denying their motions to dismiss on the ground of qualified immunity. Their arguments with respect to qualified immunity fall into several broad categories: (1) the Plaintiff’s allegations do not allege the violation of a clearly established right, (2) do not allege sufficient personal involvement of the Defendants in the challenged actions, (3) are too conclusory to overcome a qualified immunity defense, and (4) the Defendants’ actions were objectively reasonable. Permeating the Defendants’ assertion of a qualified immunity defense is the contention that, however the defense might be adjudicated in normal circumstances, the immediate aftermath of the 9/11 attack created a context in which the defense must be assessed differently and, from their standpoint, favorably.

In addition, Ashcroft, Mueller, and FBI Defendant Rolince seek review of the denial of their motion to dismiss for lack of personal jurisdiction, arguing that the issue of personal jurisdiction is available for review on this interlocutory appeal because the issue is inextricably intertwined with that of qualified immunity.

Because many of the Defendants’ grounds for asserting an immunity defense overlap with respect to several of the Plaintiff’s allegations, it will be convenient to consider separately each of the Plaintiff’s causes of action with respect to the one or more Defendants against whom it is asserted, rather than consider separately the claims asserted against each Defendant. Before turning to each of the Plaintiff’s allegations, we first consider the legal standards that apply to nearly all

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 6

of the Plaintiff's claims and to most of the grounds on which the Defendants assert their qualified immunity defense.

*152 I. General Principles of Qualified Immunity

(a) *Standard of review.* When a district court denies qualified immunity on a Rule 12(b)(6) motion to dismiss, “we review the district court’s denial *de novo*, accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs’ favor.” Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 250 (2d Cir.2001).

[1] (b) *Appealability.* A district court’s denial of qualified immunity is appealable as a collateral order if it turns on an issue of law. See Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Thus, a defendant may appeal a district court’s ruling denying qualified immunity when, if a plaintiff’s allegations are assumed to be true, the only question is whether the alleged conduct violated a clearly established right. See Locurto v. Safir, 264 F.3d 154, 163 (2d Cir.2001).

[2][3] (c) *The qualified immunity defense.* Qualified immunity is an immunity from suit and not just a defense to liability. See Saucier v. Katz, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The first step in a qualified immunity inquiry is to determine whether the alleged facts demonstrate that a defendant violated a constitutional right. See id. at 201, 121 S.Ct. 2151; see also Scott v. Harris, --- U.S. ---, 127 S.Ct. 1769, 1774 & n. 4, 167 L.Ed.2d 686 (2007). If the allegations show that a defendant violated a constitutional right, the next step is to determine whether that right was clearly established at the time of the challenged action—that is, “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” See Saucier, 533 U.S. at 202, 121 S.Ct. 2151. A defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for him to believe that his actions did not violate clearly established law. See Johnson, 239 F.3d at 250.

[4] In determining whether a right was clearly established, the court must assess whether “the contours of the right [were] sufficiently clear in the context of the alleged violation such that a reasonable official would understand that what he [was] doing violate[d] that right.” Id. at 250-51 (internal quotation marks omitted).

To that end, the court should consider what a reasonable officer in the defendant’s position would have known about the lawfulness of his conduct, “not what a lawyer would learn or intuit from researching case law.” Id. at 251 (internal quotation marks omitted). Furthermore, the court need not identify “legal precedent addressing an identical factual scenario” to conclude that the right is clearly established. Id.; see also Tellier v. Fields, 280 F.3d 69, 84 (2d Cir.2000) (noting that a law is “clearly established” so long as a ruling on the issue is “clearly foreshadow[ed]” by this Circuit’s decisions).

[5] (d) *Personal involvement.* Many of the Defendants claim qualified immunity on the ground that the Plaintiff has failed to allege their personal involvement in the challenged actions. All of the appealing Defendants are supervisory officials. The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated. See *153 Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir.1995) (discussing section 1983 liability).

Although a lack of personal involvement may be grounds for dismissing a claim on the merits (a ruling that would not be subject to an interlocutory appeal), such a lack is also relevant to a defense of qualified immunity because it goes to the question of whether a defendant’s actions violated a clearly established right. See McCullough v. Wyandanch Union Free School District, 187 F.3d 272, 280 (2d Cir.1999) (“Where there is a total absence of evidence of [a violation], there is no basis on which to conclude that the defendant seeking qualified immunity violated clearly

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 7

established law.”(internal quotation marks omitted)). “[O]ur task is to consider whether, as a matter of law, the factual allegations and all reasonable inferences therefrom are insufficient to establish the required showing of personal involvement.” *Johnson*, 239 F.3d at 255.

[6] (e) *Pleading requirements*. The parties dispute the extent to which a plaintiff must plead specific facts to overcome a defense of qualified immunity at the motion-to-dismiss stage. Although most of the Defendants disclaim requiring the Plaintiff to meet a heightened pleading standard, beyond the requirement of *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that a complaint “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests,” see Fed.R.Civ.P. 8(a)(2), all the Defendants make the somewhat similar argument that “conclusory allegations” will not suffice to withstand a qualified immunity defense, especially with respect to allegations of supervisory involvement, racial and/or religious animus, or conspiracy. BOP Defendant Cooksey explicitly urges us to adopt a heightened pleading standard in *Bivens* actions.

The pleading standard to overcome a qualified immunity defense appears to be an unsettled question in this Circuit. Four Supreme Court opinions provide guidance, although the guidance they provide is not readily harmonized. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), the Court rejected a heightened pleading standard in a civil rights action alleging municipal liability, applying instead only the traditional requirement of “‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Id.* at 168, 113 S.Ct. 1160 (quoting Fed.R.Civ.P. 8(a)(2)). In reaching this conclusion, the Court distinguished between municipalities’ immunity from *respondeat superior* liability and government officials’ qualified immunity from suit. See *id.* at 166, 113 S.Ct. 1160. Arguably, this distinction could permit requiring a plaintiff to satisfy a heightened pleading standard of a cause of action in order to overcome a government official’s defense of qualified immunity. However, the Court’s opinion in *Leatherman* suggests that heightened pleading

standards are never permissible except when authorized by Rule 9(b) of the Federal Rules of Civil Procedure. See *id.* at 168, 113 S.Ct. 1160 (noting that Rule 9(b) “do[es] not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983”). Indeed, the Court observed that, in the absence of amendment to Rules 8 or 9, the courts could rely only on control of discovery and summary judgment to “weed out unmeritorious claims.” *Id.* at 168-69.

A more pertinent precedent is *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), which concerned the adequacy of pleading a Title VII complaint. The Court rejected what had been this Circuit’s rule requiring employment*154 discrimination plaintiffs to allege facts constituting a *prima facie* case of employment discrimination. See *id.* at 515, 122 S.Ct. 992. The Court again emphasized that the judicially imposed heightened pleading standard conflicted with Rule 8(a) and that a heightened pleading standard could be attained only “by the process of amending the Federal Rules, and not by judicial interpretation.” *Id.* (internal quotation marks omitted).

Leatherman and especially *Swierkiewicz*—with their insistence that courts cannot impose heightened pleading standards in the absence of statutory authorization—indicate that a court cannot impose a heightened pleading standard in *Bivens* (or other civil rights) actions against individual officials, a precept we have heeded since the Supreme Court’s decision in *Swierkiewicz*. See, e.g., *Phillip v. University of Rochester*, 316 F.3d 291, 298-99 (2d Cir.2003) (general allegation of racial animus); *Phelps v. Kapnolas*, 308 F.3d 180, 186-87 (2d Cir.2002) (general allegation of knowledge).

However, a third Supreme Court case, decided between *Leatherman* and *Swierkiewicz*, cryptically suggests that, in some circumstances, a court could require “specific, nonconclusory factual allegations” at the pleading stage in claims against government officials. In *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998), the D.C. Circuit had recognized a heightened burden of proof in cases against government

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 8

officials alleging unconstitutional motive. *See id.* at 582-83, 118 S.Ct. 1584. The Court observed that the D.C. Circuit had adopted the heightened standard in an attempt “to address a potentially serious problem: Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials.” *Id.* at 584-85, 118 S.Ct. 1584 (internal quotation marks omitted). Although the Supreme Court recognized this problem, it rejected the heightened standard of proof.

The Court held that the D.C. Circuit's rule was not compelled by either the holding or the reasoning of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In *Harlow*, the Court had stated that “bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.” *Id.* at 817-18, 102 S.Ct. 2727. However, as the Court explained in *Crawford-El*, this statement merely concerned a plaintiff's attempt to overcome a legitimate qualified immunity defense by alleging malicious intent; this holding was irrelevant to a plaintiff's burden in alleging a constitutional violation of which improper motive is an essential element. *See* 523 U.S. at 588-89, 118 S.Ct. 1584. Neither did *Harlow's* reasoning require a heightened burden of proof: the Court observed that there existed other mechanisms for protecting officials from unmeritorious actions, such as the requirement that the officials' conduct violate clearly established law, the need to prove causation, and procedural protections. *See id.* at 590-93, 118 S.Ct. 1584.

The Court acknowledged that the usual pleading standard would sometimes not preclude at least limited discovery to amplify general allegations. The Court observed that *Harlow* only “sought to protect officials from the costs of ‘broad-reaching’ discovery” and that limited discovery is sometimes necessary to adjudicate a qualified immunity defense. *See id.* at 593 n. 14, 118 S.Ct. 1584. The Court concluded by observing that “broad discretion” in the discovery process is more “useful and equitable” than categorical *155 rules such as that of the D.C. Circuit. *See id.* at 601.

What *Crawford-El* gave civil rights plaintiffs with respect to traditional notice pleading, however, it might have modified by permitting some post-complaint detailing of a claim. In discussing the procedural mechanisms available to judges in civil rights actions, at least those alleging wrongful motive, the Court observed that, before permitting discovery, a court could require a plaintiff to “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.” *Id.* at 598, 118 S.Ct. 1584 (internal quotation marks omitted). Perhaps significantly, the Court quoted the phrase “put forward specific, nonconclusory factual allegations” from Justice Kennedy's concurring opinion in *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), in which he had explicitly advocated a heightened pleading standard for civil rights actions requiring a showing of malice. *See id.* at 235-36, 111 S.Ct. 1789 (“There is tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it.”).

The First Circuit has remarked that “[w]hatever window of opportunity [it] thought remained open after *Crawford-El* has been slammed shut by the Supreme Court's subsequent decision in *Swierkiewicz*.” *Educadores Puertorriqueños en Acción v. Hernandez*, 367 F.3d 61, 65 (1st Cir.2004). Most Circuits appear to have rejected a heightened pleading standard. *See Doe v. Cassel*, 403 F.3d 986, 988-89 & n. 3 (8th Cir.2005) (collecting cases); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir.2002) (same).

Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). If we were to consider only a narrow view of the holding of that decision, we would not make any adjustment in our view of the applicable pleading standard. *Bell Atlantic* held that an allegation of parallel conduct by competitors, without more, does not suffice to plead an antitrust violation under 15

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 9

U.S.C. § 1. See *id.* at 1961. The Court required, in addition, “enough factual matter (taken as true) to suggest that an agreement was made.” *Id.* at 1965. However, the Court’s explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), was decided half a century ago. The nature and extent of that alteration is not clear because the Court’s explanation contains several, not entirely consistent, signals, which we consider (not necessarily in the order set forth in the Court’s opinion).

Some of these signals point toward a new and heightened pleading standard. First, the Court explicitly disavowed the oft-quoted statement in *Conley* of “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Bell Atlantic*, 127 S.Ct. at 1968 (quoting *Conley*, 355 U.S. at 45-46, 78 S.Ct. 99). *Bell Atlantic* asserted that this “no set of facts” language “has earned its retirement” and “is best forgotten.” *Id.* at 1969.

*156 Second, the Court, using a variety of phrases, indicated that more than notice of a claim is needed to allege a section 1 violation based on competitors’ parallel conduct. For example, the Court required “enough factual matter (taken as true) to suggest that an agreement was made,” *id.* at 1965; “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement,” *id.*; “facts that are suggestive enough to render a § 1 conspiracy plausible,” *id.*; “allegations of parallel conduct ... placed in a context that raises a suggestion of a preceding agreement,” *id.* at 1966; “allegations plausibly suggesting (not merely consistent with) agreement,” *id.*; a “plain statement” (as specified in Rule 8(a)(2)) with “enough heft” to show entitlement to relief, *id.*; and “enough facts to state a claim to relief that is plausible on its face,” *id.* at 1974, and also stated that the line “between the factually neutral and the factually suggestive ... must be crossed to enter the realm of plausible liability,” *id.* at 1966 n. 5, and that “the complaint warranted dismissal because it failed in

toto to render plaintiffs’ entitlement to relief plausible,” *id.* at 1973 n. 14.

Third, the Court discounted the ability of “‘careful case management,’ ” “to weed[] out early in the discovery process” “a claim just shy of a plausible entitlement.” *Id.* at 1967 (quoting *id.* at 1975 (Stevens, J., dissenting)).

Fourth, the Court encapsulated its various formulations of what is required into what it labeled “the plausibility standard.” *Id.* at 1968. Indeed, the Court used the word “plausibility” or an adjectival or adverbial form of the word fifteen times (not counting quotations).

On the other hand, some of the Court’s linguistic signals point away from a heightened pleading standard and suggest that whatever the Court is requiring in *Bell Atlantic* might be limited to, or at least applied most rigorously in, the context of either all section 1 allegations or perhaps only those section 1 allegations relying on competitors’ parallel conduct. First, the Court explicitly disclaimed that it was “requir[ing] heightened fact pleading of specifics,” *id.* at 1974, and emphasized the continued viability of *Swierkiewicz*, see *id.* at 1973-74, which had rejected a heightened pleading standard. See also *Erickson v. Pardus*, --- U.S. ---, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007) (citing *Bell Atlantic*’s citation of *Swierkiewicz*).

Second, although the Court faulted the plaintiffs’ complaint for alleging “merely legal conclusions” of conspiracy, *Bell Atlantic*, 127 S.Ct. at 1970, it explicitly noted with approval Form 9 of the Federal Civil Rules, Complaint for Negligence, which, with respect to the ground of liability, alleges only that the defendant “negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway,” Fed.R.Civ.P.App. Form 9. See *Bell Atlantic*, 127 S.Ct. at 1970 n. 10. The Court noted that Form 9 specifies the particular highway the plaintiff was crossing and the date and time of the accident, see *id.*, but took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent, *i.e.*, driving too fast, crossing the center line, running a traffic light or stop sign, or even generally failing to maintain a proper lookout. The adequacy of a

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 10

generalized allegation of negligence in the approved Form 9 seems to weigh heavily against reading *Bell Atlantic* to condemn the insufficiency of all legal conclusions in a pleading, as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred.

Third, the Court placed heavy emphasis on the “sprawling, costly, and hugely time-*157 consuming” discovery that would ensue in permitting a bare allegation of an antitrust conspiracy to survive a motion to dismiss, *see id.* at 1967 n. 6, and expressed concern that such discovery “will push cost-conscious defendants to settle even anemic cases,” *id.* at 1967. These concerns provide some basis for believing that whatever adjustment in pleading standards results from *Bell Atlantic* is limited to cases where massive discovery is likely to create unacceptable settlement pressures.

Fourth, although the Court expressed doubts about the ability of district courts to “weed[] out” through case management in the discovery process “a claim just shy of a plausible entitlement to relief,” *id.* (emphasis added), the Court did not disclaim its prior statement that “federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.” *Leatherman*, 507 U.S. at 168-69, 113 S.Ct. 1160 (emphasis added).^{FN5} Leaving *Leatherman* and *Crawford-El* undisturbed (compared to the explicit disavowal of the “no set of facts” language of *Conley*) further suggests that *Bell Atlantic*, or at least its full force, is limited to the antitrust context.

^{FN5}. There is no possibility that the “weed out” language of *Leatherman* was overlooked; it was called to the Court’s attention in Justice Stevens’s dissent. *See Bell Atlantic*, 127 S.Ct. at 1982.

Fifth, just two weeks after issuing its opinion in *Bell Atlantic*, the Court cited it for the traditional proposition that “[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]”; the statement need only “‘give the defendant fair notice of what the

... claim is and the grounds upon which it rests.’ ” *Erickson*, 127 S.Ct. at 2200 (quoting *Bell Atlantic*’s quotation from *Conley*) (omission in original).

These conflicting signals create some uncertainty as to the intended scope of the Court’s decision.^{FN6} We are reluctant to assume that all of the language of *Bell Atlantic* applies only to section 1 allegations based on competitors’ parallel conduct or, slightly more broadly, only to antitrust cases.^{FN7} Some of the language relating generally to Rule 8 pleading standards seems to be so integral to the rationale of the Court’s parallel conduct holding as to constitute a necessary part of that holding. *See Pierre N. Leval, Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L.Rev. 1249, 1257 (2006) (“The distinction [between holding and dictum] requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment.”).

^{FN6}. The parties, not surprisingly, view *Bell Atlantic* entirely differently. Defendant Hasty characterizes the Supreme Court’s decision as a “sea change” in the pleading standard of Rule 8, *see* Letter from Michael L. Martinez, counsel for Defendant Hasty, to the Acting Clerk of this Court (May 25, 2007); the Plaintiff emphasizes the antitrust holding of the decision, *see* Letter from Alexander A. Reinert, counsel for Plaintiff Iqbal, to the Acting Clerk of this Court (May 22, 2007).

^{FN7}. For example, it would be cavalier to believe that the Court’s rejection of the “no set of facts” language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts (according to a Westlaw search), applies only to section 1 antitrust claims.

After careful consideration of the Court’s opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 11

requiring a flexible “plausibility standard,” which obliges a pleader to amplify*158 a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*. We will say more about this approach as we apply it below to some of the Plaintiff’s specific allegations.

Notwithstanding what we understand to be the essential message of *Bell Atlantic*, we acknowledge that we see some merit in the argument in favor of a heightened pleading standard in this case for two reasons. First, qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation. In this respect, the factors favoring a heightened pleading standard to overcome a qualified immunity defense are distinguishable from the purely prudential and policy-driven factors that the Supreme Court found inadequate to justify a heightened pleading standard in the Title VII context. See *Swierkiewicz*, 534 U.S. at 514-15, 122 S.Ct. 992.

Second, some of the allegations in the Plaintiff’s complaint, although not entirely conclusory, suggest that some of the Plaintiff’s claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement. Therefore, allowing some of the Plaintiff’s claims to survive a motion to dismiss might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent.

Nevertheless, although *Swierkiewicz* was decided in the context of Title VII, we are mindful of the Supreme Court’s statement in that decision that heightened pleading requirements “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.” *Id.* at 515, 122 S.Ct. 992 (internal quotation marks omitted). Absent any indication from the Supreme Court that qualified immunity might warrant an exception to this general approach and the explicit disclaimer of a heightened pleading standard in *Bell Atlantic*, reinforced by the reversal of the Tenth Circuit’s use of a heightened pleading standard in *Erickson*, we conclude that a heightened pleading rule may not be imposed. However, in order to survive a motion to dismiss under the plausibility standard of *Bell*

Atlantic, a conclusory allegation concerning some elements of a plaintiff’s claims might need to be fleshed out by a plaintiff’s response to a defendant’s motion for a more definite statement. See Fed.R.Civ.P. 12(e). In addition, even though a complaint survives a motion to dismiss, a district court, while mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation, may nonetheless consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff’s claims and a plaintiff may probe such matters as a defendant’s knowledge of relevant facts and personal involvement in challenged conduct. In a case such as this where some of the defendants are current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court might wish to structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up the ranks. If discovery directed to current or former senior officials becomes warranted, a district court might also consider making all such discovery subject to prior court approval.

*159 We note that Rule 8(a)’s liberal pleading requirement, when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability. Therefore, we emphasize that, as the claims surviving this ruling are litigated on remand, the District Court not only may, but “must exercise its discretion in a way that protects the substance of the qualified immunity defense ... so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings.” *Crawford-El*, 523 U.S. at 597-98, 118 S.Ct. 1584 (emphasis added). In addition, the District Court should provide ample opportunity for the Defendants to seek summary judgment if, after carefully targeted discovery, the evidence indicates that certain of

490 F.3d 143
 490 F.3d 143
 (Cite as: 490 F.3d 143)

Page 12

the Defendants were not sufficiently involved in the alleged violations to support a finding of personal liability, or that no constitutional violation took place.

See Harlow, 457 U.S. at 821, 102 S.Ct. 2727 (Brennan, J., concurring) (“[S]ummary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred.”). We give these matters additional consideration below with respect to particular claims.

[7] (f) *The post-9/11 context.* Several Defendants contend that even if the Plaintiff’s complaint would survive a motion to dismiss in the face of a qualified immunity defense under normal circumstances, the post-9/11 context requires a different outcome. This argument is advanced on three fronts. First, some Defendants contend that the Government was entitled to take certain actions that might not have been lawful before 9/11 because the Government’s interests assumed special weight in the post-9/11 context. Second, some Defendants contend that, even if the law was clearly established as to the existence of a right claimed to have been violated, it was not clearly established in the extraordinary circumstances of the 9/11 attack and its aftermath. Third, some Defendants contend that the post-9/11 context renders their actions objectively reasonable, an argument we do not reach in view of our disposition of their second contention.

We fully recognize the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attack. We also recognize that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times. *See Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 425-26, 54 S.Ct. 231, 78 L.Ed. 413 (1934) (“While emergency does not create power, emergency may furnish the occasion for the exercise of power.”). But most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the

steadfast protection of those rights in both normal and unusual times.

With some rights, for example, the right to be free from unreasonable searches, the existence of exigent circumstances might justify governmental action that would not otherwise be permitted. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) (exigent circumstances permitted warrantless entry into home). But, as we discuss below, *see* Part VI, the exigent circumstances of the *160 post-9/11 context do not diminish the Plaintiff’s right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches. This and other rights, such as the right to be free from use of excessive force and not to be subjected to ethnic or religious discrimination, were all clearly established prior to 9/11, and they remained clearly established even in the aftermath of that horrific event. To whatever extent exigent circumstances might affect the lawfulness of the Defendants’ actions or might have justified an objectively reasonable belief that their actions did not violate clearly established law, we consider the argument in connection with a particular claim.

With these general principles in mind, we turn to the Plaintiff’s specific claims.

* * * * *

Westlaw.

493 F.3d 1174

493 F.3d 1174

(Cite as: 493 F.3d 1174)

Page 1

H

Ridge at Red Hawk, L.L.C. v. Schneider
C.A.10 (Utah),2007.

United States Court of Appeals,Tenth Circuit.
The RIDGE AT RED HAWK, L.L.C.,
Plaintiff-Appellant,
v.

James M. SCHNEIDER; S & K Development
Company, Inc., Defendants-Appellees.

No. 06-4162.


July 9, 2007.

Background: Limited partner brought action seeking to vacate or modify arbitration award dissolving partnership. The United States District Court for the District of Utah, Ted Stewart, J., dismissed suit, and plaintiff appealed.

Holding: The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that limited partner failed to state a claim for review of arbitration award.

Affirmed.

West Headnotes

Partnership 289  376

289 Partnership

289VIII Limited Partnership

289k376 k. Dissolution, Settlement, and Accounting. Most Cited Cases

Limited partner failed to state a claim for review of arbitration award dissolving partnership, under arbitration clause giving it the right to seek vacation or modification of an arbitration award only if the award "is based in whole or in part on an incorrect or erroneous ruling of law," based on allegation that arbitration panel improperly overruled its objections to venue, as an improper venue ruling, even if a ruling of law, did not call into question the merits of the award.

*1174 Thomas William Peters (and David W. Scofield, Peters, Scofield, Price, on the brief), Salt Lake City, UT, for Plaintiff-Appellant.

Robert B. Lochhead, Parr, Waddoups, Brown, Gee & Loveless, Salt Lake City, UT, for Defendants-Appellees.

Before KELLY, HENRY, and LUCERO, Circuit Judges.

PAUL KELLY, JR., Circuit Judge.

* * * * *

Discussion

We review a dismissal under Fed.R.Civ.P. 12(b)(6) de novo. Beedle v. Wilson, 422 F.3d 1059, 1063 (10th Cir.2005). In conducting our review, we assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff. Id. And until recently, we have only affirmed a dismissal where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). However, the Supreme Court recently decided that "this famous observation has earned its retirement," and it has prescribed a new inquiry for us to use in reviewing a dismissal: whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, --- U.S. ---, 127 S.Ct. 1955, 1969, 1974, 167 L.Ed.2d 929 (2007). The Court explained that a plaintiff must "nudge [] [his] claims across the line from conceivable to plausible" in order to survive a motion to dismiss. Id. at 1974. Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.

* * * * *

Supreme Court Rewrites Pleading Requirements

Gregory P. Joseph*

In 1957, the Supreme Court ruled that, under the Federal Rules of Civil Procedure, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On May 21, 2007, the Supreme Court decided that “this famous observation has earned its retirement.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1555 (2007). In the process, the Court revolutionized pleading rules, introducing twin requirements of fact-based pleading and plausibility.

Bell Atlantic was an antitrust action alleging an illegal conspiracy among the Baby Bells to inhibit the growth of third-party competitors and to refrain from competing among themselves. The District Court dismissed the complaint, but Second Circuit reversed, citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), for the proposition that “Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions,” and observing that “[a]ntitrust actions are not among those exceptions.” *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 107 (2d Cir. 2005), *rev'd*, 2007 U.S. LEXIS 5901 (U.S. May 21, 2007).

In reversing the Second Circuit, the Supreme Court used sweeping language to impose a duty to plead facts pursuant to Rule 8(a)(2) — a duty that it did not, and logically could not, confine to the antitrust field:

* Gregory P. Joseph Law Offices LLC, New York. Fellow, American College of Trial Lawyers; Chair, American Bar Association Section of Litigation (1997-98), and member, U.S. Judicial Conference Advisory Committee on the Federal Rules of Evidence (1993-99). Member, Editorial Board, *MOORE'S FEDERAL PRACTICE* (3d ed.). Author, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (3d ed. Supp. 2007); *CIVIL RICO: A DEFINITIVE GUIDE* (2d ed. 2000); *MODERN VISUAL EVIDENCE* (Supp. 2007). © 2007 Gregory P. Joseph

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations..., a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level..., on the assumption that all the allegations in the complaint are true (even if doubtful in fact)....

127 S. Ct. at 1965 (citations omitted). The *Bell Atlantic* Court added that, while “detail[ed]” factual allegations are not required, “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief,” and this necessitates “some factual allegation in the complaint....” *Id.* at 1965 n.3.

In that light, consider a complaint that alleges, as its operative liability allegation, only that: “On date, at place, the defendant negligently drove a motor vehicle against the plaintiff.” If one considers “negligently” to be a mere “label” or “conclusion,” the complaint alleges nothing more than that there was a collision. That raises a possibility of relief, but nothing more. Is a mere possibility of relief sufficient? Given that the quoted allegation is taken verbatim from the restyled version of Form 11 to the Federal Rules of Civil Procedure (effective December 1, 2007), one would have thought it sufficient — particularly as restyled Rule 84 provides that “[t]he forms in the Appendix suffice under these rules.” Certainly this allegation satisfied *Conley* because, if the possibility of a recovery exists, then by definition it does not “appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley*, 355 U.S. at 45-46.

Under *Bell Atlantic*, however, merely pleading a possibility of recovery is not enough. The duty is to furnish factual “allegations plausibly suggesting (not merely consistent with)” an “entitlement to relief.” 127 S. Ct. at 1966 (internal quotations omitted). *Bell Atlantic* calls this the “Rule 8 entitlement requirement” — the “threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘show that the pleader is entitled to relief.’” *Id.*

The Second Circuit in *Bell Atlantic* had taken the view that: “The factual predicate that is pleaded does need to include conspiracy among the realm of *plausible possibilities*” (425 F.3d at 111 (emphasis added)). The Supreme Court held that a mere-possibility standard does not satisfy the Rule 8 entitlement requirement because a *possibility* of relief is something less than a *plausibility* of relief. See 127 S.Ct. at 1966 (“An allegation of parallel conduct ... gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of ‘entitlement to relief.’”).

The context of the Supreme Court’s opinion is important. *Bell Atlantic* was a complex antitrust class action — a very expensive case to litigate. The Supreme Court cited *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) — its decision in a similarly expensive securities class action — to illuminate the “practical significance of the Rule 8 entitlement requirement.” The Court emphasized that, under *Dura*, “something beyond the mere possibility” of entitlement to relief (there, loss causation) must be alleged “lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” 127 S.Ct. at 1966 (internal quotations omitted). *Bell Atlantic* reiterates that “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Id.* at 1967 (citation and quotation omitted).

Bell Atlantic also rejected the notion “that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process.” It quoted an article by Judge Frank Easterbrook for the proposition that “[t]he portions of the Rules of Civil Procedure calling on judges to trim back excessive demands ... have been, and are doomed to be, hollow.”

Id. at 1967 n.6. Therefore, the complexity and expense of the litigation, which motivated the Court's novel interpretation of Rule 8(a), may affect the level of factual detail required.

Bell Atlantic raises a variety of interesting issues.

Information-and-Belief Pleading. It is well-settled that “[p]leading ‘upon information and belief’ is sufficient to satisfy federal notice pleading under Fed.R.Civ.P. 8(a).” *Elektra Enter. Group v. Santangelo*, 2005 U.S. Dist. LEXIS 30388, at *7 (S.D.N.Y. Nov. 28, 2005), quoting *Steinbrecher v. Oswego Police Officer Dickey*, 138 F.Supp.2d 1103, 1109-1110 (N.D. Ill. 2001). Among other things, this is evidenced by Rule 11(b) contemplates information-and-belief pleading, providing that the signature on a pleading (among other things) constitutes a “certif[ication] ... to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” that there is a basis for the allegations. See 2 MOORE’S FEDERAL PRACTICE § 8.04[3] (3d ed. 2007).

Information-and-belief pleading is not the same after *Bell Atlantic*. The complaint before the Supreme Court contained the allegation that: “Plaintiffs allege upon information and belief that [the Defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.” 127 S.Ct. at 1974 (Stevens, J., dissenting). This was rejected by the Supreme Court as inadequate because it did not satisfy the fact-based pleading and Rule 8 entitlement requirements. Therefore, invocation of the phrase “information and belief,” without more, does not satisfy the fact-based pleading and Rule 8 entitlement requirements of *Bell Atlantic*.

In reconciling the tension between information-and-belief pleading and the Rule 8 entitlement requirement, it may be useful to look at the way information-and-belief pleading is

addressed in another context in which fact-based pleading is required — namely, decisions under Rule 9(b). In this setting, it is commonly held that, where allegations of fraud are based only on information and belief, the complaint must set forth the source of the information and the reasons for the belief. *See, e.g., Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 878 (1st Cir. 1991) (pre-PSLRA). This case law developed to test whether the allegations furnishing the mandatory “particularity” had a basis in fact. That goal is not dissimilar to that facing a court now obligated to test whether the newly-mandated “plausible entitlement” standard *Bell Atlantic* has been satisfied. It presents an established approach toward determining whether mandatory allegations (be they “particularity” or “plausibility”) are sufficiently rooted in fact.

This suggestion highlights the fact that *Bell Atlantic* can fairly be read as moving 8(a) jurisprudence closer to that of Rule 9(b). After *Bell Atlantic*, it is no longer accurate to say — as it was before — that “[s]uch supporting allegations seem to be unnecessary and inconsistent with the philosophy of the federal pleading rules” (5 Wright & Miller, *FEDERAL PRACTICE & PROCEDURE* § 1224 (Supp. 2006)). Arguably, *Bell Atlantic* is more stringent in its requirements than preexisting 9(b) case law, which relaxed the particularity rule when factual information is peculiarly within the defendant's knowledge or control (*see, e.g., Weiner v. Quaker Oats Co.*, 129 F.3d 310, 319 (3d Cir. 1997)), even though the pleading standard stated in Rule 9(b) is more stringent than that stated in Rule 8(a). Case law will have to sort through the extent to which this eminently practical doctrine survives.

Conspiracy. The issue in *Bell Atlantic* was conspiracy, and the Court ordered dismissal because “nothing contained in the complaint invests either the action or inaction [of the defendants] with a plausible suggestion of conspiracy.” 127 S.Ct. at 1971. Therefore, it is safe to conclude that any action alleging conspiracy — *e.g.*, RICO, civil rights, civil conspiracy —

requires allegations of fact sufficient to satisfy this standard. What would suffice? District Judge Gerard E. Lynch's underlying opinion in *Bell Atlantic*, 313 F.Supp.2d 174 (S.D.N.Y. 2003), dismissed the complaint because plaintiffs failed to plead a "plus factor" that tended to exclude independent self-interested conduct as an explanation for the defendants' behavior — for example, "that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id.* at 179. This is as good starting point as any for alleging a viable conspiracy claim.

Extent of Required Allegations of Fact. The *Bell Atlantic* Court focused on the expense of litigating a massive antitrust class action; relied on its *Dura* decision, which focused on the expense of litigating a massive securities class action; and emphasized the inadequacy of judicial oversight of discovery to rein in discovery costs. Less complicated cases, like the auto accident discussed above, do not present the same issues, either in terms of complexity, expense or the perceived inadequacy of managerial judging. There is little to be gained by requiring the auto accident plaintiff to plead — instead of that "the defendant negligently drove a motor vehicle against the plaintiff" — that "the defendant was speeding and across the center line when he drove a motor vehicle against the plaintiff." The former is as plausible as the latter — discovery will determine who was at fault. Given the new *Bell Atlantic* test, however, and notwithstanding Rule 84, erring on the side of including more rather than fewer facts is the safer course.

Erickson v. Pardus. Just how extensively does *Bell Atlantic* change the law of notice pleading? In a second pleading opinion issued per curiam in a *pro se* prisoner case on June 4,

2007, *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), the Supreme Court sounded a permissive chord.

In his complaint, the prisoner plaintiff alleged that the physician provided by the prison had “removed [him] from [his] hepatitis C treatment” in violation of Corrections Department protocol, “thus endangering [his] life.” He attached to the Complaint grievance forms in which he claimed that he was suffering from “continued damage to [his] liver” as a result of the failure to treat. The Complaint requested damages and an injunction requiring that the Corrections Department treat petitioner for hepatitis C “under the standards of the treatment [protocol] established by [the Department].”

The Tenth Circuit affirmed a magistrate judge’s determination dismissing the complaint pursuant to Fed.R.Civ.P. 12(b)(2), holding that Complaint failed to set forth a factual showing of harm sufficiently to satisfy Rule 8(a)(2): “[I]n the proceedings before the district court and this court, plaintiff has made only conclusory allegations to the effect that he has suffered a cognizable independent harm as a result of his removal from the Interferon/Ribavirin treatment program” (127 S.Ct. at 2199).

The Supreme Court summarily vacated the Tenth Circuit decision, observing:

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary; the statement need only “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. ----, ----, 127 S.Ct. 1955, --- L.Ed.2d ----, ---- - ---- (2007) (slip op., at 7-8) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In addition, when ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, *supra*, at 1955, 127 S.Ct. 1955 (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

127 S.Ct. at 2200.

There appear to be three primary differences between *Bell Atlantic* and *Erickson*.

First, the Supreme Court stressed the *pro se* status of the plaintiff in *Erickson* — a far cry from the highly sophisticated antitrust counsel in *Bell Atlantic*:

The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed *pro se* is “to be liberally construed,” *Estelle [v. Gamble]*, 429 U.S. [97] at 106, 97 S.Ct. 285, and “a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,” *ibid.* (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) (“All pleadings shall be so construed as to do substantial justice”).

Erickson, 127 S.Ct. at 2200.

It is possible that the Court is applying a more lenient (euphemism for “double”) standard in *pro se* cases, even as it explains why it is not.

Second, the pleading issue in *Erickson* was harm, not liability. Under Rule 8(a)(2), only “a short and plain statement of the claim showing that the pleader is entitled to relief” is required:

The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was “endangering [his] life.” Petitioner's Complaint 2. It alleged this medication was withheld “shortly after” petitioner had commenced a treatment program that would take one year, that he was “still in need of treatment for this disease,” and that the prison officials were in the meantime refusing to provide treatment. *Id.*, at 3, 4. This alone was enough to satisfy Rule 8(a)(2).

Id. at 2200.

In other words, “while “detail[ed]” factual allegations are not required, “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief,” and this necessitates “some factual allegation in the complaint....” *Bell Atlantic*, 127 S.Ct. at 1965 n.3.

Third, *Erickson* was a simple case, *Bell Atlantic* a complicated antitrust action. What more did the defendants in *Erickson* really need to know? Not much.

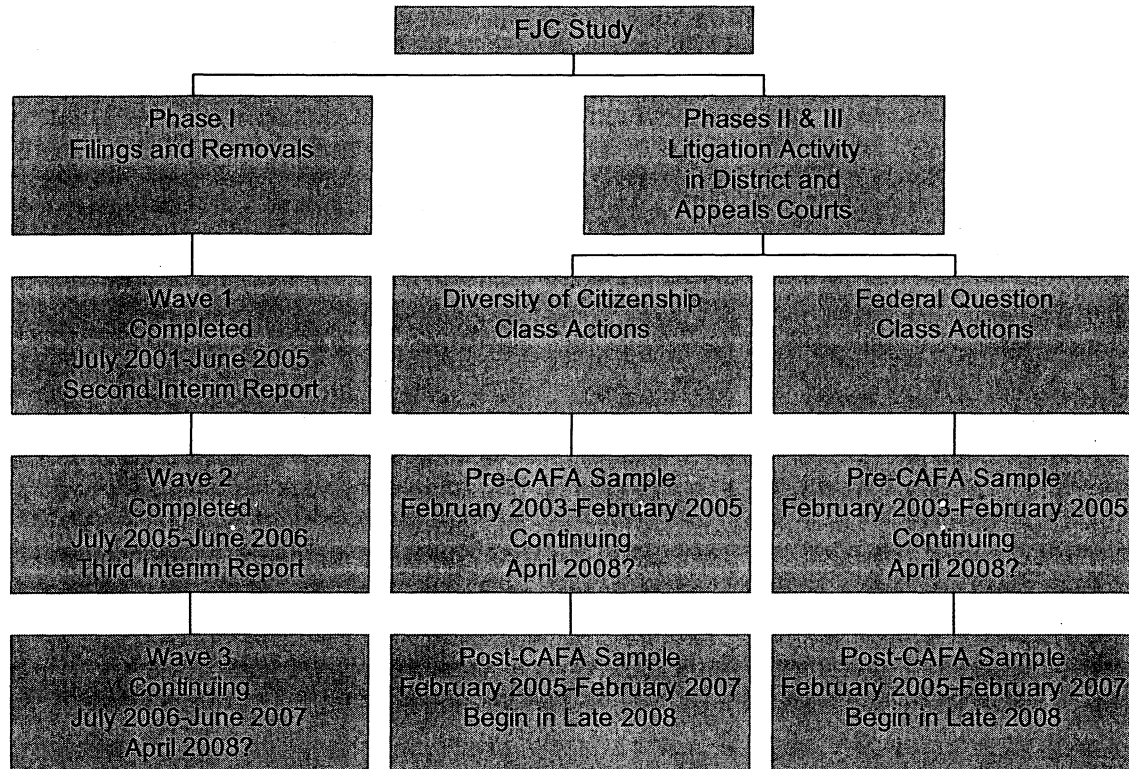
Conclusion. One could read *Twombly*'s plausibility-in-pleading standard as requiring that the inference alleged in the complaint be *more persuasive* than alternate inferences (*see, e.g.*, 127 S.Ct. at 1966 (allegation insufficient where it “could just as well” give rise to inference of non-violative conduct) and at 1972 (allegation insufficient where “we have an obvious alternative explanation”)). But, whatever Rule 8(a)(2) means, it cannot by any means require more than the strict scienter pleading requirement of the PSLRA, and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499 (2007), decided on June 21, 2007, teaches that the PSLRA is satisfied by an inference of *equal plausibility*.

Consider a securities case alleging § 11, 10b-5 and common law fraud claims (thus, not a class action). The § 11 claim is governed by Rule 8(a)(2) because it doesn't require fraudulent intent, the 10b-5 claim is governed by the strict statutory scienter requirement of the PSLRA, and the common law fraud claim is governed by Rule 9(b). What is the difference in the pleading standards among the three of them? It is not possible to articulate those differences with any assurance.

FJC Progress Report—November 2007

This is a flow chart of the entire FJC study, indicating what has been completed and what remains to be done.

Impact of the Class Action Fairness Act of 2005



Rule 68: A Progress Report

Rule 68 has provoked regular suggestions for reform. Substantial efforts early in the 1980s and again a decade later in the early 1990s did not result in proposals for amendment. This memorandum discusses whether the time has come to reopen Rule 68.

In *Reiter v. MTA New York City Transit Authority*, 2d Cir. July 20, 2006, Docket No. 04-5420-cv, 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.” This opinion was included in the agenda book for the October 2006 meeting and is included again to preserve the proposal for rule amendment for the Committee’s 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.” 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.

The Rule 68 work in the 1990s was stimulated by a 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. One issue is the interpretation of the rule 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 carries Rule 68 consequences?

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.

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. What distinguishes their work from many articles is that it draws from intensive interviews with 64 attorneys selected to represent, in even numbers, plaintiff-side and defense-side practice in employment discrimination and "civil rights" litigation. They picked these practice fields for two reasons. First, Rule 68 is more likely to be used when statutes provide attorney fees for successful plaintiffs — an offer that jeopardizes the right to recover post-offer fees is more likely to be considered seriously. Second, these fields together account for a significant share of the federal civil docket. Each federal circuit was covered by interviewing at least one set of four attorneys. The attorneys were not chosen at random, but instead by seeking leads to those with long and extensive experience in their areas of practice.

The underlying purpose began with the perception that Rule 68 offers are relatively rare even in these fields of practice. The questions pursued were first an effort to understand why Rule 68 is not routinely used and then to learn whether Rule 68 can be amended to encourage greater use. Although greater use might not contribute much by causing a still greater number of potential civil trials to "vanish," it might encourage earlier and therefore less costly disposition by settlement.

As the first of two articles, this one focuses on the reactions of the lawyers to various proposals to amend Rule 68. For present purposes, it suffices to provide a sketch of the proposals:

Change to Offer of Settlement: Many lawyers agreed that defendants are deterred by the need to offer a "judgment." The collateral consequences of being recorded as a judgment loser are important, particularly to individual defendants.

Require Plaintiffs to Disclose Accrued Fees When Asked: Some defense lawyers find it difficult to estimate a reasonable offer because they do not know what is a proper amount for pre-offer fees in a fee-award regime. Many plaintiff lawyers resist disclosure for fear of yielding strategic information — particularly that they are not yet heavily invested and thus by inference are not yet well prepared.

Extend Rule 68 To Award Sanctions When Defendant Wins: One explanation of the paucity of offers is that — particularly in employment cases in many courts — defendants believe, quite realistically, that they are going to win on the merits, often by summary judgment. Being confident that they will win, the rule that Rule 68 sanctions are not available if the plaintiff loses dissuades them from making offers. More offers might be made if the *Delta Air Lines* decision were reversed.

Incorporate Rule 68 into Early Judicial Interventions and Mediating: There was some support for explicitly requiring discussion of Rule 68 at the Rule 26(f) conference, or in mediation of judicially supervised conferences. The idea is that this would give defense counsel a lever to persuade the defendant that an offer is a good thing.

Address Fee Consequences in Rule: These lawyers were richly experienced. Among them they handled more than 13,000 civil rights or employment discrimination cases in the 5 years before the interviews. Some of them were not aware that Rule 68 can cut off post-offer fee awards. Amending Rule 68 to flag this issue — even to specify which fee statutes carry this effect [!] — would help.

Two-Way Rule: If plaintiffs can make demands under Rule 68, the result might well be more settlements — a defendant's offer is met with a cross-demand, a plaintiff's demand is met with a counter-offer, and so on. Several variations were explored. (1) A two-way "pressure" model would impose sanctions on a party who rejected an offer unless the party beat the offer by some margin — for example, a plaintiff who rejected a \$100,000 offer would suffer Rule 68 consequences unless the judgment was at least \$125,000. As a two-way rule, the same would hold for defendants. Defendants did not much like this rule. (2) A two-way "cushion" model would deny sanctions if the party rejecting the offer achieved a respectable portion — a plaintiff rejecting a \$100,000 offer, for example, would incur Rule 68 sanctions only if the judgment was less than \$80,000. Plaintiffs' lawyers liked this. But the survey asked a different question, working on the assumption that there are so few Rule 68 offers now that defendants would make even fewer offers if a plaintiff could avoid sanctions by simply coming close to the rejected offer. This one-way cushion version applied to benefit a defendant who rejects a plaintiff's demand, but not to a plaintiff who rejects an offer. Plaintiffs did not like this. In the end, plaintiffs' civil rights lawyers liked two-way offer rules; defense lawyers' reactions were more complicated. Plaintiffs' employment discrimination lawyers liked the idea.

Separate problems are recognized if sanctions are expanded in a two-way rule. If a plaintiff loses entirely, and is presumptively liable for defense costs, the most likely meaningful sanction is a multiple of costs or defense post-offer fees. If a plaintiff wins entirely and is entitled to costs and statutory fees, the defendant could be made liable for multiple costs or increased fees.

Prior proposals for amending Rule 68 are set out below.

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 monetary relief. There is no occasion to compare the difference between the money judgment and the money offer with the judgment's nonmonetary relief.

Among 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 reconsideration of Rule 68, however, will be a major undertaking.

Calendar for March 2008 - May 2008 (United States)

March 2008							April 2008							May 2008						
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa
						1			1	2	3	4	5				1	2	3	
2	3	4	5	6	7	8	6	7	8	9	10	11	12	4	5	6	7	8	9	10
9	10	11	12	13	14	15	13	14	15	16	17	18	19	11	12	13	14	15	16	17
16	17	18	19	20	21	22	20	21	22	23	24	25	26	18	19	20	21	22	23	24
23	24	25	26	27	28	29	27	28	29	30				25	26	27	28	29	30	31
30	31																			
7:●	14:●	21:○	29:●				5:●	12:●	20:○	28:●				5:●	11:●	19:○	27:●			

Holidays and Observances:

Mar 20 Prophet's Birthday (Islamic)	Apr 20 First day of Passover (Jewish)
Mar 21 Good Friday (Christian)	Apr 27 Last day of Passover (Jewish)
Mar 23 Easter Sunday (Christian)	May 11 Mother's Day
Mar 24 Easter Monday (Christian)	May 26 Memorial Day

Calendar generated on www.timeanddate.com/calendar

