ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, DC
November 17-18, 2008

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
NOVEMBER 17-18, 2008

1. **Introductory remarks by the Chair and Reporter**

   * Welcome to new members

   * Report on the June 2008 Standing Committee and September 2008 Judicial Conference Meetings

   * Amendment to become effective December 1, 2008

2. **ACTION** – Approve minutes of April 7-8, 2008 Advisory Committee meeting

3. **Discussion and initial reactions to first hearing regarding Rules 26 and 56**.

4. **On the 70th Anniversary of the Federal Rules of Civil Procedure**

   * Reflections of the Reporters to the Advisory Committee and the Standing Committee
   * Open-ended discussion of where we go from here

5. **Report to the Judicial Conference on the Use of Subcommittees**

6. **Privilege Logs** (Professor Gensler)

7. **"Mail Box" Items**

8. **Rule 68**

   ***** Do we want to undertake a Rule 68 effort and if so, how shall we do it and what shall be its goals?

9. **Update on E-Discovery and the Courts** (Professor Marcus)

10. ***Twombly* and the Rules**

    * Waiting for *Iqbal*

11. **Appellate Rule 7** (Appellate Rules Memorandum; Oral Report)

12. **Sunshine in Litigation Bill** (Testimony and answers, Judge Kravitz)

13. **Scheduling Next Meeting**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS
October 1, 2008

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	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
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	Prof. Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
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	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals Park Place Building, 21st Floor 1200 Sixth Avenue Seattle, WA 98101	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Rd. Box 90360 Durham, NC 27708-0360
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

ADVISORY COMMITTEE ON CIVIL RULES

Chair:	**Reporter:**
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	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Members:	
Honorable Steven M. Colloton United States Court of Appeals United States Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044	Honorable Vaughn R. Walker Chief Judge United States District Court Phillip 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 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 John G. Koeltl United States District Court 1030 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312
Professor Steven S. Gensler University of Oklahoma Law Center 300 Timberdell Road Norman, OK 73019-5081	Honorable Randall T. Shepard Chief Justice, Indiana Supreme Court 200 West Washington Street State House, Room 304 Indianapolis, IN 46204

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Liaison Members: Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	 Honorable Diane P. Wood United States Court of Appeals 2602 Everett McKinley Dirksen United States Courthouse – Room 2688 219 South Dearborn Street Chicago, IL 60604
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Representative: Ms. Laura A. Briggs Clerk United States District Court 105 Birch Bayh Federal Building and United States Courthouse 46 East Ohio Street Indianapolis, IN 46204	
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Da
Mark R. Kravitz Chair	D	Connecticut	Chair: 2007	2010
Michael M. Baylson	D	Pennsylvania (Eastern)	2005	2010
Jeffrey Bucholtz*	DOJ	Washington, DC	----	Open
David G. Campbell	D	Arizona	2005	2011
Steven M Colloton	C	Eighth Circuit	2008	2010
Steven S. Gensler	ACAD	Oklahoma	2005	2011
Daniel C. Girard	ESQ	California	2004	2010
C. Christopher Hagy	M	Georgia (Northern)	2003	2009
Peter D. Keisler	ESQ	District of Columbia	2008	2011
John G. Koeltl	D	New York (Southern)	2007	2010
Randall T. Shepard	CJUST	Indiana	2006	2009
Anton R. Valukas	ESQ	Illinois	2006	2009
Chilton Davis Varner	ESQ	Georgia	2004	2010
Vaughn R. Walker	D	California (Northern)	2006	2009
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open

Principal Staff: John K. Rabiej 202-502-1820

* Ex-officio

LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Jeffery P. Hopkins	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Chief Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	James N. Ishida Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544
Jeffrey N. Barr Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544	Timothy K. Dole Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544
Ms. Gale Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	Adriane Reed Program Assistant Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the United States Court Washington, DC 20544	Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the United States Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Committee on Rules of Practice and Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

TAB 1

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 9-10, 2008
Washington, DC
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, DC, on Monday and Tuesday, June 9 and 10, 2008. All the members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Chief Justice Ronald N. George
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General Mark R. Filip attended part of the meeting as the representative of the Department of Justice. In addition, the Department was represented throughout the meeting by Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division.

Also participating in the meeting were committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.

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	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

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 Laura Taylor Swain, Chair
Professor Jeffrey W. Morris, Reporter
Professor S. Elizabeth Gibson, Assistant Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that Professor Morris was completing his service as reporter to the Advisory Committee on Bankruptcy Rules, noting that he would be honored formally at the January 2009 committee meeting. She pointed out that Professor Morris had made extraordinary contributions to the rules process during the hectic periods preceding and following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The far-reaching legislation, she noted, had required him to devote an enormous amount of time and effort to researching, analyzing, and drafting a great many new rules and forms. She said that Professor Morris truly had accomplished the work of several people, and the committee would greatly miss him.

Judge Rosenthal presented a resolution signed by the Chief Justice to Judge Kravitz recognizing his service as a member of the committee from 2001 to 2007. She noted that he had been at the center of several important projects during that time, had coordinated development of the time-computation amendments now before the committee for final approval, and had served as the committee's liaison to the Advisory Committee on Criminal Rules. And she was delighted that Chief Justice Roberts had appointed him as the new chair of the civil rules committee.

Judge Kravitz, in turn, presented Judge Rosenthal with a resolution from the Chief Justice recognizing her service as chair of the civil advisory committee from 2003 to 2007. During her tenure, she had shepherded many landmark rules changes dealing with such important matters as class actions, electronic discovery, and restyling of the civil rules.

Judge Rosenthal asked the committee to recognize the many contributions of the late Judge Sam Pointer, who had served as chair of the Advisory Committee on Civil Rules from 1990 to 1993. Among other things, he had coordinated the major package of amendments to the civil rules needed to implement the Civil Justice Reform Act of 1990. She noted that Judge Pointer had also led the committee's initial efforts to restyle the Federal Rules of Civil Procedure. He consistently had set high standards in everything he did and had been a very influential leader of the federal judiciary.

Judge Rosenthal noted that Chief Judge Anthony Scirica, former chair of the standing committee, had just been elevated by the Chief Justice to the position of chair of the Executive Committee of the Judicial Conference. She said that the appointment would serve the rules process and the entire federal judiciary very well.

Judge Rosenthal reported that the March 2008 session of the Judicial Conference had been uneventful for the rules process, as no rules matters had been placed on the discussion calender. She noted that she and Professor Coquillette had had very productive meetings with both Chief Justice Roberts and Administrative Office Director

James Duff. Both are very appreciative of the work of the rules committees. The Chief Justice, she said, was supportive of the effort to restyle the evidence rules and was keenly aware of the need for the rules committees to address problems regarding cost and delay in civil cases, victims' rights in criminal cases, and privacy and security concerns in court records.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 14-15, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported briefly on two pieces of legislation affecting the rules process, both of which have been opposed consistently by the Judicial Conference. First, legislation had been introduced in the last several congresses, at the behest of the bail bond industry, to limit the authority of a judge to revoke a bond for any condition other than failure of the defendant to appear in court as directed. The legislation had not moved in the past, but had now passed the House of Representatives and been introduced in the Senate.

Second, protective-order legislation had been reintroduced by Senator Kohl. It would require a judge, before issuing a protective order under FED. R. CIV. P. 26(c), to make findings of fact that the discovery sought: (1) is not relevant to protect public health or safety; or (2) if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a substantial interest in keeping the information confidential, and the protective order is narrowly drawn to protect only the privacy interest asserted. Mr. Rabiej noted that the Senate Judiciary Committee had reported out the bill, but it had not been taken up by the full Senate. It has also been introduced in the House.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a detailed written report on the various activities of the Federal Judicial Center (Agenda Item 4). He also reported on the Center's extensive research on local summary judgment practices in the district courts as part of the committee's discussion of the proposed revision of FED. R. CIV. P. 56 (summary judgment).

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Amendments for Final Approval by the Judicial Conference

Judge Rosenthal and Judge Huff, chair of the time-computation subcommittee, explained that the committee was being asked to approve:

(1) a uniform method for computing time throughout the federal rules and statutes, as prescribed in the proposed revisions to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a);
(2) conforming amendments to the time provisions set forth in 95 individual rules identified by the respective advisory committees; and
(3) a proposed legislative package to amend 29 key statutes that prescribe time periods.

Judge Rosenthal explained that the time-computation project had proven to be more complicated than anticipated, and the subcommittee and advisory committees had worked very well together in resolving a number of difficult problems. In the end, she said, the package that the committees had produced is very practical and elegant.

Judge Huff stated that the purpose of the amendments is to simplify and make uniform throughout all rules and statutes the method of calculating deadlines and other time periods. She noted that the public comments had been generally positive and had helped the committees to refine the final product. She noted that the subcommittee and the advisory committees had identified the 29 most relevant and significant statutory deadlines that should be adjusted to conform to the proposed new rules. She pointed out, too, that local rules of court will also have to be amended to conform to the new national rules. The rules committees will work with the courts to accomplish this objective.

Professor Struve reported that there had not been a great deal of public reaction to the published amendments. The comments, she said, had been mixed but mostly positive and very useful. She noted that a few changes had been made following the comment period. For example, the definition of the term "state" had been deleted from proposed FED. R. APP. P. 26(a) and FED. R. CIV. P. 6(a) because it would be added elsewhere.

She reported that the principal issues discussed by the subcommittee following the public comment period concerned the interaction between the backward time-counting provision in the proposed rules and the definition of a "legal holiday," which includes all official state holidays. For example, in counting backwards to ascertain a filing deadline, the proposed rule specifies that when the last day falls on a weekend or holiday, one must continue to count backwards to the day before that weekend or holiday. The problem, as the public comments pointed out, is that the definition of a "legal holiday" may cause a trap for the unwary because some state holidays are obscure

and not generally observed either by courts or law firms. A filer unaware of an obscure state holiday, for example, might file a paper on the holiday itself only to learn at that time that the filing is untimely.

Professor Struve explained that the subcommittee had considered potential fixes for the problem. One would be to provide that a state holiday is a "legal holiday" for forward-counting purposes, but not for backward-counting purposes. She said, though, that the subcommittee had rejected the fix because a majority of members believed that it would make the rule too complex. On the other hand, the Advisory Committee on Bankruptcy Rules has complained that the rule will cause serious problems in bankruptcy practice and that state holidays must be excluded from the backwards-counting provision – either across-the-board for all the rules, or at least in the bankruptcy rules.

Professor Struve emphasized that the advisory committees were recommending changes in the specific deadlines contained in many individual rules to make the net result of time-computation changes essentially neutral as to the actual amount of time allotted for parties to take particular actions.

Professor Struve noted, for example, that the 10-day appeal deadline in FED. R. BANKR. P. 8002 would be revised to 14 days. In addition, she said, the civil and appellate advisory committees had worked together to address post-judgment tolling motions filed under FED. R. CIV. P. 50, 52, or 59. They decided to lengthen the deadline for filing such motions from 10 days to 28 days.

CIVIL RULES TIME COMPUTATION

Judge Kravitz stated that, as published, the Advisory Committee on Civil Rules had recommended extending the deadline to file a post-judgment motion under FED. R. CIV. P. 50 (judgment as a matter of law), 52 (amended or additional findings), or 59 (new trial) from 10 days to 30 days. But the Advisory Committee on Appellate Rules pointed out that extending the deadline to 30 days could cause problems because FED. R. APP. P. 4 (appeal as of right – when taken) imposes the same 30-day deadline to file an appeal in a civil case not involving the federal government. Accordingly, as the deadline to file a notice of appeal looms, an appellant may not know until the last minute whether a post-judgment tolling motion will be filed.

As a result, he said, the civil rules advisory committee considered scaling back the proposed deadline for filing a post-trial motion from 30 days to 21 days or 28 days. The committee concluded that 21 days was simply not a sufficient increase from 10 days, and that a substantial increase is in fact needed to help the bar. Therefore, the committee decided upon 28 days, even though that might seem like an odd time period. Yet it would give the appellant at least two days before a notice of appeal must be filed to learn

whether any other party has filed a post-judgment motion tolling the time to file a notice of appeal. The appellate rules committee found this change acceptable.

Judge Kravitz reported that the Advisory Committee on Civil Rules had found only one statute that needs to be amended to conform with the proposed rule changes.

CRIMINAL RULES TIME COMPUTATION

Judge Tallman reported that the Advisory Committee on Criminal Rules was recommending several changes in individual rules to extend deadlines from 10 days to 14, a change that is essentially merits-neutral. He noted that Congress had deliberately established very tight deadlines in some statutes, some as short as 72 hours, and he suggested that it might be difficult to persuade Congress to change these statutes.

APPELLATE RULES TIME COMPUTATION

Professor Struve stated that some public comments had suggested eliminating or revising the "three-day rule," which gives a party additional time to file a paper after service. She said that the advisory committee thinks the suggestion is well worth considering and had placed it on its agenda. But it had decided not to recommend elimination as part of the current time-computation package.

BANKRUPTCY RULES TIME COMPUTATION

Judge Swain stated that the proposed amendments to the bankruptcy rules include a recommendation to extend from 10 days to 14 days the deadline in FED. R. BANKR. P. 8002 (time for filing notice of appeal) to file an appeal from a bankruptcy judgment. She noted that the proposal had been controversial because it would change a century-old tradition of a 10-day appeal period in bankruptcy. She noted that the advisory committee had made special efforts to reach out to the bar on the issue.

Judge Swain pointed out that the proposed rules pose special challenges for the bankruptcy system in dealing with backward-counting deadlines because the Federal Rules of Bankruptcy Procedure rely heavily on a notice and hearing process and use a good deal of backwards counting. Moreover, because of the national nature of bankruptcy practice, it is not expected that bankruptcy practitioners would be aware of all state legal holidays.

The advisory committee, she said, was strongly of the view that state holidays should not be included in backwards counting. She recognized the importance of having uniformity among all the rules, and urged that state holidays be excluded from backwards counting in all the rules. If this approach is not possible, an exception to uniformity should be made in this particular instance for the bankruptcy rules.

Professor Morris explained that the Bankruptcy Code specifies more than 80 statutory deadlines. Another 230 time limits are set forth in the Federal Rules of Bankruptcy Procedure, including 18 that require counting backwards. Accordingly, he said, backward-counting deadlines are dramatically more common in bankruptcy than in the other rules. State holidays, he explained, pose no problem in counting forward because they give parties an extra day. But in counting backwards, a filing party is given less time to file a document if a deadline falls on any state holiday. Judges, he said, can usually deal with inadvertent mistakes made in backwards counting. But when a deadline is statutory, a court is less likely to be generous.

He suggested adopting the approach set forth in Judge Swain's memorandum of June 4, 2008, to the standing committee recommending that FED. R. BANKR. P. 9006(a)(6)(C) be added to define a state holiday as a "legal holiday" only in counting forward. The advisory committee would also state in the committee note to the rule that this limiting provision would apply only in the bankruptcy rules.

A member emphasized the importance of uniformity among all the rules and stated that he was concerned about having different standards in the different sets of rules. Nonetheless, he said, the bankruptcy advisory committee had made persuasive points. He wondered whether there might be another solution, such as to make distinctions among different types of state holidays. Some, he said, are important, with government offices, courts, and law firms closed throughout the state. Others, however, are hardly known at all. He suggested that the rule might be revised to provide that only those state holidays that are listed in local court rules be included in the definition of "legal holidays."

Another member agreed that the rule would clearly create a trap for the unwary. He argued that the proposal to exclude state holidays from backward counting is not too complicated, and it should be implemented across the board in all the rules, not just in the bankruptcy rules. Several other participants concurred.

A member argued, though, that the proposed rule is clear, and states do in fact announce all their official holidays. The main problem appears to be that state officials cannot act on days when their offices are closed. If they file a paper on the following day, it will be untimely under the rule. As a practical matter, they will have to file a day early.

A member noted that the committee simply cannot achieve national uniformity in this area and suggested that state holidays be dealt with by local rules. Another responded, though, that reliance on local rules would not address the concerns of the Advisory Committee on Bankruptcy Rules that many bankruptcy lawyers have a national practice and represent far-flung creditors. Lawyers and creditors are largely unaware of

state holidays and state issues. Judge Swain added that many creditors in bankruptcy cases do not have counsel. Their involvement is often limited to filing a proof of claim. It would be unreasonable to expect them to be aware of local court rules referring to state holidays.

Several participants recommended extending the bankruptcy committee's proposed exclusion of state holidays in backwards counting to all the rules. Judge Huff and Professor Struve pointed out that the agenda book contained the text of an alternate rule that would accomplish that objective by including state holidays only in counting forwards. They said that it would be an excellent starting point for revising the rule.

The committee without objection by voice vote approved the proposed amendments to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a) for approval by the Judicial Conference, using the alternate rule language set forth in the agenda book, together with a committee note incorporating language from the bankruptcy committee's memorandum of June 4, 2008, except for its last sentence, and some improved language by Professor Cooper regarding the inaccessibility of the clerk's office. Judge Rosenthal added that the text would be subject to final review by the style subcommittee and recirculation to the standing committee.

Following approval of the uniform time-computation rule, Judge Rosenthal turned the discussion to the specific time adjustments in individual rules proposed by the advisory committees to account for the changes in the time-computation method.

One member argued that the proposed amendments to FED. R. CIV. P. 50 (motion for judgment as a matter of law), 52 (motion for amended or additional findings), and 59 (motion for a new trial) go well beyond conforming the three rules to the new time-computation methodology. Rather, they would substantially expand the time for filing post-judgment motions and add cost and delay to civil litigation. She suggested that trial judges may not support extending the time because they want to resolve their cases promptly and have post-trial motions made without delay. In addition, if a lawyer does not have enough time to fully prepare a polished post-trial motion, the matter can be fixed later, and the parties will still enjoy their full appellate rights. Extending the time to file motions from 10 days to 28 days will slow down the whole litigation process.

Judge Kravitz pointed out, though, that trial judges often bend the rules to give lawyers more time to file post-trial motions, especially after a long trial when the lawyers are exhausted and a transcript is not yet available. Judges, for example, may hold up the entry of judgment. Or they may let lawyers file a skeletal post-judgment motion to meet the deadline and then have them supplement it later. The problem, he said, is that 10 or 14 days is simply not enough time in many cases for a lawyer to prepare an adequate motion. Under the rules, moreover, the court cannot extend the deadline, even though

some judges routinely do so by procedural maneuvers. In addition, there is case law holding that issues not raised in the original filing cannot be raised later. All in all, Judge Kravitz concluded, it is unreasonable to require lawyers to file quick post-trial motions, especially in large cases. Extending the deadline to 28 days may result in some delays, but on balance, the advisory committee believes that it is the right thing to do.

A member asked whether trial judges could impose a deadline shorter than the 28 days specified in the proposed rule. Professor Cooper responded that the matter had not been considered by the advisory committee. But it had considered amending FED. R. CIV. P. 6(b) (extending time) to allow judges to extend the time for filing post-trial motions. It was concerned, though, about the interplay between the civil and appellate rules and the jurisdictional nature of the deadline for filing a notice of appeal. Therefore, it declined to take any steps that might be applied ineptly in practice and lead to a loss of rights.

Judge Kravitz explained that scholars are concerned that permitting a judge to extend the time to file post-motion judgments would not fully protect the parties, given the jurisdictional and statutory nature of the time to appeal. A party might still lose its right to appeal if it fails to meet the jurisdictional deadline, even though the trial judge has extended the time to file a post-judgment motion.

A member suggested that 10 or 14 days to file a post-trial motion should be sufficient for lawyers in most cases. He asked how often the short deadline actually presents problems for lawyers. If not frequent, the procedural devices that trial judges now use to give lawyers more time may be sufficient to address the problems.

Judge Kravitz responded that the advisory committee had concluded that it was common for lawyers to need additional time, especially in circuits where the case law holds that claims are waived if not raised in the original motion. He said that he had presided over a number of cases in which the parties needed a transcript to file a motion. He pointed out that there had been no negative public comments on extending the deadline from 10 days to 28 days, either from judges or the bar. Professor Struve added that the E.D.N.Y. Committee on Civil Litigation had been critical of the time-computation project in general, but had come out strongly in favor of this particular extension.

A member added that lawyers are uncomfortable with the devices that trial judges now use, such as deferring entry of judgment or allowing a bare-bones post-judgment motion. The 10-day deadline, he said, is notoriously inadequate because many issues require careful briefing, even after a relatively short trial. Moreover, there may be a change in counsel after the trial, making the current deadline virtually impossible to meet. The proposed extension to 28 days, he said, is badly needed and will not cause unreasonable delays.

The lawyer members of the committee all agreed that the current 10-day deadline is much too short. They said that it is not safe for lawyers to rely on procedural maneuvering, such as delaying the entry of judgment. Lawyers, moreover, are bound by what they write in the original filing, and they may need a transcript to prepare a proper motion. One added that it is not uncommon for appellate counsel to be brought in after the trial and have to be brought up to speed by exhausted trial counsel.

A member pointed out that notices of appeal are normally filed only after disposition of a post-judgment motion, usually a Rule 59 motion for a new trial. Under the proposed extension, more parties may file prophylactic notices of appeal before any post-judgment motions are filed. This practice may impose some administrative burdens on the court of appeals, but Professor Struve suggested that it would likely arise only in multi-party cases. Judge Kravitz added that even 28 days may not be sufficient for lawyers to prepare post-judgment motions in some cases. Therefore, the proposed change may not altogether end the procedural devices that are now being used.

A member suggested that the committee consider the fundamental purpose of post-trial motions. As originally conceived, they were designed to allow a trial judge to promptly fix errors in the trial record. But they have evolved into full-blown motions to reconsider a whole host of issues raised at pretrial, by motion, and at trial and to relitigate all the decisions made by the trial judge in the case. In all, post-trial motions lead to a misuse of judicial time.

Judge Rosenthal stated that the advisory committees, and district judges generally, are troubled by the procedural subterfuges now used to circumvent the current rule. They are not worried about waiting a few more days if the result is better-prepared motions.

A motion was made to adopt all the proposed rule changes in the time-computation package.

Judge Tallman pointed out that FED. R. CRIM. P. 5.1 (preliminary hearing) and 18 U.S.C. § 3060(b) both specify that a preliminary hearing must be held within 10 days of the defendant's first appearance if the defendant is in custody. He explained that the proposed amendment to Rule 5.1 would extend the deadline to 14 days, but the statute will also have to be amended to keep the two consistent. If Congress does not extend the statutory deadline to 14 days, it would make no sense to amend the rule.

A member asked whether the committee should approve the rule contingent upon Congress amending the statute. Judge Rosenthal reported that representatives of the rules committees had already discussed a timetable with congressional staff to synchronize the effective date of the new rules with the needed statutory changes. She said that staff had been very sympathetic to the objective, and it did not appear that there would be

significant obstacles to accomplishing this objective. There is certainly no guarantee of success, but the committees are hopeful. Professor Coquillette added that the problem of synchronization could also be addressed by delaying the effective date of all the rules, or selected rules, to coincide with the statutory changes.

A member noted that under the Rules Enabling Act, rule changes supersede inconsistent statutes (except for changes to the bankruptcy rules). So even if Congress were not to act, the revised rules would override the inconsistent statutes. Judge Rosenthal responded that the committee, as a matter of comity with the legislative branch, tries to avoid reliance on the supersession clause of the Act. It also seeks to avoid the confusion that results when a rule and a statute are in conflict. The member agreed, but noted that if Congress simply does not act in time, as opposed to refuses to act, the extended deadlines in the new rules would govern in the interim until Congress acts.

The committee without objection by voice vote approved all the proposed time-computation amendments for approval by the Judicial Conference.

The committee without objection by voice vote approved the advisory committees' recommendations that the Judicial Conference seek legislation to adjust the time periods in 29 statutes affecting court proceedings to conform them to the proposed changes in the time-computation rules.

Judge Rosenthal asked the committee to concur in her view that the changes made in the time-computation amendments following publication were not so extensive as to require republication of the proposals.

The committee without objection by voice vote agreed that there was no need to republish any of the proposed time-computation amendments.

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 attachments of May 13, 2008 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

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 pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

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

Professor Struve reported that the proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would resolve an inadvertent ambiguity that resulted from the 1998 restyling of the Appellate Rules. The current rule might be read to require an appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. She reported that the public comments on the proposed amendment had raised some additional issues, which had been placed on the future agenda of the advisory committee.

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

FED. R. APP. P. 12.1

Judge Stewart explained that the proposed new Rule 12.1 (remand after an indicative ruling by the district court) was designed to accompany new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal). It had been coordinated closely with the Advisory Committee on Civil Rules.

Judge Stewart reported that the Department of Justice had expressed concern about potential abuse of the indicative ruling procedure in criminal cases. As a result, the advisory committee modified the committee note after publication by editing the note's discussion of the scope of the rule's application in criminal cases. Professor Struve added that the Advisory Committee on Criminal Rules might wish to consider a change in the criminal rules to authorize indicative rulings explicitly. Accordingly, the appellate

advisory committee had included language in the committee note to anticipate that possible development.

A member questioned the language that had been added to the second paragraph of the committee note stating that the advisory committee anticipates that use of indicative rulings "will be limited to" three categories of criminal matters – newly discovered evidence motions under FED. R. CRIM. P. 33(b)(1), reduced sentence motions under FED. R. CRIM. P. 35(b), and motions under 18 U.S.C. § 3582(c). He worried that the language might be too restrictive and recommended that it be revised to state that "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for [those matters]."

Professor Struve explained that the advisory committee had been reluctant to limit the rule to the three situations suggested by the Department of Justice because there may be other situations when indicative rulings are appropriate. A member added that the procedure could be useful in handling § 2255 motions, as appellate courts have said that a district court should rarely hear a § 2255 motion when an appeal is pending. He noted that a three-judge panel of his court recently had permitted use of the indicative ruling procedure in a § 2255 case. But Mr. Tenpas responded that the Department was particularly concerned about systematic use, and abuse, of the procedure by pro se inmates in § 2255 cases.

A member pointed out that the principal safeguard against abuse is that the court of appeals has discretion to deny any request for an indicative ruling and may refuse to remand a matter to the trial court. The discretion vested in the court of appeals safeguards against excessive use of the procedure.

Judge Stewart and Professor Struve agreed that the recommended substitute language for the committee note, "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for . . ., " would be acceptable. A motion was made to approve the proposed new rule, with the revised note language.

The committee without objection by voice vote approved the proposed new Rule 12.1 for approval by the Judicial Conference.

FED. R. APP. P. 22(b)(1)

Judge Stewart explained that the proposed amendment to FED. R. APP. P. 22(b)(1) (certificate of appealability) would conform the rule to changes being proposed by the Advisory Committee on Criminal Rules in Rule 11 of the Rules Governing § 2254 Cases and § 2255 Proceedings. The amendment would delete from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue, because the matter is more appropriately

handled in Rule 11. Professor Struve added that approval of the amendment would be contingent on approving the tandem amendments proposed by the criminal rules committee.

A member questioned the language of the proposed amendment stating that "(t)he district clerk must send the certificate and the statement . . . to the court of appeals," suggesting that the district clerk should be required to send the certificate only when it has been issued by a district judge. The certificate may be also issued by the court of appeals or a circuit justice, but a district clerk should bear no noticing obligation in those situations. The limitation on the clerk's obligation may be implicit in the rule, but it would be preferable to substitute language such as, "If the district court issues the certificate, the district clerk must send . . . ."

Professor Struve explained that the principal concern of the advisory committee had been to make sure that the certificate is included in the case file. She noted, though, that under CM/ECF, the courts' comprehensive electronic records system, there should be few problems with filing and transmitting documents. Nevertheless, the district clerk should have no obligation to handle a certificate issued by a circuit judge.

Judge Rosenthal suggested that the committee defer further consideration of the proposed amendment to FED. R. APP. P. 22(b)(1) until after the committee considers the parallel rule amendments proposed by the Advisory Committee on Criminal Rules.

Later in the meeting, the committee approved the parallel rule amendments proposed by the Advisory Committee on Criminal Rules. At that time, it approved without objection by voice vote the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference. **(See page 46.)**

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

Judge Stewart explained that the proposed amendments to FED. R. APP. P. 26(c) (additional time allowed after mail and certain other service) would clarify the method of computing the additional three days that a party is given to respond after service. The amendment would make the language of the rule parallel to that of FED. R. CIV. P. 6(d). He also pointed out that the advisory committee had received a comment from Chief Judge Frank Easterbrook recommending that the "three-day rule" be eliminated entirely, and the committee would place the matter on its agenda for a full discussion.

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

Amendments for Publication

FED. R. APP. P. 1(b)

Professor Struve explained that proposed new FED. R. APP. P. 1 (definition) would define the term "state" throughout the Federal Rules of Appellate Procedure to include the District of Columbia and any U.S. commonwealth or territory. The definition, she explained, is consistent with a proposed amendment to FED. R. CIV. P. 81(d).

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

The proposed amendments to FED. R. APP. P. 29(a) (when an amicus curiae brief is permitted) would eliminate the current language referring to a state, territory, commonwealth, or the District of Columbia because new FED. R. APP. P. 1(b) would make it unnecessary.

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

FORM 4

Professor Struve reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) had already been updated informally to conform to the new privacy rules that took effect on December 1, 2007, and had been posted by the Administrative Office on the Judiciary's web-site. The proposed revisions to the form would delete the full names of minor children and the home address and full social security number of the applicant. She explained that the advisory committee had also concluded that the term "minor" could be ambiguous because the definition varies from state to state, and pro se petitioners who normally fill out Form 4 should not be placed in the position of worrying about who is a "minor." Instead, the committee decided to substitute the language "under 18."

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

Informational Item

Judge Stewart reported that the advisory committee was continuing to monitor case law developments following *Bowles v, Russell,* 551 U.S. ___ (2007), regarding the jurisdictional and statutory dimensions of the time limits to appeal.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professors Morris and Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of May 14, 2008 (Agenda Item 10).

Amendments for Final Approval by the Judicial Conference

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 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Bankruptcy Procedure.

FED. R. BANKR. P. 1017.1

Judge Swain noted that proposed new FED. R. BANKR. P. 1017.1 (individual debtor's exemption from the pre-petition credit counseling requirement) would have revised the process for granting an extension of time for the debtor to complete the credit-counseling required by the 2005 amendments to the Bankruptcy Code. It had been published for public comment in August 2007, but the comments had shown that a rule is unnecessary because very few cases arise in which there is a request for an extension. Therefore, the advisory committee decided to withdraw it from further consideration.

FED. R. BANKR. P. 4008

Judge Swain noted that the proposed amendment to Rule 4008 (discharge and reaffirmation hearing) would require that a new official form cover sheet be filed with a reaffirmation agreement. (See OFFICIAL FORM 27 below.)

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

Judge Swain explained that the new rule and the proposed rule amendments deal with clarifying the requirement that a judgment be set forth in a separate document. New FED. R. BANKR. P. 7058 (entry of judgment) would make FED. R. CIV. P. 58 (entering judgment) applicable in adversary proceedings. FED. R. BANKR. P. 7052 (findings by the court) and 9021 (entry of judgment) are conforming amendments to accompany new Rule 7058.

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

OFFICIAL FORMS 1, 8, and 27

Professor Morris reported that the amendments to Exhibit D of OFFICIAL FORM 1 (individual debtor's statement of compliance with the credit counseling requirement) and OFFICIAL FORM 8 (individual Chapter 7 debtor's statement of intention) would become effective on December 1, 2008. New OFFICIAL FORM 27 (reaffirmation agreement cover sheet) would take effect on December 1, 2009, to coordinate it with the proposed revision to Rule 4008 that would require the form to be filed with a reaffirmation agreement. The form will give the court basic information about what is contained in the agreement. He noted that the advisory committee had received comments on the form and had made minor changes after publication.

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

TECHNICAL CHANGES

FED. R. BANKR. P. 2016, 7052, 9006(f), 9015, and 9023

Professor Morris reported that the advisory committee recommended that the proposed amendments to the five rules be approved and sent to the Judicial Conference for final approval without publication because they involve only technical changes, such as correcting cross-references or implementing provisions in the other sets of rules.

He said that the proposed amendment to FED. R. BANKR. P. 2016 (compensation for services rendered and reimbursement of expenses) merely corrects a cross-reference to a subsection of the Bankruptcy Code changed by the 2005 omnibus bankruptcy legislation.

The amendment to FED. R. BANKR. P. 9006(f) (additional time allowed after service by mail or certain other means) would correct a cross-reference to subparagraphs in FED. R. CIV. P. 5 (service), which had been renumbered as part of the civil rules restyling project.

The other three amendments would implement the proposed new 14-day deadline to file a notice of appeal from a bankruptcy judgment. Professor Morris explained that the proposed 28-day time to file a post-judgment motion in civil cases would not work in bankruptcy cases because the deadline to file a notice of appeal, currently 10 days, will be 14 days once the time-computation amendments take effect.

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

OFFICIAL FORMS 9F, 10, and 23

Professor Morris reported that the proposed amendments to the forms were technical in nature and did not merit publication. He explained that the advisory committee inadvertently had retained a requirement in OFFICIAL FORM 9F (initial notice in a Chapter 11 corporation or partnership case) that debtors provide their telephone numbers. That item of personal information has been removed from the other forms.

The change in OFFICIAL FORM 10 (proof of claim) would remind persons filing claims based on health-care debts that they should limit the disclosure of personal information. Two changes in the definition section of the forms would tie the words "creditor" and "claims" more closely to the definitions set forth the Bankruptcy Code.

The proposed amendment to OFFICIAL FORM 23 (debtor's certification of completing the required post-petition financial-management course) would add a reference to § 1141(d)(5)(B) of the Bankruptcy Code.

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

Amendments for Publication

Professor Morris explained that the proposed amendments and new rule would implement new Chapter 15 of the Bankruptcy Code, added by the 2005 legislation.

FED. R. BANKR. P. 1004.2

Under proposed new FED. R. BANKR. P. 1004.2 (Petition in Chapter 15 cases), an entity must state on the face of the petition the country of the debtor's main interests.

FED. R. BANKR. P. 1014 and 1015

FED. R. BANKR. P. 1014 (dismissal and change of venue) and 1015 (consolidation or joint administration of cases) both deal with multiple cases involving the same debtor. A question had been raised as to whether these rules are applicable in Chapter 15 cases. The advisory committee would resolve the ambiguity by making the two rules specifically applicable.

FED. R. BANKR. P. 1018

The amendments to FED. R. BANKR. P. 1018 (contested involuntary and chapter 15 petitions, etc.) would clarify the scope of Rule 1018 to the extent it governs proceedings contesting an involuntary petition or Chapter 15 petition for recognition. There is some confusion now as to the applicable procedures in injunctive actions. The amendments clarify that the rule applies to contests over the involuntary petition itself, and not to matters that arise in or are merely related to a Chapter 15 case or an involuntary petition. Such other matters are governed by other provisions of the Rules, as explained in the proposed committee note.

FED. R. BANKR. P. 5009

FED. R. BANKR. P. 5009 (case closing) would require a foreign representative to file and notice a final report in a Chapter 15 case describing the nature and results of the representative's activities in the United States court. In the absence of timely objection, a presumption will arise that the case has been fully administered and may be closed. Another amendment would require the clerk to send a notice to individual debtors in Chapter 7 and Chapter 13 cases that their case will be closed without a discharge if they have not timely filed the required statement that they have completed a financial-management course.

FED. R. BANKR. P. 5012

New FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in Chapter 15 cases) would establish a motion procedure in Chapter 15 cases for obtaining approval of an agreement or "protocol" under § 1527(4) of the Code for the coordination of Chapter 15 proceedings with foreign proceedings.

FED. R. BANKR. P. 9001

The amendment to FED. R. BANKR. P. 9001 (general definitions) would incorporate into the rule the definitions set forth in § 1502 of the Code, added by the 2005 bankruptcy legislation.

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of May 9, 2008 (Agenda Item 6).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81 SUPPLEMENTAL RULES B, C, and G FORMS 3, 4, and 60

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Civil Procedure, the Supplemental Rules, and the illustrative Civil Forms.

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee had published a proposed amendment to FED. R. CIV. P. 8(c) (affirmative defenses) that would remove a "discharge in bankruptcy" from the list of defenses that a party must affirmatively state in responding to a pleading. The Bankruptcy Code makes the exception unnecessary as a matter of law because a discharge voids a judgment to the extent that it determines the debtor's personal liability on the discharged debt. He said, though, that the Department of Justice had voiced opposition to the change. As a result, the advisory committee decided to postpone seeking final approval of the change in order to discuss the matter further with the Department.

FED. R. CIV. P. 13(f)

Judge Kravitz reported that FED. R. CIV. P. 13(f) (omitted counterclaim) would be deleted from the rules as largely redundant and misleading. Instead, an amendment to a counterclaim would be governed exclusively by FED. R. CIV. P. 15 (amended and supplemental pleadings).

FED. R. CIV. P. 15(a)

The amendments to FED. R. CIV. P. 15 (amended and supplemental pleadings) would revise the time when a party's right to amend its pleading once as a matter of course ends.

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

Judge Kravitz said that new FED. R. CIV. P. 48(c) (polling the jury) is based on FED. R. CRIM. P. 31(d), but has minor revisions in wording to reflect that the parties in a civil case may stipulate to a non-unanimous verdict.

A member noted that the proposed amendment referred to "a lack of unanimity or assent" on the part of the jury and asked whether "unanimity" and "assent" are different requirements. Professor Cooper responded that they are, in fact, different concepts. If the parties in a civil case stipulate to accepting a less-than-unanimous verdict, only the "assent" of the jury is required, not "unanimity." Professor Cooper added that Professor Kimble had suggested restyling the language to read: "a lack of unanimity or a lack of assent."

FED. R. CIV. P. 62.1

Judge Kravitz reported that proposed new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal) was the most important rule in the package being forwarded to the Judicial Conference for approval. He noted that the language had been refined following the public comment period to emphasize that the remand from the court of appeals to the district court is for the limited purpose of deciding a motion.

A member suggested that the rule's language was awkward in referring to "relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." He suggested rephrasing the rule to read: "because an appeal has been docketed and is pending." Professor Cooper responded that there are several situations in which docketing of an appeal does not oust the district court's jurisdiction. The advisory committee, moreover, had tried to avoid getting into the morass over whether docketing an appeal is jurisdictional.

FED. R. CIV. P. 81(d)

Judge Kravitz pointed out that the proposed amendment to FED. R. CIV. P. 81(d) (law applicable) would define a "state" for purposes of the Federal Rules of Civil Procedure, where appropriate, as the District of Columbia and any U.S. commonwealth or territory.

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

Amendments for Publication

FED. R. CIV. P. 56

Judge Kravitz reported that the advisory committee had made additional refinements in the proposed amendments to FED. R. CIV. P. 56 (summary judgment) as a result of the comments made by standing committee members at the January 2008 meeting. In addition, the committee note had been shortened significantly.

Judge Kravitz explained that the project to revise FED. R. CIV. P. 56 had been challenging and, understandably, it had taken a great deal of time to complete. He extended special thanks to Judge Michael Baylson for his excellent leadership and insight in chairing the subcommittee that had developed the summary judgment proposal. He also thanked Professor Cooper, Andrea Kuperman, Joe Cecil, James Ishida, and Jeffrey Barr for their significant research efforts in support of the project.

Judge Kravitz explained that actual summary judgment practice has grown apart from the current text of Rule 56. The deficiencies of the current national rule have left space that has been filled by experimentation at the local level. Accordingly, he said, in fashioning a new national rule, the advisory committee had enjoyed the unique opportunity of drawing upon the best practices contained in local court rules.

Judge Kravitz reported that the bar is largely supportive of moving towards a more uniform national summary judgment practice under Rule 56. He noted that the advisory committee had conducted two mini-conferences on the proposed amendments with lawyers, law professors, and judges, and he had spoken personally to several bar groups. At the same time, however, he said that there may be resistance to the proposed rule from courts that do not presently use the three-step process embodied in the new rule.

He explained that the proposed rule would provide a uniform framework for handling summary judgment motions throughout the federal courts, but it would also give judges flexibility to prescribe different procedures in individual cases. The procedure that the new rule lays out will work well in most cases, he said, but trial judges will be free to depart from it when warranted in a particular case.

Judge Kravitz emphasized that there is nothing radical about the three-step, point-counterpoint procedure prescribed in the proposed rule. Clearly, a party should be required to give citations to the record to support its assertion that an issue is disputed or not. That, he said, is precisely what the amendments are designed to accomplish.

Judge Kravitz emphasized that the advisory committee had adhered to two basic principles in drafting the rule. First, it decided not to change the substantive standards governing summary judgment motions. Second, it decided that the revised rule must be neutral – not favoring either plaintiffs or defendants. He pointed out that the last time the advisory committee had proposed making changes to Rule 56, in the early 1990s, it had attempted to make substantive changes, and the effort had failed.

Judge Kravitz reported that the advisory committee had also worked with the Federal Judicial Center to verify empirically that the proposed rule would not run afoul of either of the two fundamental principles.

Mr. Cecil explained that 20 districts now require the point-counterpoint procedure in their local rules. The Center had compared summary judgment practice in those districts with practice in two other categories of districts: (1) the 34 districts that require movants to specify all the undisputed facts in a structured manner, but do not require any particular form of response from opponents; and (2) the remaining districts that have no local rule requiring either party to specify undisputed facts.

The Center's research, he said, had uncovered little meaningful difference among the three categories of districts, except in two respects. First, in districts having a point-counterpoint process, judges take somewhat longer to decide summary judgment motions. Those districts, however, generally have lengthier disposition times. Therefore, the longer times cannot be ascribed to the point-counterpoint procedure. Second, in districts that do require a structured procedure, motions for summary judgment are more likely to be decided. But there appears to be no difference as to the outcome of the motions – whether they are granted or denied. Mr. Cecil cautioned, however, that the current court data concerning termination by summary judgment may not be sufficiently reliable.

Judge Kravitz proceeded to highlight those provisions of the proposed rule that either have prompted comment from bench and bar or have been changed by the advisory committee since the January 2008 standing committee meeting.

RULE 56(a)

Judge Kravitz pointed out that proposed Rule 56(a) specifies that a court "should" grant summary judgment if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. He said that the advisory committee had heard a great deal about whether the appropriate verb should be "should," "must," or "shall." He noted that the rule had used the term "shall" until it was changed to "should" as part of the 2007 general restyling of the civil rules.

He said that the advisory committee, after lengthy consideration, had decided that it would be best to retain the language of the rule currently in effect, *i.e.*, "should." Professor Cooper added that there continues to be some nostalgic support for returning to "shall," but that usage would violate fundamental rules of good style. Therefore, he said, the choice lies between "should" and "must." Earlier drafts of the committee note, he said, had undertaken to elaborate on the contours of "should," but the advisory committee decided that it would be improper to risk changing the meaning of a rule through a note. Thus, the 2007 committee note to the restyled Rule 56 remains the final word on the subject.

Professor Cooper added that the verb "should" is clearly appropriate when a motion for summary judgment addresses only part of a case. Under certain circumstances, he explained, it is wise as a practical matter for a judge to let the whole case proceed to trial, rather than grant partial summary judgment. He suggested that one possible approach might be to use "must" with regard to granting summary judgment on a whole case, but "should" for granting a partial summary judgment. That formulation, however, appears unnecessarily complicated.

Judge Kravitz noted a Seventh Circuit case suggesting that summary judgment must be granted when warranted on qualified immunity grounds, although the decision appears to have more to do with qualified immunity than summary judgment. He explained that the advisory committee tries to avoid providing legal advice in the committee notes. The committee, moreover, did not want to mention qualified immunity in the note as an example of a particular substantive area in which summary judgment may come to be indeed mandatory when the proper showing is made, for fear that it might miss other substantive areas.

Judge Kravitz noted that, at the January 2008 standing committee meeting, a member had pointed out a discrepancy between proposed Rule 56(a), which specifies that summary judgment "should" be granted in whole or in part, and Rule 56(g), specifying that partial summary judgment "may" be granted. He reported that the discrepancy had been fixed and the two provisions now work well together.

A member expressed concern that using the word "should" in Rule 56(a) would signal to the bar that the committee is retrenching from the substantive standard that had prevailed before the restyling of the civil rules, thereby making summary judgment less readily available. For decades, he said, Rule 56 had specified that a judge "shall" grant summary judgment if a party is entitled to it. In the restyling effort, though, the verb "shall" was changed to "should" as part of the policy of eliminating the use of "shall" throughout the rules. At the time, the committee specified that no substantive change had been intended.

He recommended that the committee signal to the bar once again that no substantive change had been intended by the change to "should." Accordingly, a judge

should have no discretion to deny summary judgment when a party is entitled to it as a matter of law.

Another member suggested that the relevant sentence in proposed Rule 56(a) is incoherent because it specifies that a court "should" grant summary judgment if a party is "entitled" to it. If a party is "entitled" to summary judgment, by definition the grant of summary judgment is mandatory. Other members endorsed this view.

A member argued that the appropriate verb to use in the rule is "must." In his state, for example, the state court trial judges are concerned that the intermediate appellate courts frequently reverse their grants of summary judgment. The consequence is that they are chilled from granting summary judgment, believing that it is safer to just let a case proceed to trial. Another member noted that some trial judges in his federal circuit grant summary judgment even when there is clearly a credibility dispute between the parties because they believe that they know how a case will turn out in the end.

Judge Kravitz explained that the advisory committee believes that the substance of the proposed rule is identical to the way it was before December 1, 2007, when "should" replaced "shall." There was no intention to make any substantive change. He pointed out that the committee note, for example, states that discretion should seldom be exercised. That point, he said, would continue to be emphasized in the materials that are published. A judge would exercise discretion to deny summary judgment only in a rare case.

He added that under prevailing summary judgment standards, a trial judge who decides a summary judgment motion must resolve all reasonable inferences in favor of the non-moving party. That, he said, leaves a good deal of latitude to the judge, even before deciding whether the moving party is "entitled" to summary judgment as a matter of law. He suggested that even if the rule were to specify that summary judgment "must" be granted if the moving party is "entitled" to it, the trial judge would have some flexibility in determining whether the moving party is "entitled."

A member complained that a number of trial judges avoid granting summary judgment, no matter how strong the moving party's entitlement to it. But there is no empirical evidence on the point because the cases go to trial, and there is no way to appeal the denial of summary judgment. To avoid the stark choice between "should" and "must," he suggested that the language might be revised to specify that "summary judgment is required if . . .," or "summary judgment is necessary if . . . ."

Judge Kravitz responded that the advisory committee had indeed considered an alternative formulation along these lines, but had abandoned the effort because it would change the substantive standard for granting summary judgment. He added that while the civil defense bar is nervous about the 2007 change from "shall" to "should," the

plaintiffs' bar is concerned about other aspects of the proposed rule and would be strongly opposed to changing "should" to "must."

A member suggested that the committee publish the rule for comment as currently drafted and solicit comments from the bar. She also observed that the proposed rule would explicitly authorize a court to grant partial summary judgment, and it would not make sense to specify that a judge "must" grant partial summary judgment.

Judge Kravitz pointed out that it was clear from the discussion that several committee members believe that a substantive change had been made inadvertently during the course of the restyling process. But he pointed out that the term "shall" had been interpreted in the pertinent Rule 56 case law as not requiring a judge to grant summary judgment in every case even though a party may be "entitled" to it.

He also noted that the committee would have to republish the rule for further public comment if it were to: (1) publish the proposal using "should"; (2) receive many negative public comments on the choice; and (3) then decide to revert to "must." He suggested that it might make more sense – although he did not specifically advocate the idea – to publish the rule using "should" and "must" as alternatives and specifically invite comment on the two.

A member observed that the bar had been informed that the change from "shall" to "should" during the restyling process was merely a style change. Therefore, the change from "should" back to "shall" would also be a mere style change.

Judge Kravitz noted that a change from "should" to "must" would clearly be more than a style change. He explained that the style subcommittee had made clear that "shall" is an inherently ambiguous word that should be changed wherever it appears. Therefore, in drafting the proposed revisions to Rule 56, the advisory committee had carefully researched how courts had interpreted the word "shall" in Rule 56. It concluded that "shall" had largely been read to mean "should" within the context of Rule 56.

Professor Kimble added that "shall" is so ambiguous that it can mean just about anything. It has been interpreted to mean "must," "should," and "may" in different circumstances. A cardinal principle of sound drafting, he said, is that ambiguous terms must be avoided. He said that "shall" should indeed normally mean "must," but in actual usage it often does not.

A member stated that she had always assumed that "shall" meant "must" and had been surprised to learn about the inherent ambiguity of "shall." She said that if the committee wants to solicit public comment on the choice between "should" and "must," it should make clear in the publication exactly what the committee intends for the rule to

mean as a matter of substance, describe the underlying issues, and ask for specific advice on those issues.

Judge Kravitz stated that the advisory committee will certainly highlight the issue for public comment. He reiterated that there are sound reasons for giving a trial judge discretion regarding partial summary judgment. One common problem, he noted, is that parties often move for summary judgment on the whole action, but may only be entitled to it on one count. In some cases, granting partial summary judgment may be warranted, but it may make more sense for the judge to go ahead and try the whole case.

A participant observed that these issues are critically important because few civil cases now go to trial. Summary judgment today lies at the very heart of civil litigation and is key as to how counsel perceive and evaluate a case. He recommended publishing the proposed rule using the alternative formulations of "should" and "must" and inviting specific comments on the alternatives. Judge Kravitz noted, by way of example, that the recent electronic discovery amendments had also been published with alternative formulations.

A member stated that, on initial reading, the change from "shall" to "should" did not appear to be substantive. But, on further reflection, the matter is not so clear. He pointed out that the 2007 change from "shall" to "should" is perceived by some as a substantive change, even though the committee is convinced that it is not. For that reason the proposal should be published with "should" and "must" in the alternative to solicit thoughtful comments. Several other members concurred.

A member suggested that some judges may refuse to grant summary judgment, even when warranted, because they are overworked. They can simply deny summary judgment with a one-line order and proceed to trial. But under the committee's proposal, the trial judge "should" give reasons for denying summary judgment. The requirement to give reasons may impact the willingness of some judges to grant summary judgment. Judge Kravitz added that the Federal Judicial Center's research shows that a disturbing number of summary judgment motions are still undecided when cases go to trial.

Judge Kravitz observed that it would be complicated to draft a provision specifying that a trial judge "must" grant complete summary judgment, but "should" grant partial summary judgment. It may be that some other formulation could avoid the drafting problems, but he suggested that it would be better just to tackle the issue head on and use either "should" or "must." He also noted that the choice of words could affect appellate review of summary judgment determinations because the word "must" conjures up the prospect of mandamus.

A member stated that if the committee were to change the verb to "must," it would clearly be a substantive change. Judge Kravitz responded that the committee

would have to conclude that "shall" had meant "must" all along, that it would not be a substantive change, and that the committee had made a mistake in the restyling process.

A member argued, however, that most lawyers and judges believed that "shall," formerly used in Rule 56, had meant "must." Therefore, the 2007 restyling change to "should" was substantive. Judge Kravitz responded, though, that research had revealed cases where courts of appeals had held that district courts had discretion not to grant summary judgment, even though the operative language of the rule was "shall."

A motion was made to publish the Rule 56(a) amendments for comment in a form that sets out and highlights "should" and "must" as alternatives and also solicits comment on the concept of treating complete summary judgment differently from partial judgment in this regard.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(a) for publication, subject to further refinement in language.

RULE 56(b) and (c)(1)-(2)

A member observed that the term "response" appears in several places in proposed Rule 56(b) and (c), but it is confusing because Rule 56(c) intends it to include only a factual statement, and not the response in full. He recommended that the language be modified to make it clear that a "response" does not include a brief.

A member noted that proposed Rule 56(c)(2)(A) specifies that a party must file a motion, response, and reply. Then Rule 56(c)(2)(B) refers to a response that includes a statement of facts. He suggested that the language state that the party must file a response and a separate statement of facts, rather than have the statement included in the response.

A participant noted that proposed Rule 56(b)(2) states that "a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later." But the filing of the summary judgment motion means that an answer is not due. Thus, there will never be a responsive pleading "21 days after . . . a responsive pleading is due."

Professor Cooper explained that the impetus for the provision had come from the Department of Justice. The Department pointed out that a plaintiff may serve a summary judgment motion together with the complaint. This is common, for example, in collection actions. The Department has 60 days to answer a complaint. Under the proposed rule, however, it would have to respond to a plaintiff's summary judgment motion before its deadline for filing an answer to the complaint. For that reason, the

advisory committee added the language "or a responsive pleading is due, whichever is later." What the committee meant to say was something like: "or if the party opposing summary judgment has a longer time to file an answer to the complaint." Mr. Tenpas concurred, noting that the Department did not want to be required to respond to a motion for summary judgment before even being required to answer the complaint. He suggested that perhaps the provision could be fixed by saying, "or a responsive pleading is due from that party."

A participant pointed out that the problem is that the provision was intended to cover summary judgment motions filed by plaintiffs, but as written it covers all parties. Several participants suggested improvements in language, including breaking out the provision into parts to specify how it will operate in each situation. Judge Rosenthal recommended that Professor Cooper and Judge Kravitz consider the suggestions and return to the committee with substitute language.

Judge Kravitz explained that Rule 56(c) spells out the primary feature of the revised rule – its three-step, point-counterpoint procedure. He reported that the advisory committee had made a number of improvements since the last standing committee meeting, and he thanked Professor Steven Gensler, a member of the advisory committee, for devising a more logical, clearer format for the rule.

Judge Kravitz pointed out that one of the criticisms of the three-step process comes from lawyers who have had to defend complex cases where a moving party may list 500 or so facts in a summary judgment motion. It is just too difficult, he said, for the opposing party to go through them all and respond to each. Most local rules, moreover, do not give a party the right to admit a fact solely for purposes of the summary judgment motion. Accordingly, the proposed rule specifies that a party need not admit or deny every allegation of an undisputed fact, but may admit a fact solely for purposes of the motion. This, he said, was an important improvement.

He also noted that the words "without argument" had been deleted from proposed Rule 56(c)(5) because they were confusing and unnecessary. The committee note, moreover, explains that argument belongs in a party's brief, not in its response or reply to a statement of fact.

A member reported that, in his experience, the procedure contemplated in proposed Rule 56(c) is essentially standard practice in many districts already. He pointed out, though, that the proposed language of Rule 56(c)(2)(B) was confusing in part because it specifies that a party opposing a motion "must file a response that includes a statement." The "response" and the "statement" accepting or disputing specified facts are two separate things. Another member agreed and pointed out that the confusion results in part because the rule requires a moving party to file three documents and the opposing party to file two.

Another explained that a party opposing a motion must actually file four things: (1) a statement opposing the motion for summary judgment; (2) a "counterpoint" response, *i.e.*, a response to each of the undisputed facts enumerated by the moving party; (3) a statement pointing out any other facts that the opposing party contends are disputed; and (4) a brief. It is not intended, though, that the opposing party actually file four separate documents. But it would be useful for the rule to flag for opposing parties that the second and third items are separate concepts.

Another member agreed that the current formulation needs to be refined and suggested devising a new term that would denominate the whole package that the moving party must file and the whole package that the responding party must file. Lawyers should be given clear directions as to exactly what they are expected to provide.

A motion was made to approve proposed Rule 56(b) and 56(c)(1-2) for publication, subject to Judge Kravitz, Professor Cooper, and the Rule 56 Subcommittee making further improvements in the language consistent with the committee's discussion.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(b) and (c)(1-2) for publication, subject to further refinement in language.

RULE 56 (c)(3)-(6)

A member noted that proposed Rule 56(c)(3) specifies that "a party may accept or dispute a fact" for purposes of the motion only. It makes perfect sense for a party to accept a fact for purposes of the motion only, but for what purpose would a party ever dispute a fact for purposes of the motion only? Judge Kravitz responded that the advisory committee had focused only on "accepting" a fact for purposes of the motion, and had not considered "disputing" a fact for purposes of the motion.

A member noted that, under proposed Rule 56(c)(4), the court may consider other materials in the record to grant summary judgment "if it gives notice under Rule 56(f)." He suggested that the reference to Rule 56(f) is unnecessary because that rule itself covers the notice that the court must give.

In addition, he noted that proposed Rule 56(c)(6) states that an affidavit or declaration must "set out facts that would be admissible in evidence." The affidavit itself, though, would be admissible in evidence only if the affiant were testifying at trial. The language may cause some confusion because an affidavit submitted in support of or in opposition to summary judgment need not itself be admissible in evidence, but the facts do have to be admissible. Courts often receive affidavits that set out hearsay, but hearsay evidence is not enough to defeat summary judgment.

A participant noted that "facts" are not admissible in evidence and suggested that it would be better to say "facts that can be proven by admissible evidence." Another pointed out, though, that the language had been taken directly from the current Rule 56(e)(1), even though the terminology is not accurate. No court will be misled, and it does not appear to present a serious problem in practice that needs to be fixed. Another member recommended that no change be made because it might appear to signal a substantive change.

A member suggested that proposed Rule 56(c)(5), specifying that "a response or reply . . . may state without argument," should be revised to refer explicitly to a party's brief, where "argument" should be made. Another member suggested, though, that the rule should not go into detail as to how parties should combine their papers. It is an area where trial judges will want flexibility to prescribe procedures.

A motion was made to approve the rest of proposed Rule 56(c) for publication, with appropriate revisions in language to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(c)(3)-(6) for publication, subject to further refinement in language.

RULE 56(e)

Judge Kravitz explained that proposed Rule 56(e) enumerates the actions that a trial judge may take if the party opposing a summary judgment motion does not properly respond to the motion. He pointed out that if a party does not cite support to show that a particular fact is disputed, the court may deem the fact undisputed for purposes of the motion. But that by itself does not automatically entitle the moving party to summary judgment.

He noted that the advisory committee had decided not to spell out in detail what a judge should do with defective motions. There is a good deal of case law on the subject, and judges have experience in dealing with them. A member added that the committee note should explain that giving the opposing party notice and a further opportunity to respond will often be all that a court needs to do.

RULE 56(f)

A member asked whether the language of proposed Rule 56(f)(2), allowing a judge to "grant or deny the motion on grounds not raised by the motion or response," refers only to legal grounds not raised, or also to other facts not raised. Judge Kravitz responded that the language is intended to be broad and cover both.

RULE 56(g)

Judge Kravitz reported that proposed Rule 56(g) had been revised substantially since the last standing committee meeting. It would give a court substantial discretion when it does not grant all the relief requested by a motion for summary judgment.

A member pointed out that the committee note sets out several reasons why a trial court might not want to grant partial summary judgment. He suggested that the note would be more balanced if it also stated the reasons why a court should grant partial summary judgment, as set forth in Judge Kravitz's memorandum accompanying the proposed rule.

A member pointed out that the committee note refers to the trial of facts and issues at "little cost," and suggested that the words be deleted because there are always substantial costs to a trial.

Judge Kravitz observed that if the committee were to decide that there should be a revised section addressing partial summary judgment – in response to the suggestions that judges should have discretion to deny a worthy partial summary judgment motion but not a worthy summary judgment on the whole case – proposed Rule 56(g) would need to be folded into that section.

A participant suggested that the language of proposed Rule 56(g) that "any material fact – including an item of damages or other relief – that is not genuinely in dispute" is confusing. An item of damages is not a material fact. He suggested that the provision would be clearer if it referred to "any material fact, item of damages, or other relief." Judge Kravitz pointed out that the advisory committee had merely retained the language of the current rule, though it might be improved.

A member noted that proposed Rule 56(c)(3) permits a party to accept a fact for purposes of the motion only. But then proposed Rule 56(g) allows a court to treat the fact as established in the case. Would the party have to be given notice if the court is considering treating the fact as established in the case?

Judge Kravitz responded that this should not happen because the party has accepted the fact for purposes of the motion only. The judge should not be able to use the party's limited admission for any other purpose. The member speculated, though, that a party might try to prevent a trial judge from finding a fact established in the case under Rule 56(g) precisely by using the stratagem of admitting the fact for purposes of the motion only. Another member agreed, suggesting that the rule seemed to present a paradox. Judge Kravitz noted, though, that judges rarely enter a Rule 56(g) order anyway.

A member stated that it might be advisable to delete proposed Rule 56(g). Under the current proposal, if a party admits a fact for purposes of the motion only, some further procedure should be required before the judge may enter an order under Rule 56(g) finding the fact established in the case. Judge Kravitz noted that the proposed Rule 56(g) material is in the current rule, and he suggested that it remain in the rule for publication and that public comment might be solicited on whether it is still needed.

RULE 56(h)

Judge Kravitz reported that defense counsel had urged that the rule specify that sanctions be imposed when a summary judgment motion is made or opposed in bad faith. But, he said, the advisory committee had decided to avoid the inevitably controversial issue of sanctions.

A motion was made to approve for publication the remainder of proposed Rule 56, with drafting improvements to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to the remainder of FED. R. CIV. P. 56 for publication, subject to further refinement in language.

FED. R. CIV. P. 26

Judge Kravitz reported that both plaintiffs' and defendants' lawyers have voiced strong support for the proposed amendments to FED. R. CIV. P. 26(a)(2) (disclosure of expert testimony) and FED. R. CIV. P. 26(b)(4)(A) (trial preparation protection for experts' draft reports, disclosures, and communications with attorneys). He pointed out that lawyers commonly opt out of the current rule by stipulation. The proposed amendments, he said, do not go as far as some may want in shielding all expert materials from discovery. For example, they do not place an expert's work papers totally out of bounds for discovery.

Under the current regime, he explained, lawyers engage in all kinds of devices to make sure that little or no preparatory material involving experts is created that could be discovered. Among other things, lawyers may hire two experts – one to analyze and one to testify. They may also direct experts to take no notes, prepare no drafts, or work through staff whenever possible.

Judge Kravitz noted that lawyers expend a great deal of time and expense in examining experts about their communications with lawyers and the extent to which lawyers may have contributed to their reports. But the outcome of cases rarely turns on these matters. Although some benefit may accrue to the truth-seeking function by having

more information available about lawyer-expert communications, the benefits are far outweighed by the high costs of the current system.

He emphasized that it is very important for the proposed amendments to Rule 26 to be clearly written. If the rule is vague, it will not succeed in reducing the high costs of the current rule because lawyers will not feel secure about the extent of the rule's protections. It would lead to unnecessary litigation over the meaning of the text, and lawyers will continue to engage in the kinds of artificial behavior regarding their experts that the advisory committee is trying to avoid.

RULE 26(a)(2)

Judge Kravitz explained that the proposed amendments to Rule 26(a)(2)(C) would require lawyers to provide a summary of a non-retained expert's testimony. The advisory committee, he said, had deliberately used the word "summary," rather than "report," to make it clear that a detailed description is not needed. The committee, he said, was concerned about placing additional burdens on attorneys.

A member asked whether the provision is intended to cover a lay witness described by FED. R. EVID. 701. Judge Kravitz responded that a witness under Rule 701 – one who is not an expert witness – is not covered by the amendments, and a lawyer would not be required to provide a summary of the testimony of a non-expert witness.

The member added that some witnesses do not testify as experts, but nonetheless have specialized knowledge. Judge Kravitz pointed out that proposed Rule 26(a)(2)(C) does in fact cover witnesses who are both fact-witnesses and expert-witnesses, and a summary must be provided of their expert testimony.

RULE 26(b)(4)(A)

Judge Kravitz said that under current Rule 26 anything told to or shown to an expert is discoverable. But under proposed Rule 26(b)(4)(A), work-product protection would be extended both to an expert's draft reports and to the communications between a party's attorney and the expert, with three exceptions: (1) compensation for the expert's study or testimony; (2) facts or data supplied by the attorney that the expert considered in forming the opinions to be expressed; and (3) assumptions supplied by the attorney that the expert relied upon in forming the opinions to be expressed. Under current Rule 26(b)(3), work-product protection is limited to "documents and tangible things." But the work-product protection proposed in the amendment would be broader, in the sense that it would cover all lawyer-expert communications not within any of the three exceptions, even if not "documents or tangible things."

A member stated that the proposed changes are excellent. He noted that lawyers now opt out of the current rule by stipulation or play games to avoid discovery of experts' draft reports and communications. He asked whether an attorney who deposes an expert and has a copy of the expert's report may ask the expert whether the attorney who has retained him or her had helped write the report or had made any changes in it. Judge Kravitz said that the question could not be asked under the proposed rule because inquiries about lawyer-expert communications would be out of bounds for discovery. The proposal, he said, is fair because it applies to drafts and communications on both sides.

A member suggested that the key question for the jury to decide is whether it can rely on an expert's opinion because it is based on the expert's own personal expertise. Therefore, the opposition should be permitted to pursue inquiries that could establish that the expert's opinion is not really an independent assessment reflecting the expert's own expertise, but the views of the attorney hiring the expert. Judge Kravitz pointed out, though, that the expert's report itself is not in evidence. The opposition can probe fully into the basis for the expert's opinions, but it just cannot ask whether the lawyer wrote the report. Who wrote the report is not important to the jury, and the jury does not even see the report. The key purpose of the report is really to apprise the opposition of the nature of the expert's testimony.

A member stated that he always enters into stipulations opting out of the current expert-witness provisions of Rule 26 because the current rule leads to a great deal of needless game-playing, discovery, and cross-examination. He explained that he always provides an outline for an expert to use at trial in order to help organize the testimony for the witness. The testimony, though, is that of the expert, not the lawyer. Requiring the outline to be turned over creates largely irrelevant disputes over authorship and distracts from the substance of the expert's testimony. The proposed rule, he concluded, is a major improvement over current practice and is consistent with what good lawyers on all sides are doing right now. And it does not favor one side or the other.

Professor Coquillette agreed and reported that he has often served as an expert witness in attorney-misconduct cases. Under the Massachusetts state rule, which is similar to the advisory committee's proposal, state trial judges do not allow inquiry into who wrote an expert's report. The cases go to trial, and the experts are cross-examined at the trial, but there are no long cross-examinations or interrogations. The jury bases its decision in the final analysis on what the expert says on substance. The state rule, he said, does not take away anything important from the truth-finding process.

On the other hand, in professional malpractice cases in the federal court in Massachusetts, it is routine for an expert to be deposed for an entire day. In the end, though, almost all the cases are settled without trial.

A member asked what the advisory committee had meant by using different language in the last two bulleted exceptions. One would allow discovery of facts and data that an expert "considered," while the other allows inquiry into assumptions that the expert "relied upon." Professor Cooper explained that it is legitimate for the opposition to ask whether an expert considered a particular fact provided by an attorney. But a more restrictive test is appropriate regarding "assumptions" provided by the attorney.

A participant argued that proposed Rule 26(a)(2)(B) explicitly requires an expert report to be "prepared and signed by the witness." Thus, the opposition should be able to ask whether the witness actually prepared the report and whether any part of it had been written by a lawyer. Judge Kravitz responded that the advisory committee had considered removing the word "prepared" from the rule and simply require that a report be signed by the witness. The committee note states clearly that a lawyer may provide assistance in writing the report, but the report should reflect the testimony to be given by the witness. The signature of the expert witness on the report means that he or she embraces it and offers it as his or her own testimony.

At trial, the opposing party may ask whether the expert agrees with the substance and language of the report, but it does not matter who actually drafted it. The current rule uses the word "prepared" and anticipates that a lawyer will provide assistance in drafting the report. But discovery should not be allowed into who wrote which parts of the report or who suggested which words to use. That is what has led to all the excessive costs and artificial gamesmanship that the proposed amendments are designed to eliminate.

A member stated that the proposed amendments are a great idea that will save the enormous time and expense now wasted on discovery into draft reports and lawyer-expert communications. He said that the litigation process should not be cluttered up with the extraneous and expensive issues of who "prepared" expert reports and opinions.

A member noted that under FED. R. EVID. 705 (disclosure of facts or data underlying expert opinion) and other provisions, experts routinely rely on other people, such as lab technicians. Much expert testimony is really the assimilation of much background information, rather than the work of one person. Perhaps a better word could be used than "prepared," but it should be understood that an expert's report will often involve collaboration. An expert could not function properly without speaking with others. If the expert signs the report, and by so doing stands by its substance, it really does not matter who supplied the actual words.

Another member observed that the rule deals with discovery, not trial. But the net effect of it will be to keep some evidence away from a jury, on the theory that it involves work product worthy of protection. Generally, expert witnesses have no direct knowledge of the facts of a case. They bring their own specialized knowledge to the

case, based on their professional expertise, not the lawyer's. A report is required in order for the expert to testify. It is different from a lawyer's communications with an expert. The opposition should be able to inquire into the circumstances of the production of a report that the court requires to be filed.

A member pointed out that most cases settle, and the proposed amendments will clearly reduce the costs of litigation by not allowing discovery of draft reports or inquiry into whether lawyers contributed to preparation. She noted that the three bulleted exceptions in Rule 26(b)(4)(A) draw a distinction between facts or data "considered" and assumptions "relied upon" that will likely lead to litigation over whether something was considered versus relied upon. She suggested that the distinction be eliminated and that in all cases the reference should be to matters "considered, reviewed, or relied upon."

A participant also questioned the validity of the distinction between "facts and data" and "assumptions," suggesting that the third bulleted exception be eliminated and the rule refer only to "facts and data."

The lawyer members of the committee were asked about the contents of the stipulations they use in opting out of the current rule. One responded that the stipulations he negotiates specify that neither party may ask for the drafts of experts, and no discovery will be allowed of lawyer-expert communications leading up to the expert's report. He added that his stipulations, though, allow the other party to ask whether the expert actually drafted the entire report.

Another member, however, said that his stipulations prohibit any inquiry into authorship. He emphasized that if questions of that nature were allowed, it would make more sense just to let the draft reports themselves be discovered because they will establish more reliably whether the expert wrote the whole report. The opposing party, he said, should only be allowed to ask whether the expert's opinion is his or her own, how the expert reached that opinion, and what supports the opinion. All the questions concerning the role of counsel in preparing the report, although not technically irrelevant, are largely pointless. There is no end to the inquiries, and they lead to endless, needless expense. Therefore, in the absence of a stipulation, lawyers and experts are forced to engage in artificialities, put nothing in writing, and avoid communications. As a result, it takes the expert much longer to draft a report, adding another large expense.

Judge Kravitz reiterated that it was important to keep in mind that the central purpose of the report is to provide the other side with notice of what the expert is going to testify about at the trial. It is not to find out who wrote each word.

A member emphasized that the real debate is over how much can be asked of the witness in cross-examination. There is a trade-off between what the other side may find out during cross-examination and the sheer cost of the exercise. Judge Rosenthal added

that the minimal benefits of the information that would be lost under the proposed amendments are simply not worth the expense of the current system.

A member stated that, under the current rule, if he cannot reach a stipulation with the other side to bar discovery of drafts and lawyer-expert communications, he will fight to obtain all the drafts. Unless an attorney knows what the other party can or cannot do, as set forth in a rule or stipulation, he or she will want all reports and communications. It would be best for the committee to cut off this kind of discovery entirely. The proposed amendments, he said, reflect the best of current practice. Without them, though, he will continue to negotiate stipulations.

A member stated that in testing an expert, the opposing party will probe for any inconsistencies between the expert's testimony and what is set forth in the report. The expert may explain an inconsistency by admitting that the particular point in the report had been written by the lawyer. The opposing party should not have to wait to learn about the inconsistency for the first time when the expert is on the witness stand. Inquiry into the inconsistency should be allowed during the discovery process.

In addition, a witness may be impeached by inquiry into the methodology used. It is important to know whether an attorney channeled the methodology for the expert. In other parts of the law, for example, it is common to have statements prepared by lawyers and signed by others, such as affidavits. Law-enforcement agents, for example, do not always write their affidavits in support of search warrants. Moreover, cross-examination is allowed in criminal cases. Issues of inconsistency may arise between a criminal defendant's testimony and a suppression report written by the lawyer. There should not be a different rule for civil and criminal cases.

A member asked why, in proposed Rule 26(b)(4)(A)(iii), the protections and restrictions apply only to a witness who is "required to provide a report." A treating physician, for example, who is not required to file a report under rule 26(a)(2)(B), should be entitled to the same work-product protection. Professor Cooper explained that if the treating physician is not retained by counsel, the work-product protection is really not needed. The relationship with the lawyer for a retained expert is not the same. Therefore, the protection applies only to retained witnesses.

Judge Kravitz suggested the example of an expert witness who is a state trooper, not retained by counsel. There is no need for the lawyer's communications with the trooper to receive work-product protection because there is no special relationship between the two. Troopers and family physicians testify essentially as fact witnesses, although they give some expert advice. The professional witness, on the other hand, is part of the litigation team.

A motion was made to approve the proposed amendments to Rule 26 for publication and to solicit specific public comment on the issues identified during the committee's discussions. Judge Kravitz added that the proposed amendments were still subject to style and format improvements.

The committee, with one member opposed, by voice vote approved the proposed amendments to Rule 26 for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2008 (Agenda Item 9).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, and 59 and HABEAS CORPUS RULE 8

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Criminal Procedure and the Rules Governing §2254 Cases and § 2255 Proceedings.

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

CRIMINAL FORFEITURE

Judge Tallman reported that the proposed amendments to FED. R. CRIM. P. 7 (indictment and information), FED. R. CRIM. P. 32 (sentencing), and FED. R. CRIM. P. 32.2 (forfeiture), dealing with criminal forfeiture, had been initiated at the request of the Department of Justice. They were drafted by an ad hoc subcommittee that had enjoyed significant input from lawyers who specialize in forfeiture matters, both from the Department and the National Association of Criminal Defense Lawyers. The amendments essentially incorporate current practice as it has developed since the forfeiture rules were revised in 2000.

Judge Tallman explained that in some districts the government currently includes criminal forfeiture as a separate count in the indictment and specifies the property to be

forfeited. The proposed rule would specify that the government's notice of forfeiture should not be designated as a count of the indictment. The indictment would only have to provide general notice that forfeiture is being sought, without identifying the specific property to be forfeited. Forfeiture, instead, would be handled through the separate ancillary proceeding set forth in FED. R. CRIM. P. 32.2.

Professor Beale pointed out that the proposal was not controversial and represents a consensus between the Department of Justice and private forfeiture experts. She walked the committee through the details of the amendments and pointed out that they elaborate on existing practice and eliminate some uncertainties regarding the 2000 forfeiture amendments.

A member pointed to language in the committee note cautioning against general orders of forfeiture (where the property to be forfeited cannot be readily identified), except in "unusual circumstances," and asked what those circumstances might be. Judge Tallman suggested that a general order might be appropriate when the government demonstrates that funds derived from narcotics have been used to buy other property. The defendant, in essence, tries to hide assets and the government seeks to forfeit an equivalent amount of property.

Professor Beale pointed out that other examples are found in the cases cited in the note. She noted that the 2000 amendments allowed a forfeiture order to be amended after property has been recovered. Thus, some flexibility in forfeiting property is already accepted in the rules and in case law, although the outer boundary of forfeiture law is still somewhat ambiguous.

Judge Tallman added that the concept of forfeiture is driven by the "relation-back" doctrine, under which the sovereign acquires title to the property obtained by wrongdoing at the time of the wrong. The rule follows the money and perfects the sovereign's interest in an equivalent value of property. A participant recommended using the term "tracing" in the rule, and Judge Tallman suggested that the committee note might add the words "to identify and trace those assets."

A member pointed to an inconsistency in the proposed rule that needed to be corrected. Under proposed Rule 32.2(b)(6)(A) publication by the government is mandatory. But Rule 32.2(b)(6)(C) specifies that publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

Professor Beale suggested changing the heading of Rule 32.2(b)(6)(C) to make it clear that there are exceptions to (A)'s mandatory publication requirement. She noted that the style consultant had advised against adding a cross-reference to subparagraph (C) in

Rule 32.2(b)(6)(A). A member suggested turning the proposed last sentence of (C) into a separate subparagraph (D), but Professor Kimble suggested that it would be better to pull the proposed last sentence of (C) back into (A). Professor Beale recommended that the committee approve the rule subject to further drafting improvements.

A participant noted that proposed Rule 32.2(b)(4)(C) specifies that "a party may file an appeal regarding that property under FED. R. APP. P. 4(b)" and asked whether it applies to an appeal by a third party. Professor Beale responded that the advisory committee had intended the language to refer only to the defendant or the government, not to third parties. It was suggested, therefore, that the rule might be amended to read: "the defendant or the government may file an appeal." A member noted that third parties are not atypical in forfeiture proceedings, and they need to be considered. The defendant takes an appeal from the judgment of conviction, but that obviously does not apply to a third party. So some guidance would be appropriate. Professor Struve added that third parties are not specifically mentioned in FED. R. APP. P. 4.

A member noted that the provision deals only with an appeal of the sentence and judgment. Forfeiture, on the other hand, is an ancillary proceeding governed by Supplemental Rule G. Therefore, no separate provision is needed in the criminal rules. A member added that proposed Rule 32.2(b)(4)(A) states that an order "remains preliminary as to third parties until the ancillary proceeding is concluded."

A member emphasized the need to have the rule make clear when third parties are included and when they are not. He moved to replace the term "a party" with "the defendant or the government" throughout Rule 32.2(b)(6)(A) and (B). Another member suggested that consideration be given to making a global change, such as by adding a new definition in FED. R. CRIM. P. 1 that would define the term "party" for the entire Federal Rules of Criminal Procedure. Judge Rosenthal agreed that the suggestion may have merit, but it would take considerable time to accomplish. She suggested, therefore, that the committee ask Judge Tallman, Professor Beale, the style subcommittee, and the forfeiture experts to refine the language of the amendments in light of the committee's discussion. Judge Tallman added that the advisory committee would favor changing the terminology in Rule 32(b)(6)(2)(C) from "a party" to "the defendant or the government."

Judge Rosenthal recommended that the committee approve the proposed forfeiture rules, subject to the advisory committee, working with others, further refining the exact language of the amendments.

The committee without objection by voice vote approved the proposed forfeiture amendments for approval by the Judicial Conference, subject to revisions by the advisory committee along the lines discussed at the meeting.

FED. R. CRIM. P. 41

Judge Tallman stated that the amendments to FED. R. CRIM. P. 41 (search and seizure) had been drafted to address challenges that courts are facing due to advances in technology. They would establish a two-step procedure for seizing electronically stored information. He noted that a huge volume of data is stored on computers and other electronic devices that law-enforcement agents often must search extensively after probable cause has been established.

Judge Tallman reported that the advisory committee had seen a demonstration of the latest technology at its April 2007 meeting. He noted, for example, that technology now on the market can prevent anyone from making a duplicate image of electronically stored information. Thus, agents in some cases must seize entire computers because they cannot duplicate the contents for off-site review. The Department of Justice, he said, reports that this process requires substantial additional time to execute warrants properly.

To address problems of this sort, the proposed rule sets out a two-step process. First, the data-storage device may be seized. Second, the device may be searched and the contents reviewed. The court may designate a magistrate judge or special master to oversee the search. Maximum discretion is given to judges to provide appropriate relief to aggrieved parties.

Professor Beale stated that the law on particularity under the Fourth Amendment is inconsistent and still evolving. The proposed rule, she said, is not intended to govern the developing case law on the specificity required for a warrant, but merely sets up a procedure. The warrant would authorize both seizure of the device and later review of the contents. The owner of the device may come into the court and seek return of the device or other appropriate relief.

A member stated that the rule makes a great deal of sense, but asked whether the advisory committee had considered how likely it is that a Fourth Amendment challenge will be brought to the proposed procedure. Professor Beale responded that the challenge would not be to the rule per se, but to particular orders or warrants issued under it. In other words, there will be the usual challenges to the breadth of the warrants, but the rule will not be invalidated.

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

HABEAS CORPUS RULES 11 and 12

Judge Tallman explained that the Rules Governing §§ 2254 Cases and 2255 Proceedings conform to the Anti-Terrorism and Effective Death Penalty Act. The statute aims to narrow the focus of issues that might justify issuance of a writ of habeas corpus. When the district court denies a petition for a writ of habeas corpus, it enters a judgment. Under the statute, a certificate of appealability must then be entered before an appeal may be taken by the petitioner, but it is unclear how and by whom it is issued. The Act, in fact, allows it to be issued by a district judge, the court of appeals, or a circuit justice.

Judge Tallman explained that the great majority of petitioners are pro se inmates, and the rules create a potential trap for them. District judges normally will first enter a judgment denying a habeas corpus petition and then later issue a certificate of appealability. But in waiting for the certificate to issue (and often seeking reconsideration of the denial of the certificate), inmates may fail to file a timely appeal. They are generally unaware that motions for a certificate of appealability do not toll the time for filing an appeal.

Judge Tallman said that the advisory committee had attempted to draft new Rule 11 in a way that spells out as clearly as possible, both in § 2254 cases and § 2255 proceedings what inmates have to do. The judges on the committee, he said, believe that district judges should normally issue or deny the certificate at the end of the case, when the facts and issues are still fresh in the judge's mind.

Professor Beale reported that the public comments had expressed some differences of opinion on this issue. Some had suggested that it would be better to bifurcate the two court decisions and allow a district judge to decide on the certificate later than ordering entry of the judgment. But, she said, the advisory committee had concluded that it is important for the court to make the two decisions together, both to promote trial court efficiency and to avoid misleading prison inmates. The committee, however, did revise the proposal after publication to give a trial judge the option of ordering briefing on the issues before deciding on the certificate of appealability. The court may also delay its ruling, if necessary, and include the two actions in a joint ruling. Judge Tallman added that the advisory committee had tried to make it clear in the last sentence of proposed Rule 11(a) that a motion for reconsideration of the denial of a certificate of appealability does not extend the time to appeal.

A member agreed that the revisions to Rule 11 will provide better information to pro se litigants, but questioned the companion amendment to FED. R. APP. P. 22(b). The appellate rule, he suggested, assumes that the district court's decision on issuing the certificate of appealability will be made after the notice of appeal has been filed and sent

to the court of appeals. But under the proposed revisions to Rule 11, the certificate of appealability will usually be issued before a notice of appeal is filed.

Judge Tallman responded that it was not necessarily true that the certificate will issue before the notice of appeal is filed. Under the governing statute, an appeal cannot be filed without a certificate of appealability. Thus, if the court of appeals receives a notice of appeal without a certificate of appealability, it must consider asking the district court to decide on issuing a certificate or granting one itself. Several participants suggested possible improvements in the language of the proposed amendment. One noted that if a habeas petitioner files a notice of appeal without a certificate of appealability, his circuit deems the notice of appeal to be a motion for a certificate of appealability.

A member pointed out that proposed Rule 11 specifies that the district court "must" issue or deny a certificate of appealability when it enters a final order. She suggested that the verb be changed to "should" in order to give district judges discretion in appropriate circumstances. Judge Tallman reported that the advisory committee had deliberately chosen the word "must," believing that a district judge could delay issuing the joint order and certificate to allow time for briefing, if necessary. He said that the advisory committee would be amenable to changing the language if the standing committee preferred to give trial judges greater discretion.

Current Rule 11 of the Rules Governing § 2254 Cases would be renumbered as Rule 12.

A motion was made to approve proposed Rule 11, retaining the verb "must."

The committee, with one objection, by voice vote approved the proposed amendments to the Rules Governing § 2254 Cases and § 2255 Proceedings for approval by the Judicial Conference.

A motion was made to approve the proposed amendment to FED. R. APP. P. 22(b)(1), with a change in language to read, "If the district court issues a certificate, the district clerk must send the certificate . . . ."

The committee without objection by voice vote approved the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 6 (grand jury) had been brought to the advisory committee's attention by magistrate judges, who noted that in some districts no judge is present in the city where the grand jury sits. Therefore, a magistrate judge may have to travel hundreds of miles just to receive the return of an indictment. The proposed amendment would authorize a magistrate judge to take the return by video teleconference.

A participant questioned the language of the amendment that specifies that a judge may take the return "by video teleconference in the court where the grand jury sits." He suggested that the proper phrasing might be "from the court . . . ." Alternatively, the sentence might end after the word "teleconference." Professor Beale responded that the advisory committee wanted to have the return by the grand jury made in a courtroom in order to maintain the solemnity of the proceedings.

A member pointed out that the committee note states that the indictment may be transmitted to the judge in advance for the judge's review. She said that it is surprising that the matter is addressed in the note, rather than the rule itself, because it is essential that the indictment be sent to the judge in advance by reliable telegraphic means.

Judge Tallman agreed that the judge should have a copy of the indictment in hand. The judge would conduct the proceedings remotely by videoconference, and a deputy clerk would be physically present in the courtroom with the grand jury to receive and file the indictment.

A member pointed out that he had served as an assistant U.S. attorney in three different districts, and the practice of receiving grand jury returns varied in each. Nevertheless, there is always at least a deputy clerk present to receive and file the indictment. Judge Tallman emphasized that the thrust of the proposed rule is merely to authorize a judge's participation by video teleconference, not to regularize grand jury practices.

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

Judge Rosenthal stated that there may be some advantage to deferring publication of the proposed amendment to Rule 6 because it may be an unnecessary burden to couple it for publication with the potentially controversial proposed amendments to Rule 15. She suggested that it might be better to publish the amendments to Rule 15 in August 2008, review the public reaction to them, and then publish the amendment to Rule 6 at a later date. She emphasized that no decision had been made on the matter, but asked the committee's approval to delay publication if she deems it appropriate.

The committee without objection by voice vote agreed that the chair of the committee may decide on the timing of publication of the proposed amendment.

FED. R. CRIM. P. 15

Judge Tallman stated that the proposed amendments to FED. R. CRIM. P. 15 (depositions) would authorize, in very limited circumstances, the taking of depositions outside the United States and outside the presence of the criminal defendant, when the presence of a witness for trial cannot be obtained. The procedure, for example, would be permissible when the presence of the witness in the United States cannot be secured because the witness is beyond the district court's subpoena power and the foreign nation in which the witness is located will not permit the Marshals Service to bring the defendant to the deposition.

Judge Tallman noted a recent decision of the Fourth Circuit upholding the taking of depositions in Saudi Arabia in an al-Qaeda case. The Saudi Arabian government would not permit the witnesses to come to the United States. So the district court authorized a video conference where the defendant was in Virginia and the witnesses in Saudi Arabia. The witnesses could see the defendant, and the defendant could see the witnesses. The procedures contained in the proposed amendments, he said, mirror what the Fourth Circuit approved in that case.

Judge Tallman pointed out that the advisory committee was particularly sensitive in this area because the Supreme Court had reviewed earlier proposed amendments in 2002 and had declined to transmit a proposed amendment to FED. R. CRIM. P. 26 to Congress. At that time, Justice Scalia questioned the constitutionality of this kind of procedure, but said it might be permissible if there were case-specific findings that it is necessary to further an important public policy. Judge Tallman explained that the advisory committee had tried to meet Justice Scalia's concerns. Thus, proposed Rule 15(c)(3) lists in detail all the factors that the court must find in order for a deposition to be taken without the defendant's physical presence.

Professor Beale added that the proposed rule would require a court to determine, on a case-by-case basis, what technology is available and whether the technology permits reasonable participation by the defendant. The rule, she said, clearly establishes a preference for the witness to be brought to the United States and covers only those situations where the witness cannot come.

A member stated that certain nations would regard this procedure as a serious abuse of extraterritorial judicial authority by the United States and a violation of their sovereignty. Therefore, it might be helpful to state in the committee note that the

committee takes no position on whether the procedure might be legal in particular foreign nations.

A participant pointed out that the proposal was, in effect, a rule of evidence and suggested tying it to the language of FED. R. EVID. 807(b) (residual exception to the hearsay rule) and its comparative requirement. Under the proposed amendments to FED. R. CRIM. P. 15, for example, the government might have many similar witnesses available in the United States, but their presence is not a listed factor that the court must consider. FED. R. EVID. 807(b), he said, would provide a better, tougher standard. He also questioned the reference in proposed Rule 15(c)(3)(A) to "substantial proof of a material fact." Professor Beale responded that the phrase had been taken from the case law.

A member suggested that the standard in the rule need not be as narrow as FED. R. EVID. 807(b) because the testimony of the witness may not be hearsay evidence. In any event, though, she expressed doubts that the evidence produced by a deposition conducted under the proposed rule would be admissible.

Professor Beale agreed that the proposed rule does not address whether the information obtained from the witness will actually be admissible in evidence. But, she said, several circuits now have allowed district judges to craft specific arrangements in individual cases. The rule, she explained, had been drafted carefully to meet the constitutional standards and provide some structure that would make it possible in appropriate circumstances to have the evidence admitted. Of course, there is little point in conducting the deposition if it produces evidence that cannot be admitted.

A member pointed out that there are many procedural issues that the proposed rule does not address, such as the location of the prosecutor and defense lawyer during the deposition and the transmission of exhibits. She noted that the rule only addresses the initial approval and justification for conducting the deposition at all. Judge Tallman agreed that the advisory committee had intended to leave the logistical arrangements to the individual courts. Mr. Tenpas added that it is wise for the rule to avoid the technology issues because the technology is changing rapidly. It is appropriate that the rule simply focuses on when a court may allow a deposition to be taken. The Department of Justice, he said, supports the committee's best efforts on the matter and hopes that the Supreme Court will accept the rule.

A member suggested adding another circumstance to the list of case-specific findings that support taking a deposition – the physical inability of a criminal defendant to travel to another country. Mr. Tenpas responded that that circumstance may fall within proposed Rule 15(c)(3)(D)(ii), "secure transportation . . . cannot be assured," or proposed Rule 15(c)(3)(D)(iii), "no reasonable conditions will assure an appearance."

A member asked whether the committee planned to ask specifically for public comments on the constitutional issues, especially since the Supreme Court had rejected a similar proposal in the past. Judge Rosenthal responded that the committee would solicit comments on the constitutionality of the proposed procedure, and it must be up front in the publication regarding the history of the earlier amendments submitted to the Supreme Court.

A member pointed out that in some cases the criminal defendant may request a deposition. In that event, the defendant's confrontation-clause rights are not implicated by the deposition. She suggested that the proposed rule would be useful in that situation.

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

FED. R. CRIM. P. 32.1

Judge Tallman stated that the proposed amendment to FED. R. CRIM. P. 32.1(a)(6) (revoking or modifying probation or supervised release) had been brought to the committee's attention by magistrate judges. The current rule, he said, provides that a person accused of a violation of the conditions of probation or supervised release bears the burden of establishing that he or she will not flee or pose a danger, but it does not specify the standard of proof that must be met.

The Bail Reform Act specifies that a "clear and convincing evidence" standard applies at a defendant's initial appearance. Case law establishes that the same standard should be used in determining whether to revoke an order of probation or supervised release. The proposed amendment would explicitly state that the "clear and convincing evidence" standard of proof would apply in revocation proceedings.

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 12, 2008 (Agenda Item 8).

Amendments for Publication

RESTYLING THE FEDERAL RULES OF EVIDENCE

FED. R. EVID. 101-415

Judge Hinkle reported that the advisory committee was restyling the Federal Rules of Evidence in the same way that the appellate, criminal, and civil rules had been restyled to make them easier to read and more consistent, but without making any substantive changes. He pointed out that the committee was requesting approval at this meeting to publish the first third of the rules, FED. R. EVID. 101-415, but not to publish them immediately. The second third of the rules would be presented for approval at the January 2009 meeting, and the final third at the June 2009 meeting. All the restyled evidence rules would then be published as a single package in August 2009.

Judge Hinkle pointed out that additional changes may be needed in the first third of the rules because the advisory committee will have to go back later in the project to revisit all the rules for consistency. He also pointed to some global issues, such as whether the restyled rules should use the term "criminal defendant" or "defendant in a criminal case." Other issues that the advisory committee had been dealing with, he noted, have been set forth in footnotes to the proposed rules. He emphasized that the proposed restyling changes had been very thoroughly vetted at the advisory committee level.

A member noted that the proposed revision of FED. R. EVID. 201(d) (judicial notice) refers to the "nature" of a noticed fact, rather than the "tenor" of the fact, as in the current rule. Professor Capra responded that the advisory committee had examined the case law and could find no discussion of what "tenor" means. As a result, it decided to use "nature," rather than "tenor," because it is easier to understand and does not represent a substantive change.

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

FED. R. EVID. 804(b)(3)

Judge Hinkle reported that FED. R. EVID. 804(b)(3) is the hearsay exception for a statement against interest by an unavailable witness. The proposed amendment, he said, would extend the corroborating circumstances requirement to all declarations against penal interest offered in criminal cases. He emphasized that the Department of Justice does not oppose the change.

He noted that the current rule requires corroborating circumstances if the defendant offers a statement, but not if the government does. The anomaly results from the fact that Congress, in drafting the rule, believed that the government could never use

the provision because case law under the Confrontation Clause would preclude the government from submitting evidence under the rule.

The government, however, in fact can use the rule. Therefore, the provision does not impose parallel requirements on the government and the defendant. Nevertheless, some courts have held that the government must show corroborating circumstances, even though the current rule does not contain that requirement.

Judge Hinkle said that there was never any real rationale for the different treatment in the rule. It was just an historical accident because the drafters had assumed that the government could never use the provision.

He stated that the advisory committee had decided not to make any change in the rule regarding civil cases. The amendment, thus, would address only criminal cases. In addition, there are some other current misunderstandings about the rule that the committee decided not to address as part of the current proposal.

Professor Capra stated that the proposed amendments to Rule 804(b)(3) had not yet gone through style review. He pointed out that all the hearsay rules would be restyled together, which will require a great deal of work. Nevertheless, the advisory committee wanted to publish the substantive amendments to Rule 804(b)(3) now, with the understanding that the rule will be restyled in due course as part of the restyling process.

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

Informational Item

Judge Hinkle reported that the most important matter currently affecting the evidence rules is the pending effort to get Congress to enact new FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work-product protection). The rule, he noted, had been approved unanimously by the Senate, but was still pending before the House Judiciary Committee.

Judge Hinkle noted that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In that case, the Court held that admitting "testimonial" hearsay violates an accused's right to confrontation unless the accused has had an opportunity to cross-examine the declarant. He said that it is at least possible, in light of *Crawford* and the developing case law, that some hearsay exceptions may be subject to an

unconstitutional application in some circumstances. Case law developments to date suggest that rule amendments not be necessary.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the sealing subcommittee, reported that the subcommittee had decided to confine its inquiry to cases that have been totally sealed by a judge. The Federal Judicial Center, he noted, had been searching the courts' electronic databases to identify all cases filed in 2006 that have been sealed. It divided the civil cases into five categories: (1) False Claims Act cases; (2) cases related to grand jury proceedings; (3) cases involving juveniles; (4) cases involving seizures of property; and (5) all other cases. Criminal cases are being treated separately. In addition, the Center had contacted the clerks of the courts to obtain additional information about the cases. Its initial research to date had identified 74 sealed civil cases, 238 sealed criminal cases, and 3,631 cases sealed by magistrate judges. The Center reported that some of the sealed cases were later resolved by public opinions, including some published opinions.

Judge Hartz reported that the subcommittee planned to hold an additional meeting before the next meeting of the standing committee.

REPORT ON STANDING ORDERS

Judge Rosenthal reported that the committee, with the invaluable assistance of Professor Capra, was continuing its work on reviewing the use of standing orders in the courts. She said that a survey had just been distributed to chief district judges and chief bankruptcy judges, and a good deal of helpful information had been received. Professor Capra, she added, was working on proposed guidelines to assist courts in determining which subjects should be set forth in local rules of court and which may appropriately be relegated to standing orders. In addition, the courts will be urged to post all standing orders on their court web-sites.

NEXT MEETING

The committee agreed to hold the next meeting in early to mid-January 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, January 12-13, in San Antonio, Texas.

Judge Kravitz reported that the civil rules committee was planning to hold three hearings on the proposed amendments to FED. R. CIV. P. 26 and 56 – one on the east coast, one on the west coast, and one in the middle of the country. Judge Rosenthal recommended scheduling the hearings to coincide with upcoming committee meetings. Thus, one hearing will be held on November 17, 2008, in conjunction with the fall meeting of the civil rules committee in Washington, and another will be held in San Antonio on January 14, 2009, the day after the next meeting of the standing committee. The third will be held on February 2, 2009, in San Francisco.

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 16, 2008

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

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At its September 16, 2008 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2008.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2010, 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.

Agreed to establish a Capital Investment Fund pilot program for a four-year period beginning in fiscal year 2009, subject to congressional approval, which would allow participating court units to —

a. Voluntarily return funds for deposit into the fund up to a maximum at any given time of $50,000;

b. Utilize funds deposited into the Capital Investment Fund in subsequent fiscal years, once the Executive Committee has approved the national Salaries and Expenses financial plan and final allotments have been transmitted to the courts; and

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Agreed to seek legislation adjusting the time periods in 29 statutory provisions affecting court proceedings to account for the proposed changes in the time-computation rules.

Approved proposed amendments to Appellate Rules 4(a)(4), 22, and 26(c), and new Rule 12.1 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 amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 as part of the project to improve the time-computation rules 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 amendments to Bankruptcy Rules 2016, 4008, 7052, 9006, 9015, 9021, 9023, and new Rule 7058 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 8, 9F, 10, 23, and Exhibit D to Form 1 to take effect on December 1, 2008.

Approved new Bankruptcy Official Form 27 to take effect on December 1, 2009.

Approved proposed amendments to Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 as part of the project to improve the time-computation rules 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 amendments to Civil Rules 13(f), 15(a), 48(c), and 81(d), and new Rule 62.1 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 amendments to Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81, Supplemental Rules B, C, and G, and Illustrative Forms 3, 4, and 60 as part of the project to improve the time-computation rules 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 amendments to Criminal Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 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 amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 as part of the project to improve the time-computation rules 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.

SUPPLEMENTAL RULES FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS

Rule C. In Rem Actions: Special Provisions

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Statement of Interest; Answer. In an action in rem:

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

* * * * *

TAB 2

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 7-8, 2008

The Civil Rules Advisory Committee met on April 7 and 8, 2008, in Half Moon Bay, California. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Hon. Jeffrey Bucholtz; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Robert C. Heim, Esq.; Judge John G. Koeltl; Chilton Davis Varner, Esq.; Anton R. Valukas, Esq.; and Judge Vaughn R. Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Joe Cecil and Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., and Greg Katsis, Esq., Department of Justice, were present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Joe Fagel, Esq.; Francis Fox, Esq.; Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison); Mark Landis, Esq.; Ken Lazarus, Esq.; Joe Fagel, Esq.; and Professor Brooke Coleman.

Judge Kravitz opened the meeting by noting occasions for joy and sadness.

The Committee was saddened to learn of Judge Sam C. Pointer, Jr.'s, death. Judge Pointer chaired the Committee from 1991 to 1993. His ongoing impact on the Committee and its work endured for many years after. He brought the 1993 disclosure and discovery amendments to a successful conclusion. He launched the decade-long work of revising Rule 23, beginning with a draft that completely restructured all of class-action practice; later work was measured in large part by whittling down ideas that seem too bold for present implementation but that will remain as important guides for any future work. He volunteered the Civil Rules to be first in the Style Project, and personally made hundreds of revisions in the first draft prepared by Bryan Garner. The "Garner-Pointer" draft became the foundation for successful restyling when the project was resumed after a hiatus to study and learn from the restyling of the Appellate and then the Criminal Rules. As a judge, he continued to be involved in the work of the American Bar Association, to contribute to many other collaborative projects that advanced good procedure, and to demonstrate innovative and often-emulated advances in procedure for resolving the cases that came before him. His work to coordinate the work of the myriad courts involved in the silicone-gel breast implant litigation was particularly imaginative and important. And his work as a practicing lawyer compensated in some measure for the loss when he retired from the bench.

Occasions for joy include the recent marriage of Andrea Kuperman. The loss of Judge Filip as a Committee member would be sad, but the loss fades before his confirmation as Deputy Attorney General. It is equally a pleasure to have Greg Katsis present for the meeting and to anticipate his imminent confirmation as Assistant Attorney General for the Civil Division.

Another happy event is the appointment of new Committee member Judge Colloton. He has had extensive experience in the Department of Justice, in the Independent Counsel's Office, and as United States Attorney for the Southern District of Iowa before appointment to the Eighth Circuit.

Judge Kravitz turned to the agenda, noting that it includes two massive topics in Rule 56 and the revisions of the Rule 26 treatment of expert trial witnesses. Other topics are familiar, but require the close attention needed for all final recommendations. These include the Time-Computation Project and review of the proposals published for comment in August 2007.

November 2007 Minutes

The draft minutes for the November 2007 meeting were approved, subject to correction of typographical and similar errors.

Rule 56

Judge Baylson introduced the Rule 56 Subcommittee report. He began by noting that the Federal Judicial Center has continued its Rule 56 research, and has worked diligently to respond to questions the Committee raised during reports on earlier phases of the research. The results of this work are important in framing recommendations for revision.

Joe Cecil described the report that was submitted for this meeting. It describes experience in the district courts by grouping them in three categories according to their local rules. In the first group, a movant is required to provide a detailed statement of uncontested facts with references to the record and a nonmovant is required to respond in the same form. In the second group, the movant is required to provide the statement and references but the nonmovant is not required to respond in kind. The third group does not have any comparable requirements. In many ways the most significant finding was that there are few differences among the groups in the frequency of motions, or the rate of grants or denials in whole or in part. These similarities held true across different types of cases. But three of the tables attached to the report are particularly interesting.

Table 3 shows that courts that have point-counterpoint requirements similar to those proposed in draft Rule 56 decide a higher fraction of summary-judgment motions than other courts. Some part of the explanation may be that in the other districts a higher portion of the cases are settled before the motion is decided, but that simply leads to the question whether the settlement rate is affected by the summary-judgment practice. Perhaps motions are made earlier in point-counterpoint districts in relation to development of the case. The point-counterpoint structure, for whatever reason, does seem to encourage decision of the motions.

Table 5 shows that courts take longer to decide summary-judgment motions in the point-counterpoint districts. That might be tied to the higher rate for actually deciding them. Supplemental analysis suggested other reasons — these districts have higher median weighted case loads, greater numbers of pending cases per judge, and require more time to reach disposition in all cases.

Table 12 shows that the percentage of cases terminated by summary judgment is similar across all three district types. The greatest divergence is in employment discrimination cases; termination by summary judgment occurs in 13% of these cases in point-counterpoint districts, 10% in "movant only" districts, and 9% in districts that do not require detailed fact statements by either movant or nonmovant. (Judge Baylson noted that Tables 2 and 3 show a higher rate of motions in employment cases than any other category of cases, and also a higher rate of granting in whole or in part, in all types of districts.)

The tables highlight dimensions in which there is a greater than 5% difference among the types of districts. This figure, however, is arbitrary; it was chosen for purposes of drawing attention. The familiar "95%" threshold of statistical significance is used in considering the results of sampling studies. It does not apply when, as in this study, an entire population is studied. This study began with all cases terminated in fiscal 2006. It was whittled down by excluding some categories of cases in which the number of cases is imprecise, and other categories in which summary judgment motions are not likely to be made. Cases from three districts were excluded because useable CM/ECF data and local rule information were not available. The result was a population of 155,803 cases — 56% of cases terminated in fiscal 2006. At least one summary-judgment motion was made in 23,725 of these cases; in all, 46,633 separate motions were analyzed.

Discussion of the FJC study began by asking whether the rate of motions and grants in employment discrimination cases suggests that the point-counterpoint structure in proposed Rule 56 encourages too many partial or full summary judgments. It was noted that there are many possible explanations apart from the structure of the practice. One distinction is the burden-shifting "prima facie case" rule. Another is a perception that complaints in these cases often advance every conceivable theory against every conceivable defendant; many of the grants simply pare down the case to the solid core of potential claims and plausible defendants.

It also was noted that the tables must be read carefully. Table 12, describing cases terminated by summary judgment, refers to complete termination of the case. Table 3, referring to motions "granted in whole," refers to granting all of the relief requested by the motion — often that is less than termination of the whole case.

The "no disposition" information from Table 3 was described by one committee member as "astonishing." The range is from 50% in the point-counterpoint districts to 62% in the districts that require only the movant to provide a detailed statement and 58% in the other districts. The theory that settlement often intervenes between the motion and disposition simply leads to the question why settlement did not happen earlier. The study will continue to explore these issues. There are some indications that the districts that do not have point-counterpoint requirements resolve more cases by other dispositive motions.

Concern about the motions not resolved was expressed from a different perspective. Lawyers have complained that some judges refuse to decide Rule 56 motions, pushing toward trial in the hope of coercing a settlement. But it will be difficult to tease out an answer to this fear from studying docket information. It will be possible to find out how long the unresolved motions were under consideration, and whether trial actually started in the "motion unresolved" cases.

Another possibility to remember is that point-counterpoint motions may be decided more frequently because it is easier to decide a motion that has been carefully presented.

It would be possible to get more information by taking a hard look at a sample of perhaps 1,000 case files. But the questions to be asked would have to be defined in order to identify the sample. If the study were to focus on the "no disposition" question, for example, the sample of cases would be drawn differently than the sample that might be used to explore employment discrimination cases. The actual file studies would be done by law students working with a carefully drawn study protocol.

Judge Kravitz expressed the Committee's thanks and appreciation for the excellent work done by the FJC. As with other studies done for the Committee, this work has been very important and helpful.

Judge Baylson then presented the Rule 56 Subcommittee report. He identified a set of issues for consideration from those identified in — and by — the footnotes in the agenda book version.

Motion on whole action (notes 1, 24): Note 1 raises a question that has recurred. Draft Rule 56(a) begins by stating that "[a] party may move for summary judgment on all or part of a claim or defense." The Style convention is to draft in the singular, understanding that this language authorizes a motion that addresses every claim and every defense in the action. But it has been suggested that the rule text should explicitly refer to case-terminating motions, perhaps as "summary judgment on the action or on all or part of a claim or defense."

Discussion noted that this question also is presented by subdivision (g), which addresses partial summary judgment and, as presented, begins by addressing the situation in which summary judgment is not granted on the whole action. In the end, subdivision (g) was revised to address the

situation in which the court fails to grant all the relief requested by a motion for summary judgment. The distinction will be further sharpened by adding to the tag line for subdivision (a), which will read: "(a) Motion for Summary Judgment or Partial Summary Judgment."

"Should" or "must" grant (notes 2, 3): Rule 56 originally stated that summary judgment "shall" be granted when there is no genuine issue as to any material fact and the moving party is "entitled" to judgment as a matter of law. The 2007 Style version of the rule translates "shall" as "should." The 2007 Committee Note explains that this rendition of the ever-ambiguous "shall" was necessary to reflect the cases that recognize discretion to deny summary judgment even when the movant apparently has carried the Rule 56 burden of showing there is no genuine issue.

"Should" has met continuing resistance even after Style Rule 56 took effect. Defendants, more than plaintiffs, are likely to protest that there should be no discretion to force on them the burdens of trial if a sufficient summary-judgment showing has been made. Andrea Kuperman studied a large number of cases in response to this concern. She found several cases, including cases from several circuits, explicitly recognizing discretion to deny summary judgment. She also found many cases that repeat the common refrain that summary judgment is a matter of law, reviewed de novo by the appellate courts without recognizing any district-court discretion. But most of these statements were made in boilerplate paragraphs announcing standards of review for whatever issues were before the court, commonly in cases in which summary judgment was granted. Only one circuit court opinion rejecting discretion to deny involved review of a denial of summary judgment; that was a Seventh Circuit case that involved an official-immunity defense, a matter in which the specific substantive concern to protect against the burdens of trial and discovery may well explain a duty to grant a properly supported motion.

The Subcommittee, after studying the question again, continues to recommend "should."

The first question was why not revert to "shall." Courts seem to be divided, at least in pronouncement, on the propriety of discretion to deny a properly supported motion. "Must" is clear. "Should" is clear. "Shall" — because it is not clear — will better support continued evolution in the case law.

It was noted that in bankruptcy practice motions for summary judgment often are filed on the eve of trial in a contested matter. The judge should be able to say the motion is too late to be considered. The rule should not impose a mandatory obligation to grant a motion in terms that will require hasty and ill-considered action or postponement of a trial that may present urgent needs for immediate action.

A Committee member expressed continuing confusion. "How can we think 'should' means the same as 'shall'"? The Kuperman memorandum and outside letters, however, show that courts have different views. The proposal adopts "should" "because we like it better." But this is confusing to the bar. The high rate of "no disposition" outcomes in the FJC study does not tell us whether, or how often, the failure to decide a summary-judgment motion reflects a judge's view that there is discretion to deny. We should not do anything that might encourage courts to refuse to grant a motion — as by simply not ruling on it — because they would prefer that the case settle. We should be clear about what we're doing, and clear in the ways in which we inform the bar.

This comment prompted the response that it shows why "shall" has been eliminated from the rules lexicon. It is ambiguous. It can mean "must," "should," or "may." Translations in the Style Project were chosen to reflect what the word had come to mean in practice. "Should" was selected to fit the cases recognizing discretion to deny, in part because those cases seemed right for many circumstances. Serious problems would arise if "shall" were restored to exist in unambiguous uniqueness among all the rules but with ambiguous meaning for this particular rule.

The effect of the 2007 change was discussed further. Rule 56(c) will say "should" at least until December 1, 2010; the cycle of rules amendments makes any earlier change impracticable. The current project is aimed at improving summary-judgment procedure and making it uniform across the country. It is not intended to change the standard as it is now established, including the 2007 clear recognition of discretion to deny. Discretion to deny, moreover, is established for very good reason. It would be folly to say that when summary judgment is appropriate on only part of a claim or defense the court "must" grant it. Perhaps it would be helpful, in Committee Note or in reporting to the Standing Committee and for publication, to offer examples of discretion to deny. Examples might include that the motion is too late; summary judgment is proper only as to a small part of a case; the facts and issues that must be tried so far overlap anything that might be resolved by summary judgment that granting summary judgment may prove costlier than denial; and so on.

It also might be appropriate to add an observation to the Committee Note that the procedural discretion to deny may be superseded by substantive principles. Official immunity is the familiar example. Both qualified and absolute immunities have been recognized to establish protection not merely against liability but also against the burdens of trial and even the burdens of pretrial. This substantive principle might easily develop to defeat discretion to deny summary judgment; the many cases that decide collateral-order appeals from denials do not hint at discretion to deny. Instead denial is reviewed as a matter of law.

Further support was expressed for "should." The draft Committee Note makes its use clear. It might help to provide additional examples; "we're following the law, not changing it." Another Committee member agreed, suggesting that recognition of discretion to deny is appropriate as to fact issues and law issues that might better be resolved after the assurance of full trial-level presentation of the facts. As to matters of law, one consequence may be increased use of Rule 12(c) motions to catch out legal inadequacies that now are caught by Rule 56 motions.

Still another member supported "should," but urged that the Committee Note should be expanded to note the prospect that substantive immunity principles may overcome discretion to deny. The point might be made in general terms: The general procedural discretion to deny may yield to substantive-law principles that are designed to protect against the burdens of further pretrial proceedings or trial. This may be true even when, as in the Seventh Circuit case, a defendant clearly is not entitled to summary judgment on one claim and the only question is whether summary judgment is warranted as to another claim.

Another member commented on reading the cases described in the Kuperman memorandum. The 1986 Supreme Court cases "look more like 'must'"; the 2007 Committee Note seems generous on the scope of discretion if we want to keep the law as it was up to 2007. We may change the law by trying to address all permutations. Perhaps it is better to delete all of the draft Committee Note that addresses discretion to deny, and to avoid any comments about qualifying the discretion when substantive principles supervene.

This suggestion was supported by a reminder that the Standing Committee prefers that notes be shorter rather than longer. Adding examples of discretion and possible limits may move too far from the simple advice that the discretion should be sparingly exercised.

Judge Baylson noted that the Subcommittee had struggled to choose the verb. The Committee Note begins by honoring the 1986 Supreme Court decisions and leaving continuing evolution of the summary-judgment standard to judicial decisions. "Shall" will not be accepted by the Standing Committee. "Should" seems better than "must."

The proponent of "shall" agreed that if it will not be "shall," then "should" is the best choice. But the Committee Note should be stripped down.

It was noted that no cases have yet been found that rely on or explore the 2007 change from "shall" to "should."

Further support for "should" was expressed by noting that Rules 50(a) and (b) say that judgment as a matter of law "may" be granted. It is common to deny judgment at the close of the case, choosing to submit it for jury decision to get a "bullet-proof judgment." The same option should be available for summary judgment. Going to trial and getting a trial judgment may in fact spare the parties a lot of time and expense.

On motion, "should" was approved, 9 votes yes and 3 votes no.

Discussion returned to the Committee Note. Support was expressed for retaining the draft discussion of discretion, adding a discussion of immunity. Immunity springs from substantive law, not Rule 56. There may be other substantive doctrines that also defeat discretion to deny summary judgment. It would help to recognize this in the Note.

A different view was that there should be some change in the statement that "[t]here is no change in the rule that a court has discretion to deny summary judgment even if it does not appear that there is a genuine issue." Even though the Seventh Circuit decision involved official immunity, the court did not expressly rely on that in stating there is not discretion to deny.

The suggestion that it would be better to delete the entire paragraph on discretion to deny was renewed. It was supported by a reminder that care always must be taken to ensure that a Committee Note does not contradict rule text, and does not become the occasion for expanding rule text.

This reminder led another participant to suggest that the draft Note "has way too much useful stuff in it." It is important to explain why the rule should be changed, and how it is changed. But much of the explanation can be in the report to the Standing Committee and the letter transmitting the proposal for public comment. The Committee Note should be "leaner and meaner." It is right to say that the proposed rule does not change the summary-judgment standard. It may not be wise to say anything more.

Another Committee member supported the suggestion to delete the entire paragraph on discretion to deny. "Should" may seem to signal an expansion of the discretion to deny. It is better to leave the discussion to the 2007 Committee Note, relying on the new Committee Note for the initial observation that the standard is not changed. Two other members agreed, although one of them expressed continuing concern that it would be useful to say something about official-immunity cases.

A slightly different view was that it would be wise to delete much of the draft paragraph on discretion to deny, but that it would be useful to retain the final two sentences that quote and then elaborate on the 2007 Committee Note.

A variation suggested simple revision of the first sentence of the paragraph on discretion. It would say there is no change in the decisions addressing the question whether there is discretion to deny.

Further support was expressed for deleting the entire paragraph. It clearly has bothered many people, who thought Rule 56 established a right to summary judgment on making the proper showing. Denial is serious business; in most circumstances it is not appealable, and is not reviewable after trial and final judgment. The Style revision painted us into a corner. It is better to avoid anything that might emphasize and eventually expand discretion to deny.

An effort to bring this discussion to a conclusion posed two alternatives: Delete the entire paragraph on discretion to deny, or retain the final two sentences describing and supplementing the 2007 Note — perhaps with an added bit on substantive principles that may defeat discretion. Support was voiced for each approach. Deletion of the entire paragraph was suggested because "'must' is just as wrong as 'should.' The less said about it the better. The Note should not try to express all the law." Deletion was further supported as clean. It avoids the inconsequence of simple repetition and the risk that any variation would be an inappropriate effort to amend the 2007 Committee Note.

It was agreed to delete the part of the paragraph before the final two sentences. A vote on retaining the final two sentences divided evenly, 6 yes and 6 no.

An effort to draft a revised incorporation of the 2007 Committee Note was urged. Many lawyers are concerned about "should." Saying nothing may lead some courts who prefer "must" to read "should" as "must." "You have to tell the bar again and again." And it was argued again that something should be said about official immunity as a substantive right to be protected against further process.

The last view expressed was that the 2007 Committee Note should stand on its own. It was written when "should" was written into the rule. It is unwise to embellish it now. Nor is it appropriate for the Committee Note on a procedural rule to express views about what substantive law is or may come to be. (This view was expressed again later in the discussion of partial summary judgment. The Committee Note should not be used to re-explain a rule provision that is not being changed. The issue can be identified in the Report to the Standing Committee to pave the way for the memorandum transmitting the proposal for public comment. If there is extensive comment suggesting that the Note should be expanded, it can be taken into account.)

Reasons for disposition (note 4): After the November 2007 Committee meeting the Subcommittee unraveled a fractured vote by preparing a draft saying that the court must state on the record the reasons for granting summary judgment and should state the reasons for denying it. After further deliberation the Subcommittee decided that it would be better to direct simply that the court should state on the record the reasons for granting or denying the motion. The Committee Note continues to distinguish grants by stating that it is particularly important to state the reasons for granting summary judgment and that the statement should be dispensed with only if the reasons are apparent both to the parties and to the appellate court. The only discussion agreed with this choice. At times a district judge will not sufficiently explain the reasons. But in some cases the reasons are painfully obvious; in those cases nothing would be gained by forcing a redundant statement. This version of Rule 56(a) was approved.

Order of subdivisions — time for motion, procedure (note 5): The draft structure sets the times for motion, response, and reply in subdivision (b), while the procedures are covered by subdivision (c). Some participants have believed that it is clearer to present the procedures first, locating the time provisions later in the rule. But the procedures in subdivision (c) tie closely to the succeeding subdivisions for cases in which a nonmovant shows that it cannot yet present facts to justify its opposition (d); the consequences of failure to respond or to respond properly (e); judgment independent of the motion (f); and partial grant of a motion (g). Pushing the time provisions to next-to-last is likely to be inconvenient for many readers.

Some support was suggested for relocating the timing provisions. One observation was that by placing the timing provisions first the structure will create confusion as to the nature of the reply governed by the time to reply — there is a risk that this will seem to address a reply brief, not the subdivision (c)(2)(C) reply to additional facts stated in a response.

There was no direct disposition of this question, but the proposed structure seemed to be accepted.

Order for different time (note 8): Subdivision (b) allows for different timing if "the court orders otherwise in a case." It was asked whether an order should be required if the parties stipulate to extended time. From the parties' perspective, there will be great anxiety as the rule-set time approaches if the court has not yet "so ruled" on the stipulation. It was noted, however, that in most cases courts routinely accept the stipulation by order, while in some cases the court has an interest in rejecting the stipulation in order to maintain control over the case's progress. It would be possible to write a rule that provides protection for the parties if there is no ruling either way by the time of the rule-set deadline. But was agreed that this complication is not necessary.

Motion, response, reply, brief (note 9): The structure of subdivision (c)(2) presents drafting challenges. It has been agreed that the motion should be made in three separate sets of papers: the motion itself, as a brief identification of each claim, defense, or part of each claim or defense as to which summary judgment is sought; a concise statement of material facts the movant asserts are not genuinely in dispute, with citations to supporting materials; and a brief. The response is two sets of papers: the first combines a fact-by-fact response to the motion, any challenges to the admissibility of evidence cited to support the motion, and any additional facts the nonmovant asserts to defeat summary judgment; and a brief. The reply likewise is two documents: a reply to any additional facts stated in the response, and a brief. These elements are clear on careful reading. But the rule may not provide sufficient guidance to the less-than-careful reader.

The first observation was that the response indeed is a different kind of thing because it combines into one document the responses with citations, arguments about admissibility, and additional facts with citations.

One modest drafting change would be to amend the caption of proposed (c)(2) to become "Motion and Statement of Facts; Response and Responsive Statement of Facts; Reply and Responsive Statement of Facts. The captions of paragraphs (A), (B), and (C) would be changed to mimic the relevant one-third of the subdivision caption. Then it would be possible to separate the response from the citation of record support and evidentiary challenges, and to do the same for the reply.

It was agreed that a reply brief can be helpful, and indeed may be the first thing the judge consults.

The next comment was that the rule should clearly identify what the movant needs to submit, what the nonmovant needs to submit, and what the movant needs to do by reply. The briefs should be clearly separated from the motion, response, and reply. Clarity is particularly important because adverse consequences can flow from failure to move in proper form, and the draft rule itself provides adverse consequences for failure to respond or reply in proper form.

Renewed support was offered for separating the motion from the statement of facts asserted to be beyond genuine dispute. But the language of the draft for the statement of facts seems unfortunate in calling for a "statement that states concisely * * *." It was agreed to change this to "a statement that ~~states~~ concisely identifies in separately numbered paragraphs * * *.

(Later discussion concluded that further changes should be made, working on a reorganized version of subdivision (c) prepared by Professor Gensler.)

Support for positions (note 13): Draft (c)(2)(D) reads "a statement or dispute of fact must be supported by * * * (ii) a showing that the materials cited to *dispute or* support the fact do not establish *a genuine dispute or* the absence of one * * *." This provision has not been much

discussed. There is no question about showing that the materials cited to support a fact do not establish the absence of a genuine dispute. A nonmovant is not obliged to provide any record citations; it suffices to respond that the citations provided by the movant do not carry the burden of showing the absence of a genuine dispute. So too there is no question that a movant is free to argue that materials cited to dispute a fact do not establish a genuine dispute. The defendant, for example, might support a motion by pointing to the deposition statements of three disinterested witnesses that the light was green for the defendant. The plaintiff's response pointing to testimony by the same witnesses that the sky was cloudy does not, without more, contribute to showing a genuine issue as to the color of the light. But the defendant-movant's argument on this score is ordinarily included in a reply brief. When will it be appropriate for a party to include a "does not establish a genuine dispute" assertion in a motion, response, or reply? There are some possibilities. The most likely illustration may be that a so-called "additional fact" asserted in a response is irrelevant or is really an inadequate attempt to dispute a fact in the movant's statement. The movant might assert in a reply, for example, that the "additional fact" that the sky was cloudy is not an additional fact but an ineffectual attempt to dispute the showing that the light was green. It also may prove convenient to use the reply to challenge the effectiveness of a "self-serving, self-contradicting" affidavit. The defendant might support a motion by pointing to the plaintiff's deposition testimony that the light was green for the defendant; the plaintiff's response includes an affidavit that the light was red for the defendant. It seems a legitimate use of the reply to assert that the court should disregard the affidavit — as many courts have done — as something that does not establish a genuine dispute.

It was agreed that the draft should remain as proposed.

"No-evidence" motion (note 14): Draft subdivision (c)(2)(D) says that "a statement or dispute of fact must be supported by: * * * (ii) a showing * * * that an adverse party cannot produce admissible evidence to support the fact." This language is intended to cover the "Celotex no-evidence motion." This motion is made by a party who does not have the burden of production at trial, asserting that the nonmovant does not have sufficient evidence to carry the burden of production. It relies purposefully on "showing," a word taken from the Celotex opinion. This word does not say just how the movant makes the showing, a subject of continuing uncertainty in the courts and bar. This provision is included in the rule because it is an important aspect of the present summary-judgment standard, no matter how uncertain its scope may be.

The first observation was that this provision for a "no-evidence" motion is intended to be something quite different from the (c)(2)(B)(ii) direction that a response may include a statement that material cited to support a fact is not admissible in evidence. The response to a motion is quite different from a motion; it addresses material cited to support the motion's statement that a fact is not genuinely in dispute. There is some overlap — the motion itself may show that the trial burden cannot be carried if the movant has the trial burden on the fact and the admissibility rulings show that the movant cannot carry the trial burden.

Other issues were noted. As reflected in the Committee Note, the rule is intended to dispense with any need to make a motion to strike inadmissible evidence cited to support a motion for summary judgment. The cited "evidence," for example, might plainly be triple hearsay.

A separate question reflects longstanding drafting dilemmas. Many participants have found it awkward to speak of a "no-evidence" motion as one that includes a statement of facts that are not genuinely in dispute. Part of this reaction may stem from the common local-rule references to a statement of "undisputed" facts. The no-evidence motion does not say that the facts are undisputed in the sense that the movant and nonmovant agree. Instead it says that the nonmovant cannot generate a genuine dispute. What the motion looks like in practice will depend on how the court understands the "showing" referred to in the Celotex opinion. If the movant is allowed to say simply that the nonmovant must come forward in response with enough evidence to carry the trial burden

of production on its claim or defense, there would be little guidance for the response. But draft (c)(2)(A)(ii) requires a statement of "those material facts that the movant asserts are not genuinely in dispute." (c)(2)(D)(ii) allows a showing that an adverse party cannot produce admissible evidence to support "the fact." The direction of the rule, then, is that the movant must identify specific material facts as to which the nonmovant has, but cannot carry, the trial burden of production. The only remaining ambiguity about the "showing" element of the Celotex opinion is whether the movant must do something more to demonstrate that the nonmovant cannot carry the burden or whether it suffices to identify the facts and challenge the nonmovant to carry the burden. Resolution of that ambiguity one way or the other would change the summary-judgment standard as it stands in some courts today.

For all the clarity of purpose, risks of misunderstanding may remain. Professor Gensler prepared a revision of subdivision (c) designed to express the same substance in ways that may be clearer on initial reading. The Committee agreed that this revision should be used as a guide to further reorganization, perhaps in directions that return closer to earlier drafts that were themselves reorganized to achieve the present rather succinct expression.

Specific phrases in the current draft were examined. (c)(2)(D) begins: "A statement or dispute of fact must be supported by * * *." What is a dispute of fact? Perhaps it would be better to say "A motion, response, or reply must be supported * * *."

(c)(2)(D)(1) refers to citations to materials without noting an admissibility requirement. Perhaps it should be "citations to particular parts of materials in the record that are admissible in evidence, including * * *." The difficulty with adding this reference, however, is that "affidavits or declarations" ordinarily are not admissible. "Depositions" may be admissible, but may not. It was agreed that admissibility should not be added.

The required citations are to "parts of materials in the record." It was asked whether this requires separate filing. The history of this version is clear. At the November 2007 meeting the Committee changed a portion of an earlier draft to read: "A party must ~~attach to~~ file with a motion * * *" cited materials not already on file. Then it was concluded that it suffices to require citation to materials in the record — if they are not already in the record, they must be filed with the motion. A participant observed that Rule 56 should not be required to do all the work. Rule 5 describes filing, and includes a direction that most disclosures and discovery materials must not be filed until they are used in the proceeding. "Use" includes citation to support or oppose summary judgment. There is no need to encumber Rule 56 with overlapping directions.

Filing may not be enough. If the record is lengthy and the case complex, it may be important to assemble the materials in a way that makes them readily accessible to the court. At the November miniconference Judge Swain noted that some cases have lists of docket entries that by themselves may run for hundreds of pages; locating materials that in fact have been filed and are in the court record may be a difficult and time-consuming task. Throughout the development of Rule 56, Judge Fitzwater continually championed the use of appendixes of the cited materials and urged the legitimacy of local rules requiring appendixes. This question returned for further discussion later.

Noncomplying motions (note 18): Subdivision (e) addresses a response or reply that does not comply with Rule 56(c), as well as the failure to respond or reply at all. One set of questions addressed to this subdivision ask whether it also should include motions that fail to comply with Rule 56(c).

A version that would include noncomplying motions was included in a footnote for purposes of illustration. The inclusion does not much complicate the rule. It would begin "If a motion, response, or reply does not comply with Rule 56(c) * * *." The list of actions the court might take includes "(2) deny a noncomplying motion [with or without prejudice to renewal]."

Earlier discussions concluded that there is no need to address noncomplying motions. Courts regularly confront motions of all kinds that do not comply with procedural requirements, and have established ways of dealing with them. Summary-judgment motions can be handled as they have been; the need to address defective responses or replies arises primarily from the desire to establish and regulate a "deemed admit" practice.

The first suggestion was that the rule seems "unbalanced" if it does not address noncomplying motions. Noncomplying motions are denied; why not say so in the rule?

This theme was reiterated with a variation. Rule 56(c)(2) establishes the requirements for a motion. If a motion does not comply with the requirements there is no need to go further. But at the same time, it may be important to include noncomplying motions in the rule text as reassurance that the Rule 56 revision is neutral as between movants and nonmovants.

Support was expressed for leaving noncomplying motions out of the rule text, but adding some observations to the Committee Note. The observations might draw from the "one sentence" alternative suggested in the agenda footnote. The single sentence says that the rule text does not address defective Rule 56 motions because courts have general approaches to dealing with defective motions of all kinds, and because there may be a variety of defects that call for different responses. This single sentence might be elaborated by illustrating a variety of defects — making two documents where there should be three; failing to file cited materials not already on file; failure to cite to supporting materials clearly or at all; and compound or unclear statements of fact.

A more positive reason was then advanced for addressing noncomplying motions in the rule text. The rule text presses a nonmovant to make a very long response. It should be clear that the duty to respond can be avoided by attacking the motion for failure to comply with Rule 56(c)(2). Without this reassurance the nonmovant will fear the consequences of not filing a costly but timely response. An obvious alternative is to file a motion to strike the noncomplying motion, but these motions are not popular and courts seldom rule on them. This dilemma is compounded in courts that rule that failure to move to strike waives objections — even to the point of ruling that failure to challenge the admissibility of materials offered to support a motion waives objections to admission at trial.

One response was that the court itself might be pleased to strike a motion that is too long.

A second observation was that the judge would like to have both the response and the argument that the motion does not comply; having both filed within the time to respond avoids delay. Another judge agreed.

It was noted that this dilemma is similar to the dilemma encountered when a nonmovant moves for time to conduct additional investigation or discovery. The draft Committee Note includes advice that a party seeking relief of this sort ordinarily should seek an order deferring the time to respond to the motion. This procedure supports the court's control over the timing question. But a good answer is hard to find.

It was asked whether experience under local point-counterpoint rules shows a need to add noncomplying motions to the rule text. The Committee has heard repeated complaints about motions that include massive statements of undisputed facts, accompanied by "boxes" of supporting materials. Do these courts have a practice of requiring that the motion be trimmed down before imposing the burden of response? An immediate reaction was that a nonmovant should not be allowed to respond by saying only that the movant states too many facts. The bloated statement may not be what the rule is intended to permit, but the Committee has properly abandoned any attempt to set a limit on the number of facts that can be advanced as not genuinely disputed. Complex cases may indeed turn on large numbers of facts. A lawyer then observed the experience that the judge

focuses the parties on the issues before the motion is made. A motion to strike adds nothing to the response, even if the motion is far off the track. Another lawyer observed that focusing by the judge occurs in the actively managed case, the big case.

The final note was that the rule text should not include anything that will encourage motions to strike. The conclusion was that noncomplying motions will not be addressed in the rule.

"Deemed admitted" (notes 19, 20): Local rules adopting the point-counterpoint structure reflected in draft Rule 56(c) also include provisions that a fact is deemed admitted if there is no proper response. Successive drafts of what has become Rule 56(e) in the current version have gradually expanded the place for this practice, but some uncertainties have persisted. Ms. Kuperman has provided a research memorandum on the practice that illuminates some of the issues.

One issue was quickly resolved. Rule 56 drafts have moved away from directing that a response admit or deny a fact to directing that it dispute or accept a fact. A recent draft of the "deemed admit" provision spoke of acceptance, but further reflection suggested that it is more accurate to refer to a failure to respond, or to respond in proper form, as a failure to dispute. This change in (e)(2) was accepted: the court may "consider a fact ~~[as] accepted~~ undisputed for purposes of the motion."

Judge Kravitz noted that the Standing Committee discussion in January led to no clear conclusion. There was concern about considering a fact undisputed when the motion does not cite any support for it. One way to address this would be to add a few words: the court may "consider a fact supported by the record undisputed * * *." The cases do seem to support imposition of adverse consequences for failing to respond, or for responding in improper form. One alternative would be to consider undisputed "a properly supported fact." Inserting "properly," however, faces two obstacles. One is a simple matter of style — who would think that an improperly supported fact should be considered undisputed? That objection need not be fatal; adding "properly" makes clear that the court must undertake some examination of the materials cited to support the fact. But the related objection is more important. "Proper" support is ambiguous. Does it mean that there are, as required, citations to the record? That the cited record materials do in some way support the fact? Or that the cited materials suffice on their own to carry the movant's summary-judgment burden, so that the failure to respond properly means only that the nonmovant has lost the opportunity for examination of other record facts that would defeat the movant's apparently sufficient showing?

The question can be framed as asking whether the trial judge is to be required to do the work that should have been done by the nonmovant in framing a response. Or — and no one has advocated that the judge must undertake an independent examination of all the materials that have been filed in the action, much less ask whether there are unfiled materials that might bear on the motion — should the judge be required to do some lesser part of the nonmovant's work? Or should there be unlimited discretion whether to do any part of the work, or instead to treat the absence of a proper response to a fact asserted by a movant as a default on that fact?

One part of the answer embraced by the draft is clear. It says that the court "may" consider the fact as undisputed. If it is changed to say that it may consider undisputed a fact supported by the record, then the court would have some obligation to consider the record. The extent of the examination, however, would remain uncertain: is apparent support enough, or must the court undertake a full-fledged, if one-sided, summary-judgment evaluation of the materials cited by the movant?

A further complication emerges from the drafting of (e)(3). It says that the court, faced with no response or a noncomplying response, may "grant summary judgment if the motion and supporting materials show that the movant is entitled to it." This language has carried forward from an earlier period when it was intended to say that the court must undertake a full examination of all

the materials cited by the movant to determine whether, absent citation of contradicting materials, they satisfy the summary-judgment standard. It does not fit well with the later addition of the "considered undisputed" provision of (e)(2).

Whatever is made of the reference to record support, it must be clear from the rule text that considering a fact undisputed does not of itself establish a right to summary judgment. The court must still consider the facts established after weighing any proper part of the response and adding facts considered undisputed for want of a proper response, then set the outer limits of permissible fact inference on the basis of those direct facts, and finally determine the legal consequences of these direct and inferential facts.

This duty to determine the consequences of facts considered undisputed was supported as a clear, simple approach. The court does not grant summary judgment simply because some or all of the movant's asserted facts have not been properly disputed. And the court should be required to determine whether the materials cited by the movant at least support its position.

Further discussion emphasized the need to be clear in using the various terms that frame the discussion. Everyone accepts the proposition that the trial judge is not required to examine the record for materials that have not been cited by the parties, to ferret through the record or sniff about for buried truffles. Everyone agrees that failure to respond properly should not be treated as default of the entire action. There is some support for the view that the failure to respond as required by Rule 56(c)(2) should not relieve the court of the obligation to undertake a full summary-judgment examination of the materials cited by the movant. The "deemed admit" practice, however, rejects that view. The rejection could be more or less thorough-going. It might relieve the court of any obligation even to look at the movant's cited materials. Or it might require the court to look at the materials to determine whether they "support" the fact in some measure — a plaintiff's self-serving deposition testimony that the defendant went through a red light does not entitle the plaintiff to judgment as a matter of law because the court or jury need not believe the plaintiff, but it does support the plaintiff's assertion that the light was red. The defendant could have established a genuine issue by doing no more than responding that the cited material does not establish the absence of a genuine dispute, see draft (c)(2)(D). But failing to do so allows the court to consider the fact undisputed if the court finds that appropriate. Looking at the cited materials for support would lead to a different result if the only material cited by the movant-plaintiff is deposition testimony that the light may have been red, it may have been green or yellow, "I don't know." That material does not support the plaintiff's position.

It was asked whether the rule text should attempt to address examination of the movant's cited materials. The rule says only that the court may consider a fact undisputed if there is no complying response. The court's decision will depend on a host of circumstances of the particular case. In most cases the first response is likely to be notice that the nonmovant has failed to respond as required and that failure to comply may lead to consideration of facts as undisputed. Why try to dictate further?

The problem of integrating (e)(2) with (e)(3) was addressed by suggesting that words should be added to (e)(3) to clarify the role of facts considered undisputed: The court may "grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it * * *." One question was whether this addition is unnecessary because "supporting materials" includes both materials cited by the movant and facts considered undisputed. An answer was that it is better to be explicit. The "may consider undisputed" in (e)(2) gives the judge discretion whether to treat a fact as undisputed because there is no proper response. (e)(3) then does different work by recognizing authority to grant summary judgment, but only if warranted by applying the law to the direct facts established according to the summary-judgment standard or considered undisputed under (e)(2), together with the facts that might be inferred on the

basis most favorable to the nonmovant. All agreed to add "including the facts considered undisputed" to (e)(3).

A last suggestion was that the paragraphs of (e) should be reordered to set first the authority to grant summary judgment, then the authority to consider facts undisputed, and then authority to afford a second chance to respond or reply as required by Rule 56(c). This suggestion failed for want of support.

Action on the court's own (note 23): Draft Rule 56(f)(3) recognizes the court's authority, established under present decisions, to consider summary judgment on its own. The court must identify for the parties material facts that may not be genuinely in dispute. Discussion in the Standing Committee last January raised the question whether the procedure should be revised to one in which the court invites submission of one or more motions for summary judgment. The Subcommittee recognized that there is an advantage in inviting a motion because that will trigger the clear procedural framework of subdivision (c). This advantage is described in the draft Committee Note. At the same time, the Subcommittee concluded that the court may wish to move more directly. A common illustration arises when an individual public official moves for summary judgment on the basis of official immunity and the court rules that there was no constitutional or statutory violation. The official's municipal employer did not move for summary judgment because it cannot claim immunity. The court might well suggest that the parties should address the reasons why it should not grant summary judgment for the employer on the basis of the determination that there was no violation at all.

The first question was whether the judge should be directed to identify for the parties material facts that may not be genuinely in dispute. Why not rely on the general obligation to give notice and a reasonable time to respond that applies to all independent actions by the court under subdivision (f)? The notice can identify the claims or issues, rather than specific facts, or, for another example, ask why summary judgment should not be granted for the employer in light of the ruling that the employee did not violate the plaintiff's rights.

One response was that if the court is not inviting a motion, the notice is at least similar to a notice to show cause. The parties need guidance as to what the court thinks important. Perhaps a sentence could be added to the Note observation about the invited-motion alternative, making it clear that the court can either identify facts for the parties or invite a motion. Unless the rule text is changed, however, any such statement would need to be consistent with the rule text on identifying facts.

A different approach was taken by asking whether the requirement of notice inherently demands identification of facts that may not be in genuine dispute, so there is no need for a redundant reminder in (f)(3).

A different question asked why there is any need for considering summary judgment on the court's own, when subdivision (f)(1) allows the court to grant summary judgment for a nonmovant. The answer is that the question may come to the court in a context independent of a motion for summary judgment. An important illustration is Rule 16(c)(2)(E), describing as one of the matters for consideration at any pretrial conference "determining the appropriateness and timing of summary adjudication under Rule 56."

This discussion concluded by leaving the way open for modest expansion of the Committee Note if that is not inconsistent with the more general goal of reducing the length of the Note.

Partial summary judgment (notes 1, 24, 25): The Committee has repeatedly considered the relationship between what have become subdivisions (a) on summary judgment in general and (g) on partial summary judgment. Discussion in the Standing Committee last January again drew

attention to this question. It has been decided repeatedly that there is no need to refer to summary judgment "on the whole action" in subdivision (a). But it has seemed convenient to distinguish subdivision (g) by describing partial summary judgment as a device used when summary judgment is not entered on the whole action.

The first observation suggested that "partial summary judgment" is not a proper label. The motion may be for summary judgment on only a single claim or defense, or even part of a single claim or defense. The court may grant the motion in full without disposing of the whole action, or even disposing of a major part of the action. This observation was expanded. It is useful to adopt a well-recognized and much-used term. Courts and litigants continually refer to "partial summary judgment," even though the term does not now appear in Rule 56. As styled in 2007, Rule 56(d)'s caption refers to "case not fully adjudicated on the motion," and the text begins: "If summary judgment is not rendered on the whole action * * *." The present draft simply builds on the "whole action" term in the source. But it may be misleading for the reasons suggested. Perhaps it would be better to preface subdivision (g) like this: "If the court does not grant all the relief requested by a motion for summary judgment * * *."

The purpose of present subdivision (d) is to encourage orders specifying facts not in genuine dispute even when summary judgment is not appropriate as to all of a claim or defense. That purpose was expressed in the pre-2007 version by saying that "the court * * * shall if practicable ascertain what material facts exist without substantial controversy." Style Rule 56(d) eliminated the unfortunate suggestion of a "substantial controversy" standard different from the "genuine issue" standard of former and Style Rule 56(c), and reduced shall to "should, to the extent practicable * * *." Draft Rule 56(g)(2), freed from the constraints of the Style project, carries the notion of practicability one step further. It says simply that the court "may enter an order stating any material fact * * * that is not genuinely in dispute." This recognizes that summary disposition of individual facts may require great effort by the court without any substantial benefit to the parties at trial, and indeed with some risk that a trial limited by facts taken as established will be distorted.

The question of identifying "partial summary judgment" was carried further. Many situations arise. Summary judgment may be sought on all claims among all parties. But it may be sought only as to one party, even an intervenor. It may be sought as to only one claim. Granting all the relief requested by the motion is partial disposition of the case, but a full grant of the motion.

One suggestion was that the subdivision (g) caption should be changed to "partial grant of motion." As revised to "partial grant of summary judgment, and still later to "Partial Grant of Summary Judgment Motion," this motion carried.

Further discussion led to an interim rejection of the proposal to begin subdivision (g) as "If the court does not grant all the relief," and so on. "[N]ot granted on the whole action" was thought better because it covers the case in which the motion is completely granted but does not dispose of the entire case.

The long-abiding puzzle of the fit of the partial summary-judgment provision with the general summary-judgment provision was brought back for discussion. Subdivision (a) says that the court "should" grant a motion for summary judgment on a claim, defense, or part of a claim or defense. Subdivision (g) says that if summary judgment is not granted on the whole case, the court "should, if practicable, grant summary judgment on a claim, defense, or part of a claim or defense." Why are these not inconsistent, conflicting in the force of the direction to grant summary judgment?

The first response was that it may not be wise to enter summary judgment on part of a claim or defense. It is better to direct only that the court should do this if practicable. A claim should not be "sliced up into little pieces." But what, then, is the intended distinction between "should, if

practicable" grant as to part of a claim or defense, and "may" state material facts not genuinely in dispute? This needs further thought.

Following informal discussions, the doubts about the relationship between subdivision (g)(1) and subdivision (a) prevailed. Subdivision (a) should be the only one that addresses summary judgment on all or part of a claim or defense. "Should grant" will prevail as the standard without any confusion about "should, if practicable" created by draft (g)(1). (g)(1) will be eliminated. The proper focus of subdivision (g) then becomes the discretionary authority to determine that a material fact is not genuinely in dispute. This authority is useful when the court does not grant all the relief requested by the motion. In effect, the relief requested by the motion determines what is "all or part of a claim or defense." To the extent that the court does not grant the motion request, it has discretion whether to determine individual material facts.

This integration is to be accomplished by changing the caption of subdivision (a) as noted earlier: "Motion for Summary Judgment or Partial Summary Judgment." That will be the only reference to partial summary judgment, implicitly identifying it as a motion that does not seek to dispose of the entire action. Subdivision (g) will become a single subdivision without separate paragraphs:

> **(g) Partial Grant of Summary Judgment Motion.** If the court does not grant all the relief requested by a motion for summary judgment it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the action."

The Committee Note may be revised to say that the court can grant a motion in part. It might also express the Style convention that a reference to a motion on "all or part of a claim or defense" authorizes a motion as to all claims and defenses as to all parties. Again, much will depend on the determination as to overall Note length.

Appendix of supporting materials (note 33): The draft rule text, subdivision (c)(2)(D), requires that supporting material be in the record. It does not address the question whether the supporting materials might be gathered in an appendix. The Committee Note observes that the parties may find an appendix useful, or the court may order that the parties prepare one. The next sentence says that the appendix procedure can be established by local rule. This sentence has persisted in the Note in large part due to the repeated urgings of Judge Fitzwater. The Subcommittee has been uneasy about supporting local rules in light of the general ambivalence about local rules and a fear of encouraging a proliferation of rules on this subject. But it concluded that the sentence should remain in the Note.

A lawyer member said that lawyers will appreciate this sentence. "The more guidance on what the court wants, the better." A judge suggested that the sentence will not actually encourage courts to adopt local rules — they will, or not, as they wish. The Committee agreed to retain the sentence.

Judge Baylson moved that, subject to the discussion and the revisions agreed upon, the Committee approve transmission of Rule 56 to the Standing Committee with a recommendation that the proposal be published for comment. The revised draft will be circulated for review by the Advisory Committee on the understanding that there will be no need for a second vote of approval unless a Committee member asks for one. The Committee chair will have the usual authority to accept Standing Committee changes unless in the chair's judgment a change is so fundamental as to require further consideration by the Advisory Committee. [it may be better to omit this sentence.]

The motion to recommend publication was approved, 12 yes and 0 no.

Judge Kravitz concluded the discussion by noting that work remains to be done on Rule 56, but the Subcommittee has done an enormous amount of work very well.

Expert Trial Witness Discovery and Disclosure

Introduction and background: Judge Campbell introduced the Discovery Subcommittee report on discovery and disclosure of expert trial witnesses. This will be the Committee's fourth discussion of these problems. The Subcommittee has worked to great effect in advancing the topic.

One set of issues arises from rather frequent disregard of Rule 26(a)(2)(B) limits on trial-expert disclosure reports. The rule requires a report only if the witness is retained or specially employed to provide expert testimony in the case or is a party's employee whose duties as an employee regularly involve giving expert testimony. A number of courts, however, reasoning that reports are a good thing, have required reports from employee experts who do not regularly give expert testimony.

A related set of issues affect treating physicians. It has proved difficult to draw a line that identifies the point at which a physician's testimony becomes that of an expert retained or specially employed to provide expert testimony. The difficulty may mean that a party who has relied on a treating physician to provide testimony on issues that go beyond treatment finds the testimony excluded for want of a Rule 26(a)(2)(B) report.

The American Bar Association has adopted recommendations on additional questions, urging that discovery be denied as to communications between an attorney and a trial-witness expert and also be denied as to drafts of the Rule 26(a)(2)(B) report. Discovery of these matters, however attractive it may seem in the abstract, has led to practices that impede the most desirable use of experts and at the same time defeat any effective discovery. Parties avoid creating draft reports; they limit attorney communications with trial-witness experts; they retain otherwise unnecessary sets of experts who function only as "consultants," not as trial witnesses; and indulge still other behaviors to ensure that nothing discoverable is created or preserved.

The Subcommittee recommendations address these problems in five parts.

The first part is an addition to Rule 26(a)(2)(A). For any identified expert who is not required to provide a report under Rule 26(a)(2)(B), the party's disclosure must state the subject matter on which the expert is expected to provide expert evidence, and a summary of the facts and opinions. An example of the summary might be: "the cause of the injury was the defendant's product." This disclosure will solve the problem of surprise and should eliminate the trend to require reports contrary to the rule.

The second part is a revision in the list of items required in a Rule 26(a)(2)(B) report. Item (ii) will be revised to read: "the facts or data ~~or other information~~ considered by the witness in forming [the opinions]." "Information" has been one impetus, along with the 1993 Committee Note, toward discovering "information" about the contents of attorney-expert communications and draft reports.

The third part is an addition of a new item (ii) to Rule 26(b)(4)(A): "Rules 26(b)(3)(A) and (B) protect drafts in any form of any disclosure or report required under Rule 26(a)(2)." This extends work-product protection to draft reports.

The fourth part similarly extends work-product protection to "communications in any form between an expert and retaining counsel." But there are three exceptions for communications that can be discovered in the ordinary course — those regarding compensation for the expert's study or testimony, identifying facts or data the expert considered in forming the opinions to be expressed,

or identifying assumptions or conclusions suggested by the attorney and relied upon by the expert in forming the opinions.

The fifth part is the Committee Note.

At the Committee meeting last November there was general acceptance of the proposal to add party disclosure of testimony that is not subject to the report requirement, and also of the proposal to substitute "facts or data" for "data or other information" in Rule 26(a)(2)(B)(ii). The difficult questions have been draft reports and attorney-expert communications.

Costs and failures of present practice: Judge Campbell then presented a chart summarizing the reasons for believing that the proposed amendments will not defeat discovery of significant information that is discovered under present practice. At the same time, many untoward practices will be averted.

The first point is that those who oppose limiting discovery reject the view that the expert witness is properly part of a litigation team. But today's expert is an advocate, influenced by counsel. That will not change, whatever the discovery rules provide.

Adding work-product protection of draft reports and attorney-expert communications will rarely defeat discovery that actually occurs now. Discovery of draft reports occurs only if the attorney and expert are both so inexperienced as to create and preserve them, or in the rare case in which the court orders preservation. Attorneys and experts now go to great lengths to avoid having communications that might be discoverable, so again adding protection will not defeat much discovery that actually occurs now.

The proposals do not limit discovery of other information such as facts and data identified by the attorney and considered by the expert, work papers, and development of the expert's opinions. Further thought must be given, however, to discovery of the scope of the expert's assignment.

The advantages of the proposals are not the mere negative that they will not defeat much discovery that actually happens now. Present practice leads to little actual discovery because the rules lead parties and experts to avoid preparing draft reports, inefficient communications between attorney and expert, duplicate sets of consulting and trial experts, wasted deposition time devoted to generally fruitless efforts to discovery drafts and communications, and occasional fights about discovery of drafts. The proposals will not eliminate all of these costs, but should substantially reduce them. The use of duplicating sets of consulting experts, for example, is likely to be reduced but not likely to be eliminated.

Room remains to worry that the loss of discovery will lead to less restrained behavior by counsel in dealing with trial-witness experts, with unfortunate consequences. But New Jersey lawyers report that this has not been a problem under a rule similar to the proposals.

The proposals, in short, are designed to reduce litigation costs without losing useful information. Many years of continuing effort have not succeeded in significantly reducing discovery costs. Any progress that can be made is important.

Subcommittee members seconded these remarks. These discovery issues are "near and dear to practitioners." The proposals embody a real-world approach to what is happening. Expert witnesses "are not pristine; I do not pay $1,000 an hour for an expert to tell the court how good my opponent's case is." And there are many experts who are professional witnesses. Present practice, indeed, makes it difficult to hire many of the best experts. Even if they might be willing to endure the behavior required to reduce exposure to discovery, discovery of communications about how to be an expert witness makes it impossible to have the communications. And draft reports are not

prepared; lawyers go to great lengths to avoid them. A lawyer may have two or even three sets of experts; the best of them may be assigned to the consultant role. Depositions focus on who the expert talked to, not the basis for the opinions. Such discovery generally is unnecessary; "I've never seen an expert survive cross-examination if the opinion is based on counsel's wishes, not sound expertise."

Another Subcommittee member noted that there was a high level of agreement among lawyers, both those who regularly represent plaintiffs and those who regularly represent defendants. The proposals will not only reduce costs but also enable lawyers to feel better about themselves by dispensing with the behaviors now used to deflect discovery.

A third Subcommittee member noted that the proposals will have "some cost in truth finding," and will generate some line-drawing problems. The savings, however, justify these costs. Problems will remain with the use of experts in settings apart from trial, such as class certification or complex discovery disputes. But the process of developing the proposals has been good. The Subcommittee has dealt thoughtfully with all of the questions and challenges that were put to it.

Judge Kravitz noted that the Subcommittee has approached its work seriously, without an agenda to reach any predetermined result. He also noted that he had been able to discuss these topics with large groups of lawyers whose members include both plaintiffs' and defendants' representatives. They all want "something like this." But this common wish does not of itself justify action. All lawyers want to be free to "speak through their experts." Without more, the proposals might seem to impede truth-finding. Yet there may be little practical loss. We have been told repeatedly that efforts to discover attorney-expert communications and draft reports seldom find anything. And expert witnesses generally will be persuasive, or not persuasive, according to the strength of their opinions. Successful distortions by lawyer influence may be rare. And there may be great practical gain in avoiding the behaviors that are responsible for the general failure of discovery efforts.

Professor Marcus opened the detailed discussion of the proposals.

Party disclosure: The Rule 26(a)(2)(A) proposal for party disclosure of the substance of the opinions to be offered by an expert who is not obliged to give a Rule 26(a)(2)(B) report in one way carries back to the practice before 1993. From 1970 to 1993 a party could use interrogatories to learn the substance of the facts and opinions to be expressed by another party's expert witnesses, and a summary of the grounds for each opinion. The 1993 amendments substituted the more detailed report for experts covered by (a)(2)(B), but omitted any provision for other experts. The present proposal fills the gap, although it has been limited to a "summary" of the expected testimony without also requiring a statement of the "substance." Earlier drafts called for disclosing the substance of the opinions, but "summary" has been substituted in light of concerns expressed at the Standing Committee meeting last January. There is a real concern that treating physicians "may not be forthcoming on substance." The summary gives notice of what is coming. The witness can be deposed.

In response to a style question, it was noted that it is important to say "such" witness in the 26(a)(2)(A) disclosure provision because that limits the category to a witness who may present expert evidence at trial. Without this limit, the rule might seem to require a disclosure as to many witnesses saying that this witness will not provide evidence under Evidence Rules 702, 703, or 705 on any subject.

In response to an observer's question, it was noted that the disclosure covers the subject matter and summary of "expected" testimony because of a concern most readily identified with respect to treating physicians. Many lawyers report that it is difficult to get a treating physician to cooperate during the discovery process. Presumably the party will want to be in communication

before calling the witness; the pre-1993 (b)(4)(A) interrogatory would have required such communication. The proposal is "a middle ground." The Committee Note underscores the need to identify these expert witnesses. In response to the observer's further question, it was stated that it will not be sufficient disclosure to say a physician will testify to "all aspects of treatment" if the party wants testimony on such matters as the prognosis for the next 20 years, the percent of disability, and the cost of future treatment. It also was suggested that a party acts at its own peril in attempting to set out a summary without having squared it with the witness.

The party disclosure proposal in Rule 26(a)(2)(A) was accepted without opposition.

"Facts or data": The New Jersey rule calls for discovery of "facts and data" disclosed by the attorney to the expert. It seems to work well — so well that there has been no case law developing its meaning. The present "facts or other information" and the 1993 Committee Note have supported discovery of attorney-expert communications and draft reports. Changing the term in Rule 26(a)(2)(B) is just a first step toward the 26(b)(4)(A) proposals.

It was asked then is a datum not a fact — why not just refer to facts? Several Committee members responded that "facts" emphasize matters unique, individual to the particular case. "Data" may seem to imply a larger, and perhaps anonymous, aggregation of facts.

This proposal was accepted without further discussion.

Draft reports: The first explanation was that after repeated discussions, it was decided that the protection for draft reports and attorney-expert communications should be provided in Rule 26(b)(4). Although the protection is defined by referring to the work-product protection of (b)(3), two reasons counsel locating the protection in (b)(4). (b)(4) is the general provision for expert discovery; it is where people will look first. And it is easier to work free from the "documents and tangible things" limit in (b)(3) by relying on (b)(4).

The work-product protection for draft reports relates also to the protection for attorney-expert communications — the drafts may be used as part of their communications. The protection extends to drafts "in any form," not only those in the form of a document or tangible thing. The protection includes drafts of the (a)(2)(A) disclosure as well as drafts of the (a)(2)(B) report. Although the door is closed on general discovery, discovery can be had on making the (b)(3)(A) showings of substantial need for the materials and inability to obtain the substantial equivalent without undue hardship. If discovery is allowed on this basis, the court still must protect mental impressions and the like as provided by (b)(3)(B).

The first question admitted to misreading what the draft intends. "drafts in any form of any disclosure or report" was not immediately connected to the intention to expand protection beyond reports in the form of documents or tangible things. It was agreed that an attempt will be made to redraft in an effort to avoid possible misinterpretation by others.

The important question remains whether to extend this protection to draft reports. It was agreed that protection is wise, but asked how will parties and courts draw the line between draft reports and work papers? The Subcommittee decided that work papers should be freely discoverable as essential elements in understanding the evolution — and hence the quality — of the expert's opinions. But the rule will invite experts to mark every paper as a draft report. Some things will readily fall outside the draft report category, no matter what label is attached. Calculations providing the foundation for the opinion are an example. So are the facts or data considered. But "he called me and told me to change it" will fall into the attorney-expert communication, not the draft report protection.

Attorney-expert communications: Proposed (b)(4)(A)(iii) extends work-product protection to all communications between an expert and retaining counsel, but then lists "bullet" exceptions that make three categories of communications freely discoverable. Different words are used to introduce the different categories to indicate different degrees of expansiveness.

The central question whether any protection should be provided for attorney-expert communications was quickly answered. All agreed that yes, protection should be provided.

Retaining Counsel. The first question asked why the limit on discovery addresses only communications between the expert and "retaining" counsel. How about house counsel who is also present? Or lawyers from other firms — perhaps those representing coparties? The draft Committee note urges a "realistic approach * * * in defining the contours of 'retaining' counsel." A sensible understanding of this term will include the range of counsel whose communications with the expert generate the kinds of discovery problems the Committee has been hearing about. "Counsel" alone seems too broad — we want the protection to be somehow tethered to this attorney and this case. Flexibility to accommodate a variety of situations is the goal. And it was difficult to find expanded rule text language that would be reasonably clear. Further suggestions were "the party's counsel," or "coparty counsel." But it was observed that the same attorney may retain the same expert for many cases: we need to protect against discovery of communications in earlier cases that involved a different party.

The possibility of framing a definition of "counsel" was briefly considered and rejected because of the pitfalls that seem to beset efforts to define rule terms. There are only a few definitions in the rules, and some of them have caused difficulty.

Another alternative was suggested: "between a party's expert and counsel." But that might encounter difficulty in the phenomenon that usually it is the attorney who retains the expert, albeit acting as the party's agent.

It was agreed that "the last thing we want is litigation over who is 'retaining' counsel." The Subcommittee will try one more time to see whether a suitable expansion or substitution can be found.

Communications about compensation. The first bullet provides for discovery of communications "regarding" "any" compensation for the expert's study or testimony. "Regarding" is used as broader than "identifying" in the next two bullets. Discovery into the scope of potential sources of bias should be broad. And discovery into other sources of information about compensation is not touched.

It was noted that "any" compensation is a potential trap — it seems more expansive than "the" compensation required to be disclosed in the (a)(2)(B) report. But it was intended to be broader, to reach such communications as "if you do well in this case, I have 15 more cases in which you can be retained." It was agreed that "any" is appropriate if the rule is intended to be this broad.

A Committee member observed that it is proper, at deposition or trial, to ask how much time did the expert spend? What is your hourly rate? Have you testified in other cases for this party? How much money have you made in all? And this remains freely discoverable under the proposed rule — indeed these questions do not even inquire into communications about these matters, only the facts.

A different question asked about the reference to compensation "for the expert's study or testimony." Suppose the expert is also providing consulting services: is that, if not testimony, "study"? If the expert says "I got paid for other things," is it proper to ask what the expert did? Does the exception open the door to that? "Study or testimony" was taken from (b)(2)(B), which

requires that the report include "a statement of the compensation to be paid for the study and testimony in the case." The question was addressed by supposing an expert who is paid $50,000 for trial opinions and $950,000 for "consulting." The answer given by one committee member is that the $950,000 is discoverable. You can ask how much money have you earned from this client. Another member agreed that you lose some protection if you use one expert for both trial testimony and consulting. A third member described the combined-functions expert as moving in a gray area that does lose some protection. A different response was that payment for "study" seems to address directly compensation for consulting in the case. And "compensation" covers the promise of retaining the expert in future cases.

Omission of "in the case," as compared to (b)(2)(B)(vi), was explained by concern to allow discovery of communications in past cases (here again the illustration about promises for future work) and those looking forward to future cases. These examples are covered as communications about "any" compensation.

It was noted that it is common to retain an expert for consultation and then, when the expert's views turn out to be favorable, to make the expert a testifying witness. Discovery should extend to the entire compensation paid for all work.

This discussion led to the question why there should be any limit to compensation for "study or testimony" — why not allow discovery of all communications about compensation? It was responded that it is proper to ask about the compensation, as suggested in the earlier discussion. If the expert has earned $5,000,000 from testifying in cases brought by this lawyer, discovery is useful. But why go beyond to inquire into communications about compensation in those other cases?

A different aspect of "study or testimony" was noted. Large firms engage in the business of providing expert testimony. One firm member may be the actual witness, with compensation figured separately for the witness, while many firm employees do the work that will support the testimony, with compensation figured separately for that work. Discovery properly extends to communications about compensation for all of that "study."

It was asked whether "compensation" is broad enough to clearly cover the agreement to pay $50,000 for this case coupled with a communication suggesting the possibility of earning $950,000 for testifying in 19 future cases. Should it be "compensation anticipated by the expert"? This suggestion was resisted as the likely source of much litigation. And the Committee Note is clear — discovery extends to communications "about additional benefits to the expert, such as further work in the event of a successful result in the present case * * *."

It was observed that a post-dated check should count as present compensation.

A different suggestion was "any compensation or benefits" for study or testimony.

Again it was noted that the protection and the exception address only communications between attorney and expert. The exception applies only to those aspects of a communication that the exception describes. Communications about other things the witness did are not communications about compensation. And questions about the compensation, not about communications, are proper.

The Subcommittee agreed to consider further the language of the compensation exception.

Communications about facts or data. The second bullet exception provides free discovery of communications between retaining counsel and an expert "identifying" "any" facts or data that counsel provided to the expert and that the expert "considered" "in forming" the opinions to be expressed.

"Identifying" facts or data is meant to be broad, but not as broad as "regarding" in the exception for communications regarding compensation. Communications transmitting facts or data should be discoverable; discovery of all subsequent communications about ("regarding") the facts or data, or even other parts of the communication that transmits the facts or data, could easily extend too far, to include to all communications about the opinions to be expressed.

In response to a question it was stated that facts or data "considered" here, as in 26(a)(2)(B)(ii), includes facts or data that the expert did not rely upon to support the opinions to be expressed. This word is used to prevent defeat of discovery by saying "I did not rely on it." The next question asked how can it be that an expert does not "consider" facts or data provided by counsel? Minor examples were noted — the facts or data may be provided in an e-mail attachment or letter the expert never opened, or opened but discarded without reading. More importantly, the expert may be functioning in two roles: some facts or data are supplied for the consulting function, and are not considered in performing the trial-witness function. In addition, a lawyer may furnish a great deal of irrelevant information to the expert, not knowing what is relevant: a deep stack of medical records may be provided to a neurologist, who as expert makes the first determination which records should be considered in forming an opinion.

"Considered" was further questioned by asking whether discovery should extend to communications of facts or data "in connection with" the opinions to be expressed. The response returned to the dual-capacity expert. One expert may both be providing trial testimony and helping to evaluate settlement, prepare for cross-examination, and the like. We do not want discovery of communications directed at these nontestifying functions. "In connection with" could be too broad. "Considered" is the word chosen in (a)(2)(B)(ii), and seems better here.

Continuing enthusiasm was expressed for "in connection with forming the opinions," and also continuing doubts. There is a clear contrast between "considered" and "relied upon" in the third exception addressing assumptions or conclusions the expert relied upon.

This discussion concluded by acquiescence in the conclusion that the choice between "considered" and "in connection with" is a matter of "wordsmithing" that can be left to the Subcommittee.

It also was noted that it is proper to ask why an expert did not consider something, whether fact, datum, or something else. All the proposed rule does is protect against discovery of attorney-expert communications regarding facts or data not considered by the expert in forming the opinions to be expressed.

The consequences of this exception were explored by asking what happens if the expert is asked at deposition about communications of facts or data. The expert gives a detailed answer, but omits a fact or two. The omitted facts are not critical, and may not have affected the opinion. Will this become a basis for excluding testimony at trial? The response was that so long as the facts are in the (a)(2)(B) report there is no basis for exclusion in Rule 37(c)(1).

Assumptions or conclusions. The third bullet exception allows free discovery of communications between an expert and retaining counsel "identifying" "any" "assumptions or conclusions" that counsel "suggested" to the expert and that the expert "relied upon" in forming the opinions to be expressed. Again, "identifying" was chosen over "regarding" for the same reasons as supported the exception for communications "identifying" facts or data. Both "assumptions" and "conclusions" are covered. As compared to facts-or-data communications, this exception addresses only assumptions or conclusions the expert relied upon; discovery as to those discussed but not relied upon would be too broad. And as with the other two exceptions, this one applies only to escaping the general work-product protection for attorney-expert communications. It does not speak to other discovery of assumptions or conclusions relied upon or not relied upon.

An observer commented that it is important to address both "assumptions" and "conclusions." A witness may be told to assume a fact — an assumption — but also may be told to accept a conclusion. The expert might be directed to give an opinion of value that rises to at least $X, or to frame an opinion by assuming the accuracy of a conclusion provided by a different expert.

The first question was whether the exception should be broader than assumptions or conclusions "suggested." Several members suggested that "provided" to the expert would be better. This suggestion was accepted by the Subcommittee.

The next question built on an observation in the draft Committee Note that this exception does not extend to "more general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts." Why not? The generalized response was that extending discovery this far would inhibit lawyers from having freewheeling discussions that may be valuable in improving the ultimate opinions. An example might be: "Would it matter if the light was green? Why? Why not?" Yes, discovery of these discussions might be valuable. But these proposals are designed to address the practical consequences of expansive discovery: the discussions would not occur, and there would be nothing to discover.

Further discussion in the same vein agreed that it would be useful to discover the hypotheticals discussed by counsel and the expert. But the question is what cost is paid for the discovery. "You do not often get it under the present system. They manage not to create a discoverable trail." So the limit to assumptions or conclusions that the expert relied upon is justified.

For similar reasons, the exceptions should not be read to mean that "assumptions" are discoverable as facts or data, governed by the broader scope for things "considered" by the expert. If the expert is told it is a fact, then the communication is discoverable under the broader "considered" standard. But if the expert is told only to assume it to be a fact, the communication is discoverable only if the expert relied on it. The purpose is to protect communications about hypotheticals. As an example: Assume another expert will testify that the braking system was improperly designed. Your task is to testify whether the accident would have happened anyway.

Although this narrowing purpose is accepted, a line-drawing problem will remain. One way would be to delete the qualification added by "considered" to the facts-or-data communications exception, so that free discovery extends to communications "identifying any facts or data that counsel provided to the expert," period, end of sentence. The same argument would be made for dropping "in connection with" if that is substituted for "considered by." In response it was suggested that "assumption" is easier to identify than "facts or data."

The need to allow attorney-expert discussion of hypotheticals free from the fear of discovery returned to the discussion. Limiting discovery to "assumptions or conclusions that counsel suggested to the expert and that the expert relied upon in forming the opinions to be expressed" may not provide protection enough. It might open the door to discovery of all communications about the conclusions the expert will express — counsel might seem to "provide" the conclusion, whatever its origin, by discussing it without rejecting it. The need to allow discovery of such matters as the conclusions of another expert relied upon by this witness expert can be satisfied by allowing discovery only of "assumptions that counsel provided to the expert and that the expert relied upon." The expert has been told to assume the conclusion, making it an assumption for this purpose. "[C]onclusions" will be deleted from this exception.

This discussion concluded with a general observation that addressed all of the (b)(4)(A) proposals. Many lawyers have told the Subcommittee that they regularly stipulate out of the current discovery rules. Three attorney members of the Standing Committee volunteered examples of their

standard stipulations at the meeting last January. Routine bargaining out of the system provides strong reason to doubt its worth.

Agreeing that the source of the assumptions relied upon by the expert should be discoverable, it was suggested that it would be better to delete "suggested" and extend the exception to discovery "identifying any assumptions or conclusions that counsel ~~suggested~~ provided to the expert * * *." The Subcommittee agreed to this change.

Scope of the assignment. The Subcommittee studied a possible fourth bullet exception that would provide free discovery of communications "defining the scope of the assignment counsel gave to the expert regarding the opinions to be expressed." Drafted in this form, the Subcommittee concluded that the exception would authorize open discovery of anything counsel said to the expert. Communications about the conclusions reached by the expert, alternatives considered, and so on might be discovered. And it was difficult to define an alternative exception that would allow important discovery while avoiding undesirable discovery.

The first question posed a hypothetical: Suppose the expert testifies to the market for automobile sales in the United States. Counsel for the other party then asks whether the expert considered the world market? And if not, why not? If the expert wants to say "I did not, although usually I do, because counsel told me not to," what do we do? Part of the response is that the question can be asked as framed, and can also be asked by inquiring into any assumptions counsel provided to the expert. These questions can fully explore the failure to examine the world market. There is little practical reason to be concerned about the prospect of an artificial response: "I always consider the world market, but I did not for this case." "Why not?" "I cannot tell you why not." That response would devastate the expert's credibility. The expert could answer instead "that was not part of my assignment." Failure to provide an exception to the protection of attorney-expert communications on this count only affects the way in which the questions are asked; it does not constrain the ways in which the expert chooses to respond. The lawyer will have to decide whether to limit the assignment in consultation with the expert about the vulnerability of an opinion based on a limited assignment.

Proposals accepted. Discussion of the proposed rule text closed with the conclusion that the Committee had accepted the substance of all the proposals and "ninety-nine percent of the wording." "This is terrific work." Only the draft Committee Note remains for discussion.

Committee Note. Like the Committee Note for Rule 56, the Note for the expert-witness discovery proposals should be examined to determine whether some parts of the valuable information it provides would be better used as part of the memorandum reporting the recommendation to the Standing Committee and transmitting the proposals for publication.

This question was put in a different way. The draft Note is excellent, but "too excellent." It would be helpful to transfer some of the explanation and justification to the report to the Standing Committee. On the other hand, it may be that some of the passages that look like "sales talk" also will provide a useful guide to ongoing practice, as a constant reminder of the realities of litigating behavior that prompted the amendments.

It was concluded that the Rule 56 and Rule 26 Committee Notes will be carefully examined so that the Standing Committee can be reassured that the Committee worked hard to strip out everything that can be deleted.

The draft Note cites a law review article that describes the cases that expand the expert-witness report disclosure in defiance of the rule text, and asks whether it would be better to cite some of the cases. Discussion of this question suggested that it is generally risky to cite cases as authority. Cases may be overruled, or superseded by growth in a different direction. It is less risky

to cite cases not as authority but as illustrations of a problem, including cases that create a problem that should be corrected. There is no risk that such cases will lose their value as note material if they are overruled — most especially if they are overruled by the rule amendment addressed in the Note.

An observer asked an unrelated question: did the Subcommittee consider dropping the requirement that a Rule 26(a)(2)(B) disclosure report must be signed by the expert? The party disclosure proposed for (a)(2)(A) is not signed by the expert. The Subcommittee recognizes that expert testimony commonly involves a collaboration between counsel and the witness. The Subcommittee responded that it had not considered omitting the signature. But the suggestion did not seem wise. The proposed amendments, as the prior rules, recognize the importance of cross-examining the expert on the positions taken by the expert. It is important to maintain the rule that this is the expert's report of the expert's testimony There is value in requiring that the expert at least read and reaffirm the report by signing it. Indeed some Subcommittee members initially resisted the idea of protecting attorney-expert communications, but became reconciled to the protection because it is, in the end, the expert's opinion and testimony. Signing the report is important to keep the expert "on the hook."

The final paragraph of the Note discusses the importance of extending to trial the work-product protection the proposals establish for discovery. This paragraph was included to reassure lawyers that they need not worry that the protection provided in discovery will be undone at trial. There is a risk that absent this reassurance lawyers will continue in all the artificial behaviors they have adopted to thwart discovery, at great cost and with some sacrifice of stronger expert testimony. But the Note offers advice on something that is outside the scope of the rules proposals. The proposals are deliberately confined to discovery. A rule governing trial may seem better suited to the Evidence Rules. There even is some risk that a "protection" at trial might be viewed as a matter of "privilege" for the statute, 28 U.S.C. § 2074(b), that requires that Congress approve any rule creating a privilege. In addition, this paragraph cites as "cf." a Supreme Court decision stating that work-product protection applies at trial of a criminal case. It seems peculiar to cite a decision that is no more than a "cf."; even a "see" citation may be a warning flag. And there is a risk in citing any case to establish a substantive proposition, given the possibility that the case might be overruled.

One approach would be to leave this paragraph in the Note for the time being, with a request that the Standing Committee consider the wisdom of sending it forward for publication.

Approval. Discussion of the expert-witness discovery proposals concluded with a motion that the Subcommittee be permitted to make changes in the rule text in accordance with the Committee discussion and votes; that the revised proposals be circulated to the Committee for information, but not for a vote unless a Committee member requests a vote; and that the revised proposals be submitted to the Standing Committee with a recommendation for publication. The motion was adopted, 12 yes and 0 no.

Time-Computation Project

Common concerns: Judge Kravitz introduced the Time-Computation Project by noting that concerns remain about integrating the effective date of the rules amendments with desirable statutory changes and with the need to allow local rules committees time to integrate local rules with the new time provisions. On the present track, the time-computation amendments will take effect December 1, 2009. The question is whether integration can be achieved by providing clear notice of each step from Standing Committee transmission to the Judicial Conference on through Supreme Court transmission to Congress. As to statutes, it has been hoped from the beginning that the several advisory committees will be able to create brief lists of noncontroversial statutory changes that can be recommended to Congress this year. Some communications from the Department of Justice

seemed to evince skepticism about the feasibility of enacting legislation on this schedule, but current developments in the committees suggest reasons for greater optimism.

Judge Rosenthal reported that she and John Rabiej had visited with staff of the House and Senate Judiciary Committees to discuss a variety of "advance-information" issues. The staffs thought there would be no difficulty in amending some statutes; indeed they were both sympathetic to anything that might alleviate the time-computation agonies suffered by practicing lawyers and optimistic about working on a schedule aiming for an effective date on December 1, 2009.

Judge Rosenthal further observed that the shorter the list of statutes to be amended, the better. The Bankruptcy Rules Committee has a list of 10 statutes, but all involve simply changing 5-day periods to 7. With advice from the Department of Justice, the Criminal Rules Committee has a list of 20 statutes, but 5 of them are on other committees' lists. It remains to be seen whether any of them are controversial.

As to local rules, the Administrative Office is working on a plan and timetable to see how many discrepancies there are between local rules and the new national rules. It will be desirable, if it is possible, to develop a transition plan to assist local rules committees and the bench and bar.

These preliminary observations concluded by noting that there were few comments on the published proposals. No one asked to testify. Subject to integration with statutory amendments and local rules, the project remains on track for adoption in the regular course. It is important that all advisory committees continue to work in harness toward this goal.

Discussion turned to identifying the statutes that might be nominated for amendment. Only one seems to require change. Proposed Rule 72(a) and (b) change from 10 days to 14 days the time to object to magistrate judge orders and recommendations. Because of the change to computing time by counting every day, the increase to 14 days is not an increase at all. Ten days always meant at least 14 days under the former method of computing that excluded intermediate Saturdays, Sundays, and legal holidays. The former computation method applied also to the 10-day period set by 28 U.S.C. § 636(b) for filing objections; the statute now means, and has meant all along, that "10" days means at least 14 days. It is imperative that statute and rule continue to operate in harmony. This statute will be recommended for amendment.

Professor Struve compiled a lengthy list of statutes containing time periods shorter than 11 days. Many of them apply to proceedings in civil actions. At least two of them seem strong candidates for revision, but the reasons for revision do not arise from the Time-Computation Project. 28 U.S.C. § 144 sets the time for filing an affidavit that a judge is biased or prejudiced at "not less than ten days before the beginning of the term at which the proceeding is to be heard." Section 138 directs that "[t]he district court shall not hold formal terms." There is an obvious problem in combining these two statutes, but the subject is sensitive and it may be better for the judiciary to stand back. The removal provisions of the Class Action Fairness Act include a notorious scrivener's error in 28 U.S.C. § 1453(c)(1), setting the time to apply for permission to appeal a remand order at "not less than 7 days." A bill already has been introduced to substitute the manifestly intended "not more than 7 days."

Apart from these statutes, it was decided that no others need be recommended for amendment. Some statutes involve matters of clear political concern, such as those limiting the duration of temporary restraining orders in labor disputes. More generally, Congressional adoption of short deadlines reflects concern that speedy action is required; rules committees are wise to defer to that judgment. Deference might counsel wholesale changes if it were thought that Congress intentionally relied on the Rule 6(a) computation methods in setting deadlines, but that seems unlikely — indeed it is impossible for statutes such as the Norris-LaGuardia Act that were enacted before the Civil Rules came into being. A determination whether to recommend changes, moreover,

would require clear understanding of the many different substantive areas involved in these statutes as well as an understanding of current practice and the realistic needs of practice. There is some reason to doubt whether the direction to compute statutory time periods according to Rule 6 is always remembered and relied upon in practice. One possible reflection is the Federal Deposit Insurance Corporation's comment on the published rules urging that there be no recommendation to change the statutory times relevant to its actions because it already employs the calendar-day approach.

The last problem common to all the sets of rules to be noted was a last-minute question about whether to include state holidays in computing backward-counting periods. The potential problem is easily illustrated. Proposed Rule 6(c) sets the time to file a motion at 14 days before the hearing. A motion set for hearing on a Friday ordinarily should be filed on Friday two weeks earlier. But suppose the Friday for filing is an obscure state holiday little known to lawyers in other states and perhaps eccentrically observed even within the holiday state. Because this is a backward-counting period, filing is due on Thursday, one day early. This could be a trap for the unwary. The Time-Computation Subcommittee struggled over a revised draft that would exclude state holidays only in computing forward-counted periods. In the end it decided that the resulting level of rule complexity would be more costly than the risk of inadvertently late filings. Even the most careful lawyers — and perhaps especially the most careful lawyers — are uncomfortable with complexity in computing time periods. There is little risk that a federal court would be persuaded to treat as untimely a filing caught up in an obscure state holiday; the Rule 6(b) authority to extend will be liberally exercised in this setting. It was noted that the Bankruptcy Rules Committee took no action to disagree, even though the Bankruptcy Rules do have a seemingly mandatory backward-counted period.

The Committee voted to approve the proposed Time-Computation "template" rule, conveniently published as Civil Rule 6(a), with the proviso that the chair can accede to any further changes recommended by the Time-Computation Subcommittee.

Civil-Rules specific concerns: Few concerns specific to the Civil Rules emerged during the comment period.

One comment asked whether the "count every hour" approach will countermand the Committee Note advice that breaks and adjournments should be omitted in applying Rule 30(d)(1), which presumptively limits a deposition to "1 day of 7 hours." The Committee concluded that there is no appreciable danger that Rule 30(d)(1) will be regarded as a "time period" requiring "computing" by this method.

Several comments raised a question about the change from 10 days to 30 days for filing post-judgment motions under Rules 50, 52, and 59. The change was proposed because the former 10-day period, always at least 14 days in practice, was simply too short for filing these motions in many complex cases. Courts have adopted responses to cope with the provision in Rule 6(b)(2) that prohibits extending these periods. One strategy, the simplest and safest, is to defer entry of judgment; the drawbacks are that the court has to be alert to the problem and may feel guilty about this method of subverting the direction that it cannot extend the period. A different strategy is to require timely filing of a skeleton motion, setting an extended time for briefing that will fill out the motion. The reasons for extending the time are strong.

The difficulty with the proposed 30-day period is that it coincides with the time to file the notice of appeal in most civil actions. Appeals may be filed on the same 30th day as one or more post-judgment motions, requiring that the notice of appeal be suspended, only to revive upon the last disposition of any timely filed motion. Revival itself may be a trap because of the need to amend the notice or to file a separate notice if any party wishes to challenge the action taken on the post-

judgment motion. The Appellate Rules Committee's Deadlines Subcommittee believes that it would be better to adopt a period somewhat shorter than 30 days.

Discussion began by renewing enthusiastic support for extending the period beyond 10 or 14 days. A deliberate choice was made in the Time-Computation Project to carry forward the Rule 6(b)(2) provision prohibiting extension of these time periods, fearing the dangers that inhere in attempting to add flexibility to periods related to the "mandatory and jurisdictional" time limits for filing a notice of appeal. Perhaps that question should be reconsidered. Revision of Rule 6(b)(2), however, requires more time than can be devoted in the context of the Time-Computation Project. In choosing a period shorter than 30 days, 21 days is only 7 days longer than was effectively allowed by the former 10-day period. That is not much of an improvement. 28 days would be better; although there are no 28-day periods in the time-amended rules, preserving 7-day increments is attractive. But if 28 days seems too perilously close to the 30-day appeal period, it may be better to fall back on 21 days. Adopting a mid-range compromise such as 25 days would set a period that appears nowhere else and does not have the advantage of fitting with the 7-day increment approach taken in setting common periods at 7, 14, and 21 days.

It was noted that the Department of Justice would always prefer to have more than 21 days, but that it could comply with a 21-day period, particularly if there is some opportunity to expand on the motion in the brief. The appeal period is 60 days in actions to which the United States is a party, but that does not seem to warrant setting different motion periods in Rules 50, 52, and 59 for those cases.

A lawyer Committee member observed that the bar would be grateful even for 21 days; that may be the best choice. A judge suggested that 28 days is better; it is not a big problem if a premature notice of appeal is filed. "Premature" notices, indeed, are a common experience. With CM/ECF, all parties are likely to have virtually immediate notice of all filings.

The need to integrate with the judgment of the Appellate Rules Committee led to resolution on these terms: The Rules 50, 52, and 59 periods will be set at 21 days. But the Appellate Rules Committee will be advised that the Civil Rules Committee would prefer 28 days if the Appellate Rules Committee believes that will not cause undue disruption. (The Appellate Rules Committee met two days later and agreed to the 28-day period.)

The Committee voted to recommend adoption of all of the other rules published for comment as part of the Time-Computation project, changing only from 30-day periods to 28-day periods in Rules 50, 52, and 59.

Rules Published for Comment in August 2007

Apart from the Time-Computation Project, other rule proposals published for comment in August 2007 included amendments of Rules 8(c), 13(f), 15(a), 48(c), and 81(d). A new Rule 62.1 also was published for comment.

Rule 8(c): The proposed amendment of Rule 8(c) would strike "discharge in bankruptcy" from the list of specifically identified affirmative defenses. Bankruptcy judges have been urging this amendment for several years on the ground that statutory changes make void any judgment on a discharged debt whether or not the discharged debtor pleads the discharge as a defense. Continued listing as an affirmative defense is inconsistent with the statutory scheme, and might mislead someone to believe that the statutory protection is lost if the debtor fails to plead discharge as an affirmative defense. Comments by the Department of Justice have argued that the proposed change should not be adopted. The multiple arguments advanced by the Department have so far failed to persuade either the bankruptcy judges who have considered the arguments or the Reporter for the Bankruptcy Rules Committee. Nonetheless the arguments must be taken seriously, and should be

considered with the continuing assistance of bankruptcy judges and the Bankruptcy Rules Committee. Discharge in bankruptcy has persisted in the Rule 8(c) list for many years after the relevant statutory changes without causing any apparent real-world problems. Little will be lost if action on this proposal is deferred one more year in the rulemaking cycle. At the same time there is a prospect that further discussions with Department lawyers may persuade the Department to support the proposal as published. The Committee voted to recommend adoption of the proposal, subject to deferring the recommendation if the Department continues its opposition in the Standing Committee.

The published Committee Note will be changed at least as follows: " * * * These consequences of a discharge cannot be waived; the Bankruptcy Code provisions governing the effect of a discharge are self-executing. ~~If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim.~~" Additional changes may emerge from further discussions with the Department. One possible change would add this sentence: "This amendment does not address pleading by a claimant who believes that a claim is not barred by an adversary's discharge."

Rule 13(f): Rule 13(f) allows amendment of a pleading to add an omitted counterclaim. The published proposal deletes this subdivision. The standards for allowing amendment are expressed in words different from the general amendment standards in Rule 15, but are interpreted to mean the same thing. Apart from this source of potential confusion, courts have remained uncertain whether the relation-back provisions of Rule 15(c) apply to an amendment that adds a counterclaim. Deletion of Rule 13(f) will mean that all amendments are governed by Rule 15, including the relation-back provision. The only comment on the published proposal supported it. The Committee agreed to carry forward with the proposal.

Rule 15(a): Under present practice service of a responsive pleading terminates the right to amend a pleading once as a matter of course. Service of a responsive motion does not terminate this right to amend, which — so long as no responsive pleading is served — persists at least until the court rules on the motion, and perhaps beyond. The published proposal treats a responsive pleading and a motion under Rule 12(b) (e), or (f) in the same way: the right to amend once as a matter of course persists, but only for 21 days after service. Some of the few public comments urged that either a responsive pleading or a responsive motion should cut off this right to amend immediately on filing. The grounds for the comments were the same as those considered by the Advisory Committee and by the Standing Committee in several different meetings. The Committee agreed to carry forward with the proposal.

Rule 48(c): This proposal adds a new subdivision (c) on jury polling to Rule 48. The proposal is modeled on Criminal Rule 31(d), with variations to accommodate the differences between some aspects of criminal and civil procedure. There were no public comments. The Committee agreed to carry forward with this proposal.

Rule 81(d)(2): Rule 81(d)(2) has defined "state" as used in the Civil Rules to include, "where appropriate," the District of Columbia. The published proposal added to the District of Columbia "any United States commonwealth, territory[, or possession]." Among the comments was one by the Department of Justice renewing earlier-expressed concerns about including "possession" in this definition. The Department has not been able to identify any entity that might qualify as a United States "possession," with the possible exception of American Samoa. It fears, however, that reference to a "possession" might be incorrectly interpreted to refer to military bases overseas. Control over these bases is allocated by agreements with foreign countries. The Committee agreed to acquiesce in the Department's recommendation that "or possession" be deleted. It further agreed to carry forward with the proposal as modified, and with conforming changes to the Committee Note.

Approval of Rule 81(d)(2) means that the conditional proposal to add a similar definition to Civil Rule 6(a)(6)(B), published as part of the Time-Computation project, will be withdrawn.

Rule 62.1: Proposed new Rule 62.1 responds to a suggestion by the Solicitor General several years ago. Most circuits have established a procedure for district court response to a motion to vacate a judgment under Rule 60(b) when a pending appeal defeats district-court jurisdiction to grant the motion. The court can defer action, deny the motion, or indicate that it would (or, in some circuits, might) grant the motion if the case is remanded. Many lawyers, however, are not familiar with this "indicative ruling" practice, and some newer district judges also are not aware of it. Proposed Rule 62.1 was refined over the course of several meetings. It was decided that it should be generalized to apply beyond the Rule 60(b) setting, so as to reach any situation in which the district court lacks authority to grant requested relief "because of an appeal that has been docketed and is pending." As the work progressed the Appellate Rules Committee concluded that it would be better to adopt an integrated Appellate Rule, published simultaneously as proposed new Appellate Rule 12.1, so that provisions addressed to action by the court of appeals would be found in the Appellate Rules rather than the Civil Rules.

There were few comments on this proposal. Further consideration of proposed Appellate Rule 12.1 suggests two minor changes in the Committee Note. Rule 12.1 and the accompanying Committee Note focus attention on the distinction between a limited remand that retains control of the appeal in the court of appeals and a remand of the entire action that dismisses the appeal. The Rule 62.1 Committee Note refers in two places to remand of the "action" or "case." These casual references will be changed to refer to remand for the purpose of acting on the motion in the district court.

The path of integration with Appellate Rule 12.1 has led to changes from earlier references to the appellate court to specific references to the "circuit clerk" and the "court of appeals." That means that the Rule does not address the rare but important circumstances of a direct appeal from a district court to the Supreme Court. Discussion of this result led to the conclusion that it is better not even to add a sentence to the Committee Note commenting that the courts will continue to evolve practice pending direct appeal to the Supreme Court as experience shows wise.

The Committee agreed to carry forward with proposed new Rule 62.1 with the changes in the Committee Note.

(After the meeting concluded it was noticed that the version of Rule 62.1 in the agenda materials did not conform in all details to the published version. The variations in the Committee Note are readily conformed to the Note as published. One variation in the published text of Rule 62.1(c) requires a change to conform to the version submitted to the Standing Committee at its June 2007 meeting: "**(c) Remand.** The district court may decide the motion if the court of appeals remands for ~~further proceedings~~ that purpose." Substitution of "that purpose" conforms subdivision (c) to subdivision (a)(3), which refers to the district court's indication of action "if the court of appeals remands for that purpose." It also is better because it clearly refers to a remand in response to the motion and the district court's indicative statement. The more open-ended "remands for further proceedings" could be misread to include circumstances in which the court of appeals retains the appeal, decides on grounds that moot the motion but that require further proceedings for different reasons, and remands. This change was circulated to the Advisory Committee and accepted as the Committee's recommendation.)

Federal Judicial Center Study: Class-Action Fairness Act

Thomas Willging presented the current phase of the Federal Judicial Center Study of the impact of the Class Action Fairness Act on the number of class actions in federal diversity jurisdiction. He began by noting that long ago when the Judicial Conference supported legislation

to use diversity jurisdiction as a means of moving class actions from state courts to federal courts, the Center predicted that the change would bring on the order of 300 additional class actions a year to federal courts. That prediction has proved remarkably accurate.

Figure 1 of the study presents the big picture. During the study period from July 2001 to the end of June 2007, the number of all class actions in federal courts increased by 72%, from 1350 to more than 2300. The largest increase came in "labor" cases, particularly opt-in classes under the Fair Labor Standards Act that are not governed by Civil Rule 23. (Occasionally state-law claims are added when there strong case law, at times in hopes of winning certification under Rule 23.) The next-largest increase was in "consumer protection and "fraud" classes, which are mostly federal-question cases although state-law claims are occasionally added. There is no reason to believe that CAFA affected the increase in these filings. "Contract" cases have increased at a fairly steady pace. The effects of CAFA have appeared primarily in contract actions, state-law consumer fraud actions, and to some degree in property-damage tort claims. The increase attributed to CAFA hovers in the range from 23 to 25 cases a month. This is remarkably close not only to the FJC prediction of 300 cases a year but also to the Congressional Budget Office prediction. The CBO prediction, however, was based on completely wrong foundations. They predicted 300 removals a year, and that all state-court class actions would be removed. They did not know how many class actions there are in state courts. The number is probably impossible to determine for all states, but good numbers are available at least for California; there are still thousands of class actions in California state courts.

Figure 2 shows original diversity filings and also removals. The increase begins immediately after the effective date of CAFA in February 2005.

Figure 3 shows that the origin of diversity cases has changed over time from the enactment of CAFA. Original filings began an upward trend that continues; removals went up, and now are declining. In response to a question, Mr. Willging recognized that the increase in original filings may reflect the choice of plaintiff class lawyers to file in federal court to have the advantage of picking which federal court they prefer, as compared to picking a state court they would prefer only to suffer removal to a less-desired federal court.

Figure 4 shows the percentage changes in original filings and removals on a circuit-by-circuit basis. It must be remembered that percentage changes may be more dramatic than the absolute numbers of cases. The dramatic percentage increase in filings shown for the Eastern District of New York in a later figure, for example, reflects a change from 1 case to 7. The increases are widely dispersed among the circuits; the greatest percentages are shown in courts in the Third, Ninth, and Eleventh Circuits.

Figure 7 shows that contract filings have increased greatly, from 14 a month to more than 30 a month. Consumer-protection actions have tripled, from 3 a month to 9 a month. These are seemingly low numbers that add up over time. The contract actions often involve warranty claims or insurance practices. Hurricane Katrina may figure in the contract claims rates. Tort-property claims have risen from 3 a month to 5 a month. Tort-personal injury classes, apparently the source of the concerns that drove enactment of CAFA, have declined. The decline probably reflects the general disuse of class actions for these actions. The low absolute numbers must be understood, however, in relation to the counting method used for this study. If class actions are consolidated for MDL proceedings or are otherwise consolidated into a single proceeding, they were counted as a single action.

The next phase of the FJC study will look at two samples of pre-CAFA actions and post-CAFA actions. One pair of samples will involve an intense look at diversity cases; the other pair will look at federal-question cases, mostly to determine whether there has been an increase in the addition of state-law claims to federal-question classes. The plan is to report on at least the pre-

CAFA diversity sample at the fall Advisory Committee meeting. Studying the post-CAFA sample may be delayed because it is important to study terminated cases, and many of the recently filed cases may not soon terminate.

It was noted that experience in California state courts may not reflect experience in all states. An intensive study of California filings is being conducted with the help of students from the Hastings College of the Law. Experience so far seems to show an 8% to 10% decline in California state-court filings. The FJC is helping a law student who has taken on a study of class-action activity in Michigan.

It also was observed that at least newspaper reports have indicated that the disfavor of "coupon settlements" shown by CAFA has affected state courts, leading to refusals to approve settlements and insistence on cash payments instead.

Judge Kravitz thanked the FJC for its work and resources devoted to the work. The study is very important for the Committee's continuing responsibilities to monitor class-action developments. The appearance of many new diversity class actions may have a significant impact on the way Rule 23 is used. It may be too early to begin an active Rule 23 project, but active attention remains important. The use of settlement classes has never been dismissed from the agenda, and one day may be a fit subject for possible rule revisions.

Administrative Office Forms

The Director of the Administrative Office has authority to prescribe procedures in clerk's offices. This authority is reflected in Civil Rule 79(a)(1), which directs the clerk to keep a civil docket in the form and manner prescribed by the Director with the approval of the Judicial Conference. Peter MCCabe noted that the Office has been drafting forms since the 1940s. The E-Government Act raised questions about privacy, prompting a review of the forms to determine whether any of them call for information that should not be gathered. The review process turned up 567 forms. A number of them raised questions under the Act and have been corrected.

The forms also have to be changed to keep pace with changes in the relevant bodies of rules. One illustration is Civil Rule 45. Rule 45 is printed on the back of subpoenas; when Rule 45 changes, the subpoena form must be changed.

The Office has asked Joseph Spaniol to restyle the forms used in courts. He has done 33 of what will be a total of approximately 100 forms.

The Civil Rules forms have been posted by the AO on its "outside" website, enabling people to fill them in for use. These forms have never been reviewed by the Advisory Committee. The AO is considering whether the process of generating and reviewing the forms should be changed.

Sealing Subcommittee

Judge Koeltl and Professor Marcus reported on the January 13 meeting of the Standing Committee Subcommittee on Sealing. The Subcommittee was initially created in response to questions about the practice in some courts that omits any reference to a sealed case from the court's docket. This problem has been addressed. But the practice of sealing whole cases remains for further consideration.

The question addressed at the Subcommittee meeting was to define the scope of its further work. Three possibilities were considered. The narrowest would be to look only at fully sealed cases. There are not many of them. The FJC study of sealed settlements worked on a sample of 227,000 cases; only 23 of them were sealed. A broader possibility would be to look generally at materials filed under seal. A still broader possibility would be to study other orders restricting the

dissemination of information. The Civil Rules Committee considered some of these problems several years ago, in large part in response to proposals for "sunshine" legislation, and concluded after extensive work that there was no need for rules amendments at that time.

The Subcommittee decided to deal only with wholly sealed cases. That was the subject that led to creating the Subcommittee. This subject is difficult in itself. It will be necessary to find out just what cases are sealed. Indeed it will be necessary to define what should be treated as a "case" for purposes of the study — should the study extend to things like applications for search warrants or grand-jury reports? Going further to explore standards for sealing parts of cases, the proper use of discovery protective orders, and the like, would be a complicated and difficult undertaking.

The Federal Judicial Center will assist the Subcommittee by studying how many cases are being sealed, and why.

Sunshine in Litigation Act

Judge Rosenthal reported that legislation pending in the Senate would affect Rule 26(c) protective orders by requiring specific findings that the order does not affect the public health or safety, or that any effect on the public health or safety is outweighed by the need for privacy. If any protective order is justified, the court is required to limit it to the narrowest protection needed to protect the identified privacy interests. The same process must be repeated when the case ends to determine whether the protective order should survive.

The legislation addresses sealed settlements in similar terms.

The Advisory Committee has concluded there is no need for such legislation, drawing in part on a valuable study conducted by the Federal Judicial Center. There is no substantial ground to conclude that protective orders, or sealed settlements, deny the public knowledge of products, conditions, or persons that pose a risk to public health or safety. Absent any general need, the legislation is a bad idea. It would impose heavy burdens on the courts — indeed, given the proliferation of discovery materials as electronically stored information yields ever greater volumes of material, the burdens could become unmanageable. Apart from the burden on the court, discovery practice would be impeded. Parties unable to rely on protective orders would delay or impede discovery in many ways, both imaginative and confounding.

Similar legislation has been introduced in many Congresses. This time it has been reported out by the Senate Judiciary Committee and has bipartisan support. Careful communications with Congress on this topic will be important.

Future Work

Judge Kravitz raised the question of future Committee work. The Committee continually reminds itself that it may be appropriate to avoid a work schedule that brings revised rules every December 1. The bench and bar had to absorb the e-discovery rules in 2006 and the Style Rules in 2007. 2008 brings a respite, with only one technical conforming amendment of a Supplemental Rule. 2009 will bring the Time-Computation Project changes. On the present schedule, both summary judgment and expert witness discovery amendments will take effect in 2010. Perhaps 2011 will turn out to provide another respite from change. But urgent needs for change might emerge that require prompt action, or some minor amendments will seem achievable without causing any need for significant adjustments in practice. However that proves out, the process of generating, refining, and adopting rules changes seldom takes less than 3 years and often takes much longer. It is always important to pursue the Judicial Conference's § 331 duty to "carry on a continuous study of the operation and effect of the general rules of practice and procedure."

One item that will be on the agenda for the fall Committee meeting is last year's pleading decision in the Twombly case. Judge Kravitz noted that the Twombly decision was discussed at length by a distinguished panel at the Standing Committee meeting last January. The materials submitted for discussion by the panel have already been cited in a published opinion. The Standing Committee likely will want the Advisory Committee to examine many possible variations of amended pleading rules as experience develops under the influence of the Twombly opinion. The illustrative pleading Forms appended to the rules also will deserve reconsideration. It seems too early to begin serious drafting looking toward proposals to publish in 2009. But it is not too early to begin initial consideration of what possibilities might be explored. The Federal Judicial Center is thinking about possible ways to measure the frequency of motions on the pleadings and the frequency of granting the motions. As with all other topics on which they have done empirical research to support Civil Rules amendments, any help they can provide will be most welcome. A preliminary overview will be on the Advisory Committee agenda next fall.

Professor Gensler has suggested that the Committee investigate the advisability of adopting a national rule on privilege logs. Practice under Rule 26(b)(5)(A) is now governed in large part by local rules. That may not be a good thing. Loss of privilege for failure to comply with one local rule can easily mean loss of the privilege for all purposes. The national rule sends no message, or perhaps mixed messages, on questions like the time to provide the privilege log. It would be useful to learn whether practitioners find problems in this area. One Committee member observed that the subject at least deserves consideration. Privilege-log practice is intertwined with e-discovery, which has effected a sea change in dealing with privilege and privilege logs. Compiling privilege logs is the biggest expense in discovery today; it can easily run up to a million dollars in a complex case. A second member concurred — privilege logs are a source of huge expense, satellite litigation, and traps for the unwary. It was agreed that Professor Gensler will prepare a memorandum to support further inquiry.

It was further suggested that Professor Marcus should carry on his exploration of the ways in which the e-discovery amendments are working out with an eye to determining whether there are problems that need to be fixed. Professor Marcus pointed out that evaluating the development of e-discovery practice will be a difficult task. "Big bucks are involved." One widely quoted estimate is that annual revenues for consultants on e-discovery compliance will soon reach four billion dollars. Privilege logs are an example. The rule has stood unchanged since 1993. Some vendors of e-discovery products say that it is easy to compile a log if only you buy their product. It is difficult to get reliable, dispassionate advice on e-discovery in general. It may be equally difficult if the focus is narrowed to privilege logs. "Looking hard may be a good thing, but it will be hard to do anything."

The perspective shifted a few degrees with the observation that it is a good idea to begin looking at these topics. But the "shifting sands" problem is always present. Evidence Rule 502 is at least well on the way to adoption by Congress. One impact may be that the resulting protection against inadvertent privilege waiver will increase the pressure to reply promptly to discovery requests, affecting the time to prepare a privilege log. Technology changes, whether in hard- or software, could change still further both practice and the problems of practice. There is no question that the time will come when it is important to look hard at all aspects of e-discovery. The first challenge will be to know when the time has come. It may be too soon now. Dissatisfactions are bound to arise now, but the need will be for a systematic inquiry. The "when" and "how" of the inquiry remain uncertain. It may be premature to designate a Subcommittee until the Committee has a good view of the landscape as a whole.

A Committee member agreed that the passage of time will be beneficial. The e-discovery rules have been good. Their intersection with things like privilege logs has had a material effect on

the economics of law practice. Large firms now have "staff lawyers" or "contract lawyers" who work full time reviewing documents for privilege and responsiveness. The expense is substantial. It is an unusual dynamic.

Another Committee member noted that consulting firms are growing up. They offer services directly to general counsel, at a stated price per page. These consulting firms may take the place of staff lawyers or contract lawyers hired by law firms.

It was noted that the American College of Trial Lawyers is funding research into the actual cost of discovery. The project is just beginning, but it may provide information about the cost of privilege logs.

Thomas Willging noted that the Federal Judicial Center has "a pretty full workload," but might be able to assist a discovery project. The 1997 survey that supported earlier discovery amendments might provide a model.

These discovery topics will be considered further at the fall meeting.

On other topics, an observer noted that the American Bar Association Litigation Section is studying the desirability of working toward uniform pretrial orders. Some courts require a lot of make-work. The study may conclude that pretrial conferences should be held closer to trial, after rulings on summary-judgment motions. It was noted, however, that experience with Rule 16 amendments has shown a great deal of judicial sensitivity about pretrial practices. Many judges will resist changes that interfere with their preferred habits.

The suspended project on simplified procedure also was brought to mind. There is a continuing perception that many cases in the federal courts would be better governed by less searching and less expensive procedures. There is a related perception — for some a fear — that simplified procedures might bring to federal courts more federal-question claims for small damages. Experience with local "tracking" rules that have sought to assign some cases to more expeditious and less expensive procedures seemed discouraging when the simplified-procedure project was actively considered. Perhaps it would be useful to design a conference to consider the question whether the Civil Rules have developed into a system that is "just right" for an intermediate range of cases, but too expensive and cumbersome both in the oft-discussed "large" "complex" cases and also in actions for potential recoveries that cannot support huge outlays on costly procedure. The Committee was reminded that RAND did a study of experience under the Civil Justice Reform Act. The "multiple tracks" approach was not recommended. Since then, litigation has grown more complex and costly. Judges have no desire to increase either cost or complexity. Much of the difficulty arises from the fact that many cases include at least one party that wants to promote obfuscation. Another Committee member noted that the source of much contention and cost is disclosure and discovery, "the fight over access to the underlying proof."

Next Meeting

The fall meeting likely will be held in Washington. If Rules 26 and 56 are published for comment, it seems likely that there will be requests to testify at the public hearings. It may be wise to schedule three hearings, with the expectation that two may suffice. The Committee meeting might be scheduled for November, giving enough time after August publication to enable some participants to prepare. November hearings, however, are too early for most organizations — the sources of many helpful comments — to prepare. A November hearing is most likely to be useful when the Committee wants an early sense of public reactions that will support preparation for the later hearings, including developing alternatives that might be discussed at the later hearings. The date will be set soon on consideration of all Committee members' calendars.

Adjournment

The Committee, having finished all agenda items, voted to adjourn.

Respectfully submitted

Edward H. Cooper
Reporter

TAB 3

Item 3 will be an oral report

TAB 4

NOT DEAD YET

RICHARD MARCUS*

Over thirty years ago, Jack Friedenthal proclaimed a "crisis" in federal rulemaking.[1] Starting about fifteen years ago, this same crisis attitude began to crop up from many sources. In 1988, Congress had intervened in the rulemaking process and made it more open.[2] By 1994, Charles Alan Wright spoke of a "malaise" of the federal rulemaking process and reported that he was "gloomier about the status of the rulemakng process than [he] had ever been."[3] Professor Mullenix foresaw that the Advisory Committee on Civil Rules might go "the way of the French aristocracy."[4] A few years later, Professor Walker found "the most serious challenge to the procedural status quo since the adoption of the original Federal Rules in 1938."[5] Eight years ago, Professor Bone found that "today the court rulemaking model is under siege."[6]

Although the crisis clamor seems fairly universal among academics, there is some dissonance about the nature of the crisis. Professor Geyh, who worked

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Since 1996, I have served as Special Reporter to the Advisory Committee on Civil Rules, and drew to some extent on this experience in preparing these remarks. But these views are mine and not presented on behalf of the Advisory Committee or anyone else.

This piece is significantly based on work that I have published elsewhere. *See* Richard L. Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. (forthcoming 2008) [hereinafter Marcus, *Confessions*]; Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901 (2002) [hereinafter Marcus, *Reform*]; Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993) [hereinafter Marcus, *Of Babies*].

1. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 676 (1975).

2. *See* Judicial Improvements and Access to Justice Act, Pub. L. 100-702, § 407, 102 Stat. 4642, 4652 (1988) (codified as amended at 28 U.S.C. § 2073 (2000)); *see also infra* note 41 and accompanying text.

3. Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 9 (1994).

4. Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

5. Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1271 (1997).

6. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888 (1999).

with the House Judiciary Committee during part of the period of reported crisis, wrote that there was "a startling transformation of the judiciary's role" due to the more active role of Congress.[7] Professor Yeazell saw the problem as isolation of the rulemakers, who are now mostly judges, from the users of court services, the lawyers.[8]

The cause of the crisis also may be debated. Professor Geyh attributed it to the "Watergate mentality" of the last thirty years,[9] while Professor Bone thought that it resulted from "the rise of procedural skepticism during the 1970s."[10] Professor Burbank noted that certain specific amendments—particularly the 1983 changes to Rule 11—created a "poisonous environment" for rulemaking.[11] Professor Resnik perceived a pervasive loss of faith in the whole project of adjudication.[12]

In sum, the topic on which we were invited to comment–federal rulemaking–comes surrounded with a great deal of negativity. As one who has been involved for over a decade in the persisting effort to accomplish things through federal rulemaking, I come before you with a simple message: it's not dead yet. And I think it's not about to die.

To support that view, I want to make four points. First, the Big Bang of the 1930s was unprecedented, and we will not see its like again. Second, much of the recent pessimism has resulted from academic dislike of certain constraints introduced in the last quarter century on the central Liberal Ethos of the 1930s revolution; and the result is often a case of the quest for the perfect drowning out the acceptance of the good. Third, the federal rulemaking activity has important structural advantages that will not go away. Finally, there is evidence—particularly the recent E-Discovery rulemaking episode—that shows the federal apparatus is not dead, either as an innovator or as a leader.

I. The Big Bang

We have all been brought up on the notion that the procedural Big Bang happened in the 1930s with the adoption of the Federal Rules of Civil Procedure. As Professor Leubsdorf has pointed out in *The Myth of Civil*

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7. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996).

8. Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 231 (1998).

9. Geyh, *supra* note 7, at 1167.

10. Bone, *supra* note 6, at 891.

11. Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 227-28 (1997).

12. *See generally* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

Procedure Reform, we may overestimate the significance of that event in terms of changing the practices of courts and the experiences of litigants.[13]

But it is hard to overstate the applause this Big Bang has received from the highest echelon of legal academe. Professor Hazard called the Federal Rules "a major triumph of law reform."[14] Professor Yeazell said that the Federal Rules "transformed civil litigation [and] . . . reshaped civil procedure,"[15] adding that the Rules were "surely the single most substantial procedural reform in U.S. history."[16] Professor Shapiro opined that "they have influenced procedural thinking in every court in this land . . . and indeed have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure."[17] Professor Resnik found that they even "became a means of transforming the modes of judging."[18]

More than the Field Code managed in the mid-19th century, the Federal Rules swept the land. Most states adopted procedural codes modeled on the Federal Rules for their own court systems, often copying them virtually verbatim and retaining the same numbering.[19] The Federal Rules even cast a long shadow over those states which did not copy its provisions. California, for example, continues to operate under the Field Code that was originally adopted in 1872, but the application of those code provisions has shifted with the tide of the Federal Rules' times.[20] Code pleading in California is probably

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13. *See* John Leubsdorf, *The Myth of Civil Procedure Reform*, *in* CIVIL JUSTICE IN CRISIS 53 (Adrian A. S. Zuckerman ed., 1999).

14. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989).

15. Yeazell, *supra* note 8, at 233.

16. *Id.* at 248.

17. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989).

18. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 934 (2000).

19. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (examining the widespread copying of the Federal Rules).

20. Thus, although California remains a code state, its courts have adopted the same sort of liberal attitude towards the requirements of the code as the federal courts did after 1938 with regard to the Federal Rules. Thus, for example, we are told that "California's discovery system is generally less restrictive than the federal courts." WILLIAM R. SLOMANSON, CALIFORNIA CIVIL PROCEDURE 168 (3d ed. 2008). As the Supreme Court of California said in *Greyhound Corp. v. Superior Court*, 15 Cal. Rptr. 90 (Cal. 1961):

> The foregoing code sections, although substantially adapted from the federal rules of discovery, are not copied verbatim therefrom. . . . The importance of those alterations is that almost without exception they were made for the express purpose of creating in California a system of discovery procedures less restrictive than then employed in the federal courts.

less demanding than current practice in the federal courts.[21]

At the heart of this Big Bang was an attitude I have labelled the Liberal Ethos—that suits should be decided on their legal (substantive) merits and that procedure should be a Handmaid in that process.[22] The Handmaid notion was not a new idea in the 1930s. To the contrary, it lay at the heart of nineteenth century reform efforts in England.[23] But as Professor Subrin has pointed out, the Federal Rules pursued the central concept more vigorously and further,[24] particularly in accomplishing a revolution with the introduction of broad discovery.[25]

The combination of relaxed pleading, broad discovery, and deference to jury trial[26] created a procedural arrangement unknown in the rest of the world. Coupled with dramatic developments in American substantive law after World

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15 Cal. Rptr. 90, 98 (Cal. 1961).

21. Thus, in keeping with traditional code attitudes, CAL. CODE CIV. PROC. § 425.10(a)(1) requires that a complaint contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language." But the California courts do not enforce this fact pleading provision with the enthusiasm that was common a century ago. In *Reichert v. General Ins. Co.*, for example, the Supreme Court of California explained:

> While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms.

442 P.2d 377, 387 (Cal. 1968). When I was a practicing lawyer in California in the 1970s, it was widely believed that defendants had more success challenging the sufficiency of complaints in federal courts than in state court. Certainly the U.S. Supreme Court's recent decision in *Bell Atlantic Corp. V. Twombly* shows that the trend is not toward a more demanding attitude in federal court. 127 S. Ct. 1955 (2007); *see infra* text accompanying notes 54-58. For a discussion of the relationship between federal and California pleading requirements, see DAVID I. LEVINE, WILLIAM R. SLOMANSON & ROCHELLE J. SHAPELL, CALIFORNIA CIVIL PROCEDURE 137-53 (3d ed. 2008).

22. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439-40 (1986).

23. *See* Marcus, *Of Babies*, *supra* note *, at 780-82 (describing the nineteenth century reform movement in England).

24. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

25. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

26. We must not forget that for most of the mid-twentieth century the Supreme Court expanded the application of the Seventh Amendment right to jury trial. *See, e.g.*, Ross v. Bernhard, 396 U.S. 531, 532 (1970) (holding that there is a right to a jury trial in a shareholder's derivative action even though derivative actions were originally creatures of equity); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959) (holding that a district court may not sequence a trial so that "equitable" issues are tried first when that might foreclose resolution of those same issues by a jury).

War II—particularly in tort law, but also in statutory enactments—the new American procedure produced a litigation juggernaut unknown elsewhere in the world. In part, this juggernaut responded to a peculiarly American desire for both comprehensive governmental protections from harm and American antagonism toward concentrated governmental power.[27] Whether or not one embraces the private attorney general notion, it became ingrained in a significant measure of American litigation.

The key point of this familiar terrain for present purposes is that this sort of thing does not happen often. Indeed, it probably does not happen even twice a century. So anyone who wants to compare the present to our past is almost certain to conclude that the present comes up short. And that is a good thing. Those of us who spent our college years hearing applause for the idea of "continuous revolution" have (mostly) concluded in our more mature years that continuous revolution is more likely to be destructive than constructive.

II. Discontents of the Present: Academic Unhappiness with Recent Reform

One reaction to the Big Bang would be that it put in place a new arrangement that should remain untouched, or at least untouched by rulemakers. Intelligent and informed observers continued into the 1980s to urge that the best thing to do would be to leave the Federal Rules alone.[28] Actually, the rulemakers continued to work on their innovations, and a number of changes were made during the 1940s. Indeed, when *Hickman v. Taylor*[29] was pending before the Supreme Court in 1947, the Court also had before it a proposal to amend the rules to provide for treatment of work product.[30] On that occasion, the Court acted by decision rather than by adopting a rule change.

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27. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 15 (2001):

> American adversarial legalism, therefore, can be viewed as arising from a fundamental tension between two powerful elements: first, a *political culture* (or set of popular political attitudes) that expects and demands comprehensive governmental protections from serious harm, injustice, and environmental dangers—and hence a powerful, activist government—and, second, a set of *governmental structures* that reflect mistrust of concentrated power and hence that limit and fragment political and governmental authority.

28. *See* Marcus, *Of Babies*, *supra* note *, at 761 (reporting views of prominent Manhattan lawyer that "[t]he worst thing they ever did for civil litigation was to create a standing committee on the civil rules.").

29. 329 U.S. 495 (1947).

30. *See* Richard L. Marcus, *The Story of* Hickman*: Preserving Adversarial Incentives While Embracing Broad Discovery*, *in* CIVIL PROCEDURE STORIES 307, 313-15 (Kevin M. Clermont ed., 2004).

Maybe it would have worked to leave the Federal Rules unamended and to rely on judicial interpretation to supply needed details and evolutionary development. For whatever reason, Chief Justice Warren discharged the Civil Rules Committee in the mid 1950s,[31] and Congress then insisted that there be a committee established to give continuous study to the rules and recommend changes.[32] The Advisory Committee, re-established in the 1960s, adopted changes to Rule 23 in 1966 that contributed to a new revolution—the class action juggernaut.[33] Interestingly, in doing so it arguably overstepped the bounds of its procedure-making authority as those are now conceived, but delicacy on that front was not prominent in the 1960s. As the 1960s closed, the discovery rules also received a makeover that removed whatever constraints had been included in the 1930s.[34]

By 1970, the rulemaking process had reached the apogee of the Liberal Ethos. Building on the foundation provided by relaxed pleading (implemented by the Court's decision in *Conley v. Gibson*[35] in 1957) and the discovery provisions that were further unleashed by the 1970 amendments and strengthened by the 1966 amendments to Rule 23, the new American procedural arrangement stood ready to provide—in synergy with innovations in American substantive law in areas such as products liability, employment discrimination, and environmental and consumer protections—a true litigation juggernaut. All of this met with general enthusiasm in the academy.

The American litigation arrangement was not received with enthusiasm in all quarters, however. One noteworthy quarter is the rest of the world. As Professor Subrin has noted, with respect to discovery, a common foreign reaction to American practices is—"Are we nuts?"[36] Many countries adopted blocking statutes to prevent American discovery from being done within their

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31. *See* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1006, at 37 (3d ed. 2002) (reporting that "on October 1, 1956, the Court entered an order discharging the Advisory Committee.").

32. *See id.* § 1007, at 37-38 (describing reaction to the discharge of the Advisory Committee and passage of a statute that required the Judicial Conference to establish a body to study changes in procedural rules).

33. For discussion of the debates that attended the 1966 adoption of amendments to Rule 23, see John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking*, 24 MISS. COLL. L. REV. 323, 333-45 (2005). For a discussion of the reaction to the Rule 23 amendments in the courts, see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

34. *See generally* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) [hereinafter Marcus, *Discovery Containment*] (chronicling the expansion of discovery to 1970).

35. 355 U.S. 41 (1957).

36. Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

borders.[37] Although the American system had features that other countries found interesting, our jury trial—particularly when coupled with lax American rules on compensatory and, more pointedly, punitive damages—excited astonishment. Thus, when the American Law Institute undertook to design proposed Transnational Rules of Civil Procedure, it left out jury trial and broad discovery, and it consciously rejected relaxed pleading in favor of more stringent fact pleading.[38]

On the domestic front, there was a reaction also. I use the word "reaction" consciously, because the reaction can be described as "reactionary." That, indeed, has been the commonplace academic reaction to this reaction. The domestic reaction was, not surprisingly, prominent among repeat defendants who felt overburdened by litigation. For any except those convinced that plaintiffs are, as a group, much more likely to advance legitimate positions than defendants, this fact should not be too troubling. Others were troubled, however. Chief Justice Burger and Attorney General Griffin Bell, for example, were prompted by such "defense" reactions to endorse constraints on discovery.[39]

There followed a number of bouts of rule reform—in 1980, 1983, 1993, 2000, 2003, and 2006. These reforms largely involved efforts to constrain or focus litigation based on experience under the wide-open 1970 version of the Federal Rules. At least some of the reforms—such as the 1983 amendment to Rule 11—were quite dubious. But for most, the reaction far outdid the actual change.

The recurrent tenor of academic commentary—as captured in the opening paragraphs of this essay—is disapproval. There seem to be at least two strands to that disapproval. The first might be called process-oriented. Many emphasize that the process of making procedural change has been "politicized." Beyond a doubt, something of that sort has occurred. In the 1960s, the Reporter was told to keep what he was doing secret until the Advisory Committee was ready to announce proposed changes.[40] By the

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37. *See* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 153-54 (1999).

38. *See* AM. LAW INST./INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (Cambridge Univ. Press 2006) (2004).

39. *See* Marcus, *Discovery Containment*, *supra* note 34, at 752-55 (describing the 1976 Pound Conference assurances by Chief Justice Burger that revisions of the discovery rules would be considered, and the role of the Department of Justice, under Attorney General Bell's leadership, in developing those changes).

40. *See* Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991):

> I have been told by one of my predecessors [as Reporter of the U.S. Judicial Conference Advisory Committee on Civil Rules], the late Al Sacks, that he was

1970s, that era of secrecy was passing, and the 1988 legislation buried it entirely by requiring that Advisory Committee meetings be open and that there be advance notice of what would be discussed.[41] Beginning in the 1990s, the Advisory Committee convened conferences to solicit suggestions for rule changes and reactions to proposed amendments.[42] Throughout, opportunities for interested participants to know what the Committee is considering and to express views has increased.

Besides being what Congress insisted upon, this openness might be seen as a good thing. Indeed, "accountability" is a favored catch-word nowadays, so this process would appear to be desirable because it would provide additional accountability. Yet the process-based critique often seems to regard the "political" consequences of the shift to increased public access to rulemaking as bad. Frankly, it is difficult to credit the process-based criticism as a free-standing one. The basic objection is the second one—by and large, academics don't like the changes that have been made during the period of openness.

It is beyond doubt that the rule changes that have been made since 1970 have mainly sought to constrain and contain the genie released by the Federal Rules and the changes made before 1970. For those who wholeheartedly embrace the Liberal Ethos, that is a retrograde direction for change. Yet all should appreciate that even the Liberal Ethos must recognize *some* limits; if one appreciates that any change is likely to improve the lot of some and weaken the position of others in this zero-sum game, that feature matters only for those who begin with the presumption that some groups—defendants or plaintiffs, for example—are to be preferred. The rules process does not begin with that presumption, and continues to resist purely self-interested arguments for change.[43]

To my mind, the most striking aspects of the objections to recent rule changes have been (1) that they often seem to focus on the wrong things, and (2) that they often misjudge the things on which they do focus.

Often the critics of rule-change packages focus on features that are less important than others they disregard. For example, in 1993 the proposal to

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> instructed to keep his work entirely under wraps until the committee was prepared to make a recommendation. This practice reflected, of course, the traditions of judicial institutions accustomed to keeping their adjudicative deliberations to themselves.

Id. at 164.

41. *See* 28 U.S.C. § 2073(c) (2000) (requiring that there be advance notice of meetings, that meetings be open to the public and that minutes of such meetings be maintained and open to the public as well).

42. See Marcus, *Reform*, *supra* note *, at 917-19 for a discussion of this point.

43. *See* Carrington, *supra* note 40, at 165 (noting that self-interested arguments get a deaf ear).

introduce initial disclosure raised an unprecedented ruckus.[44] But by the time it was finally adopted, initial disclosure had been watered down and was subject to a local opt-out right that permitted individual districts to decide not to adopt disclosure. Frankly, it was not a big deal, even though it prompted a legislative effort to rescind the change that came within one vote of success. The big deal in 1993 was the package of expert disclosure and discovery provisions, which has had a major impact. Even now the Advisory Committee is studying ways to deal with, and perhaps to constrain, aspects of that discovery change. But there was hardly a peep about expert disclosure and discovery provisions between 1991 and 1993.

Somewhat similarly, between 1998 and 2000 the outcry about the package of discovery rule amendments focused on the minor revision to the scope provision of Rule 26(b)(1). As we have recently been told, this change "has been universally criticized by legal scholars."[45] Outside the academic sphere, it was also severely attacked. A member of the Standing Committee labeled this change "revolutionary."[46] Frankly, it seems that this was much ado about almost nothing. The Committee Note about the change emphasized that it was a minor revision.[47] A sensible reaction would be to say, "This is no big deal." Certainly that is what experience has shown. Thus, Professor Rowe, who argued and voted against the change as a member of the Advisory Committee, soon found that it had made no demonstrable difference in decisions,[48] and federal judges continue to intone that discovery is extremely wide.[49] The big

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44. *See* Marcus, *Of Babies*, *supra* note *, at 805-10 (describing the controversy in 1991-93 about initial disclosure).

45. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1186 (2005).

46. *See* Committee on Rules of Practice and Procedure, Minutes of Committee on Rules of Practice and Procedure, June 18 & 19, 1998, at 23, *available at* http://www.uscourts.gov/rules/minutes/june1998.pdf:

> One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as "revolutionary." He said that they would "throw out" the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions.

47. *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendment (noting, "The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision.").

48. *See* Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 (2001).

49. *See* Breon v. Coca-Cola Bottling Co., 232 F.R.D. 49, 52 (D. Conn. 2005) ("The definition of relevance continues to be liberally interpreted even after changes to Rule 26 in 2000."); *see also* Fisher v. Baltimore Life Ins. Co., 235 F.R.D. 617, 622 (N.D. W. Va. 2006)

deal in the 2000 amendments package was its handling of initial disclosure, which was recalibrated to be limited to information the disclosing party might use as evidence, and which was made nationally binding. Although that got the attention of district judges,[50] it received very little attention otherwise.

I have several reactions to these reactions to the rule-amendment experience of recent years. The first is that in this politicized environment almost everything is poisoned by suspicion; the most mundane of changes provoke strident over-reactions from those who suspect a malign hidden agenda.

The second reaction is more important: there has been no real retreat from the core views of the Liberal Ethos. To the contrary, the theme has been to preserve the basic structure but to constrain it somewhat. Arguably, the Alternative Dispute Resolution (ADR) movement of the 1980s could have introduced a new paradigm of conciliation that might have replaced the litigation-oriented Liberal Ethos, but it has not. To the contrary, (except for efforts to undercut class actions with arbitration clauses[51]) the ADR impulse has seemed to weaken in the last decade. Perhaps that is, in part, due to second thoughts among business litigants about the attractions of arbitration. But it would be hard to say that the ferocity of litigation has disappeared, or even abated. The judicial management movement, which has come under much criticism,[52] really looks more like a way to generate some control over the otherwise unfettered latitude of counsel.[53]

A third reaction is important as well: rule changes are not the only way that shifts in direction can occur. Rules are subject to interpretation and enforcement by courts. The most recent Supreme Court term emphasizes that such interpretation can change. For our purposes, the most notable decision is probably *Bell Atlantic Corp. v. Twombly*,[54] which appeared to jettison the statement in *Conley v. Gibson*[55] that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

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(saying that discovery rules are given a broad and liberal treatment); Anton v. Prospect Café Milano, Inc., 233 F.R.D. 216, 218 (D. D.C. 2006) (saying that the term "relevance" is broadly construed).

50. *See* Marcus, *Reform*, *supra* note *, at 915 (quoting apoplectic objections from judges).

51. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

52. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (arguing that more active judicial management of litigation creates threats to judicial impartiality without producing gains in efficiency).

53. *See* Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT'L & COMP. L. REV. 3 (2003).

54. 127 S. Ct. 1955 (2007).

55. 355 U.S. 41 (1957).

prove no set of facts in support of his claim which would entitle him to relief."[56] In *Bell Atlantic*, the Court declared that,

> [A]fter 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.[57]

In part, the Court said that it felt that being demanding about pleading requirements was warranted because of the prospect of broad discovery if the claim was not intercepted before that occurred.[58]

In a related vein, consider *Scott v. Harris*,[59] holding that summary judgment should be granted for the defendant in a suit by a motorist severely injured when police pursuing him rammed his car and caused a single-car accident. The Court's ruling was based on a videotape of the police pursuit that persuaded it that the defendants' decision to ram plaintiff's car was reasonable.[60] The Court found the chase was "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."[61] Under these circumstances, the Court ruled, plaintiff's assertions that he was in full control of his vehicle did not present a genuine issue, and the Eleventh Circuit's decision affirming the denial of summary judgment for the defendant was wrong:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
>
> That was the case here with regard to the factual issue whether [of] respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction.[62]

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56. *Id.* at 45-46.
57. 127 S. Ct. at 1969.
58. *See id.* at 1966-67.
59. 127 S. Ct. 1769 (2007).
60. *Id.* at 1775-76.
61. *Id.*
62. *Id.* at 1776. In dissent, Justice Stevens argued that "[t]his is hardly the stuff of Hollywood." *Id.* at 1783 (Stevens, J., dissenting). He elaborated:

;b Relying on a *de novo* review of a videotape of a portion of a nighttime chase

Thus, it may be that the Court will further broaden the authority of judges to intercept weak cases rather then leaving them to jury decision.

In sum, these two decisions underscore the extent to which the actual operation of rules—while heavily influenced by their content—is hardly entirely determined by their content. Particularly for those who might have urged that the Federal Rules not be touched and left to evolve under judicial interpretation,[63] there may be reason for caution. More generally, there is plenty of room for skepticism about politicized hot-button responses to relatively minor rule changes that don't significantly alter the fundamental Liberal Ethos of the rules.

A final reaction is that the academic response of the present seems almost entirely conservative, in the sense that it opposes all change as inimical to the Liberal Ethos. But if leaving the rules unchanged is not a full protection against such developments (as the Court's recent decisions suggest it may not be), it seems odd to use unhappiness with very minor amendments as a ground for losing faith in the rules process. Besides judicial action, the alternative, it must be remembered, is legislative action. Perhaps there are those who see the Private Securities Litigation Reform Act[64] (PSLRA) and the Class Action Fairness Act[65] (CAFA) as such signal improvements on what the Advisory

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> on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him."
>
> ;b Rather than supporting the conclusion that what we see on the video "resembles a Hollywood-style car chase of the most frightening sort," the tape actually confirms, rather than contradicts, the lower court's appraisal of the factual questions at issue. More important, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.

Id. at 1781-82.

63. *See supra* text accompanying note 28.

64. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.) (revising pleading standards for securities fraud suits and imposing a discovery stay until plaintiffs have satisfied heightened pleading standards).

65. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (expanding federal-court jurisdiction to prevent plaintiffs from filing class actions in state courts

Committee has done that they show the Committee's day has passed. But for those who don't see the legislation that way, or who don't revel in the Court's handling of such issues under the current rules, perhaps another look at the existing rules apparatus is in order. At least the minor disappointments some rule changes have produced among academics should be balanced against the prospects of much more aggressive changes that could come from other sources. The adage that the perfect is the enemy of the good may apply here.

III. Reasons Why the Federal Rules Will Continue to Be Important

Professor Oakley tells us, based on an updated review of state courts' adoption of the Federal Rules, that "the FRCP have lost credibility as avatars of procedural reform. Federal procedure is less influential in state courts today than at any time in the past quarter-century."[66] Professor Koppel assures us that "[t]he 'top-down' federal rules model for achieving inter-state uniformity has failed."[67] On top of the widespread academic criticism of the Federal Rules,[68] this erosion of the Rules' following among states may be a further example of the demise of the entire project.

I don't think the project is in its death throes. For one thing, as I will explain below, the Federal Rules have taken the lead on what has been, for the bar, the most prominent litigation topic of the last decade—E-Discovery. Besides the E-Discovery experience, I think there are at least three reasons why the Federal Rules process enjoys advantages that will make it continue to be the biggest game in town, even if it is not as big a game as it was in the past.

First, the federal courts are a nationwide court system, and there is a federal court in every state. No other rulemaking body (unless you count Congress) can control the procedure in courts of more than one state. True, the Conformity Act,[69] and the Process Acts before it, abjured this natural position of leadership by requiring federal courts to adopt some form of conformity with state practice.[70] But so long as the federal courts retain a basically consistent procedural system nationwide, there will be a natural tendency for that system to influence the way the states handle their procedure. As noted

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that are allegedly unduly receptive to granting class-action status). *See also* Richard Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. (forthcoming 2008).

66. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2003).

67. Koppel, *supra* note 45, at 1173.

68. *See supra* text accompanying notes 34-38.

69. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197.

70. *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035-42 (1982) (describing experience under the Process Acts and the Conformity Act).

above,[71] in California the handling of pleadings under the code pleading statute has evolved to resemble the federal approach, even to exceed the federal approach in laxity. In some surprising ways, federal procedure has continued to influence the California courts. Thus, a recent article in the legal press reported that CAFA[72] has affected California state judges: "Although the federal law doesn't apply in state courts, legal experts say California Superior Court judges are following suit and using extra caution before approving coupon settlements."[73]

This structural advantage will probably be increasingly reinforced by the growing nationalization of at least some forms of law practice. Indeed, the adoption of the Rules Enabling Act[74] was opposed in part on the ground that it would facilitate multistate practices by permitting lawyers from large firms in big cities to walk confidently into federal courts across the land.[75] Certainly "national" practices today have far eclipsed those of seventy years ago, and this development has reinforced the prominence of the procedures of the national court system.

Of course, the states may decline to follow the federal lead. California offers examples of that. Recently, the California Legislature was asked to adopt a class action bill that was said to modify California class action practice to resemble federal practice, and it was rejected.[76] Similarly, some time ago

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71. *See supra* note 21 and accompanying text.

72. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

73. Rebecca Beyer, *Coupon-Based Settlements Get Tougher*, L.A. DAILY J., May 29, 2007, at 1.

74. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2000)).

75. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2009 (1989). Professor Subrin quotes a West Virginia lawyer, who opposed the adoption of the Rules Enabling Act, in part for the following reasons:

> [A] firm in a great city may represent a railroad, or an industrial company doing business in many states[;] if the procedure in the Federal Courts is uniform this city firm can, itself, conduct the main parts of the litigation and reduce the local lawyers substantially to filing clerks and advisors on jurors. Uniformity, therefore, increases the influence and importance of the great city firm, having as its head, perhaps, some business man masquerading as a lawyer, with his partners of first and second magnitude, law clerks, process servers, runners, etc.; would correspondingly reduce local practice, local ability and local pride and drive the practice of law further on the downward road from a profession to a business. . . . Uniformity would further augment the importance of large aggregations of men and depress the individual.

Id. (citing Letter from Connor Hall to Editor, American Bar Association Journal (Oct. 15, 1926) (on file with Library of Congress, Legislative File 1913-1933).

76. Assem. B. 1505, 2007-08 Leg., Reg. Sess. (Cal. 2007). This bill would have replaced

California, by judicial decision, chose to follow the Supreme Court's *Celotex*[77] rule on the showing required of a moving party seeking summary judgment,[78] and the Legislature responded to the objections of plaintiffs' lawyers by amending the summary judgment statute to require at least seventy-five days notice of a motion, thus offsetting somewhat the reduced showing.[79] But if anything, these examples underscore the abiding leadership role of federal procedure.

Second, the federal courts have an institutionalized and highly expert rulemaking apparatus. The Administrative Office of the Unites States Courts has a Rules Committee Support Office with a professional staff of long experience and high expertise. Each of the five Advisory Committees has a Reporter who has long experience. The Standing Committee on Rules of Practice and Procedure provides leadership and direction. Together, these people have a powerful institutional memory, and increasingly the work product of this institutional activity is available online for any who want to use it. As academics, we know that the federal rulemaking experience has been the topic of many articles. There simply is no similar procedural rulemaking apparatus elsewhere in this country.

One feature of this apparatus that should be emphasized is that it is independent and relatively apolitical. True, it may be said to be more responsive to the judiciary than some would prefer. But the judiciary itself is an independent branch of government and, despite lobbying, the rulemaking process has not displayed anything like the sorts of partisan or otherwise political traits that one would find in Congress or a state legislature.

Third, the federal rulemaking apparatus has access to the Research Division of the Federal Judicial Center (FJC), a unique resource. Access to empirical information is central to effective rulemaking nowadays. Fifteen years ago, Professor Burbank called for a moratorium on further federal rulemaking

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CAL. CIV. PROC. CODE § 1781 with a new provision and added several new sections to the CAL. CIV. PROC. CODE, including § 383 that tracked FED. R. CIV. P. 23. Gov. Schwarzenegger's office wrote to the Legislature favoring passage of the bill, noting that because California's class action statute dated from 1872 it "has largely been shaped through an ad hoc approach by court rulings." Letter from Brent J. Jarmisch, Deputy Director of Legislation, Governor's Office of Planning and Research, to Nancy Parra, Assemblywoman, California Assembly (May 4, 2007) (on file with author). In contrast, the bill "builds on the foundation laid in the federal rules." *Id.* On May 7, 2007, a committee of the California Assembly defeated the bill after it was opposed on the ground that it was "anti-consumer." *See* Cheryl Miller, *Lawmakers Reject New Class Action Rules*, RECORDER (S.F.), May 9, 2007, at 1, 5.

77. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

78. *See* Union Bank v. L.A. County Super. Ct. (*Demetry*), 37 Cal. Rptr. 2d 653 (Cal. Ct. App. 1995) (adopting *Celotex*, 477 U.S. at 317, as the rule for California).

79. *See* CAL. CIV. PROC. CODE § 437c(a).

pending development of an empirical component.[80] For a long time, and increasingly, the FJC has supplied the Advisory Committee with detailed and informative empirical information about the actual functioning of the federal court system.[81] In recent years, the existence of the OSCAR system of electronic recordkeeping for the federal courts has meant that much of this research can be initiated online for virtually all federal courts. This facility has enabled the FJC to become even more precise and comprehensive, and therefore helpful to the Advisory Committee. Although some states may make similar efforts, and the National Center for State Courts attempts to develop empirical information, it is unlikely there will be another resource to compare to the FJC's abilities any time soon.

IV. A Recent Example—E-Discovery

I said that E-Discovery was the most prominent new issue in American litigation in the last decade. For many academics, that may seem surprising; most law professors have not attended closely to this topic. But lawyers have. Since 2000, there have been about two CLE events per week in this country about E-Discovery.[82] The sums spent on outside vendors of E-Discovery services have soared, and estimates have placed the figure for 2007 at $2.8 billion.[83] Worries about the costs of this form of discovery and the risk of sanctions for loss of electronically stored information have fueled a new form of practice. Some law firms have E-Discovery departments and there is at least one law firm founded to deal only with E-Discovery issues.[84]

The federal rulemaking process has taken the lead in dealing with E-Discovery.[85] In 1996, the Advisory Committee on Civil Rules launched its

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80. *See* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993).

81. *See* Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002).

82. *See* Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 11 & n.48 (2004) (describing FJC compilation of information on E-Discovery CLE events).

83. *See* Richard L. Marcus, *E-Discovery and Beyond: Toward* Brave New World *or* 1984?, 236 F.R.D. 598, 607 (2006).

84. *See, e.g.*, Jake Wildman, *E-Discovery: Discovering a New Practice*, CALIF. LAWYER, July 2008, at 26 (reporting that some firms have established formal E-discovery practice groups); Janet H. Kwuon & Karen Wan, *High Stakes for Missteps in EDD*, N.J.L.J., Dec. 31, 2007, at E2 (asserting that "it is unclear to what extent e-discovery can be considered a specialized substantive expertise in the same vein as, for example, patent law").

85. More detail on the background on the Federal Rules development of a response to E-Discovery maybe found in Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004).

Discovery Project, which was designed to survey and address problems with discovery. This effort led the Committee to convene conferences of lawyers to discuss discovery issues. The one new topic that emerged from these conferences was that discovery of electronically stored information was the "big new problem" that nobody had noticed yet. As of 1997, when these reports first began to surface, that was true. The Advisory Committee was not familiar with the problems, much less solutions, and nothing to deal with this form of discovery was included in the package of amendments that went forward in 1998.

Beginning in 2000, the Discovery Subcommittee of the Advisory Committee worked to acquaint itself with the issues raised by E-Discovery and their possible solutions. The Chair of that Subcommittee and I attended a leadership meeting of the ABA Section of Litigation and presided over an "open mike" session concerning E-Discovery issues. Many who buttonholed us during the meeting urged that rule amendments be adopted to emphasize to clients that discovery responses had to include electronically stored information. The Subcommittee enlisted the FJC to do research on the extent and nature of E-Discovery problems. Ken Withers—who had a unique command of these issues—joined the FJC around this time and contributed to its work. The Subcommittee also held two conferences to learn from lawyers (including representatives of lawyer organizations) and "techies" about these issues. The upshot at that time was that the nature of the problems was not clear, and the nature of appropriate rule responses was even less clear. Thus, although the discussion included a list of possible rule changes that might be helpful, no further action was taken.

Beginning in late 2002, the Committee returned its attention to E-Discovery. After reviewing responses to a letter inviting comment from lawyers around the country, the Subcommittee began an arduous drafting effort to try to distill plausible rule responses to these issues. Again, the FJC provided important assistance. After extensive review of these amendment ideas, the Committee convened a major conference on E-Discovery in February 2004 to discuss a range of issues.[86] Drafting on possible amendments began in earnest after that conference, leading to publication of a preliminary draft of proposed amendments in August 2004 and very extensive public comment and hearings through February 2005.[87] The summaries of the public comments and hearing testimony filled about 200 single-spaced pages. Using this input, the Committee returned to several key areas and revised the

86. Transcriptions of most of the proceedings of this conference were published in the Fordham Law Review. *See* 73 FORDHAM L. REV. 1-152 (2004).

87. The sign-ups for the final hearing—in Washington, D.C., in February 2005—were so numerous that an extra half day had to be added to enable the Committee to hear from them all.

proposals that had been published for comment. The revised amendments were approved by the Judicial Conference, adopted by the U.S. Supreme Court, and went into effect on December 1, 2006.

The point of this tale is that the multi-year federal effort has provided an unequaled basis for rulemaking. As a result, it has shaped proposed state-court responses. E-Discovery is not the sole preserve of the federal courts. To the contrary, it is increasingly true that business and institutional (and much personal) information is available only from electronic sources. Already, divorce lawyers are honing in on electronic sources for evidence,[88] and personal injury lawyers are likely to wake up to this source of information soon, not the least because medical records are increasingly maintained mainly or only in electronic form. For states, therefore, the same sorts of issues will be important.[89]

How then should the states approach those issues? One answer, of course, would be to follow the federal lead. And that is exactly what has happened in at least two extremely important efforts to design procedures for state courts to use in dealing with E-Discovery. First, the Conference of Chief Justices in 2006 promulgated Guidelines for state courts handling E-Discovery issues, which "should be considered along with the other resources cited in the attached bibliography including the newly revised provisions on discovery in the Federal Rules of Civil Procedure . . . ."[90] The Guidelines themselves repeatedly draw on federal sources. For example:

> Guideline 1B, defining "accessible information" is "drawn [from] pending Federal Rule 26(b)(2)(B).[91]
>
> Guideline 2 on the responsibilities of counsel to be informed on E-Discovery issues "is drawn from the Electronic Discovery

88. *See, e.g.*, John Simerman, *Lawyers Dig Into FasTrak Data*, OAKLAND TRIB., June 5, 2007, at 1 (describing subpoenas for electronic data on use of payment devices for use of bridges in the San Francisco Bay Area in marital litigation).

89. For example, the Conference of Chief Justices' Guidelines for E-Discovery, discussed below in text, include the following observation:

> Until recently, electronic discovery disputes have not been a standard feature of state court litigation in most jurisdictions. However, because of the near universal reliance on electronic records both by businesses and individuals, the frequency with which electronic discovery-related questions arise in state courts is increasing rapidly, in all manner of cases.

CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION vi-vii (2006).

90. *Id.* at vii.

91. *Id.* at 1.

> Guidelines issued by the U.S. District Court for the District of Kansas" and also relies on Federal Rule 26(f).[92]
>
> Guideline 3 on agreements by counsel combines the approaches of the Federal Rule 26(f)(3) and a standard adopted by the U.S. District Court for the District of Delaware.[93]
>
> Guideline 4 on an initial discovery hearing "is derived from Electronic Discovery Guidelines issued by the U.S. District Court for the District of Kansas."[94]
>
> Guideline 6 on form of production is based on Federal Rule 34(b).[95]
>
> Guideline 7 on allocation of discovery costs is based on the analysis of a leading federal case.[96]
>
> Guideline 10 on sanctions "closely tracks" Federal Rule 37(f).[97]

The foregoing enumeration does not list all the ways in which the Conference of Chief Justices' work product builds on or follows the federal lead, but should suffice to make the point.

In 2007, the National Conference of Commissioners on Uniform State Laws (NCCUSL) developed draft Uniform Rules Relating to the Discovery of Electronically Stored Information.[98] The Prefatory Note acknowledges the that the Federal Rules are the foundation for these draft Uniform Rules:

> [T]his draft mirrors the spirit and direction of the recently adopted amendments to the Federal Rules of Civil Procedure. The Drafting Committee has freely adopted, often verbatim, language from both the Federal Rules and comments that it deemed valuable. The rules are modified, where necessary, to accommodate the varying state procedures and are presented in a form that permits their adoption as a discrete set of rules applicable to discovery of electronically stored information.[99]

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92. *Id.* at 2.
93. *Id.* at 3.
94. *Id.* at 4.
95. *Id.* at 6.
96. *Id.* at 7 (citing Zubulake v. UBS Warburg L.L.C., 216 F.R.D. 280 (S.D.N.Y. 2003)).
97. *Id.* at 11.
98. *See* NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFO. (2007).
99. *Id.* at 2.

The E-Discovery experience depended on and displayed the Federal Rules' structural advantages. Because the Federal Rules apparatus engages in continuous study of issues affecting litigation nationwide, it may identify salient developments sooner than state courts do. Thus, it focused on E-Discovery more than a decade ago. Because the Federal Rules apparatus includes access to the FJC, it was able to bring singular expertise to bear on these issues. Because "cutting edge" procedural problems often emerge in federal court, various federal courts were innovating to deal with E-Discovery and could lend that experience to the effort of designing Federal Rule amendments. Because the Federal Rules amendment process involves public comment from across the country, it benefitted from reactions from all parts of the country in refining the ultimate rule amendments. And because those amendments now apply in federal courts in every state, it makes sense for the states to deal with these new issues in a similar way. Both the Conference of Chief Justices and the NCCUSL work product seem to recognize those natural advantages of federal rulemaking.

V. Conclusion—Not Dead Yet

So the federal rulemaking effort is not dead yet. To the contrary, in the last decade it has provided key leadership in addressing the most prominent new litigation issue, E-Discovery. But the era of Big Bangs is probably past, and that is probably for the best; any who grew up in the Atomic Age should beware Big Bangs. Perhaps it is time, however, for carping academics to realize that the basic core of the Liberal Ethos has not been abandoned or undermined, and also to appreciate that other sources of rules for litigation are not necessarily more sympathetic to their plaintiff-friendly views. We will not have a Golden Age of rulemaking again, but we are not entering the Dark Ages either.

JUSTNESS! SPEED! INEXPENSE! AN INTRODUCTION TO "THE REVOLUTION OF 1938 REVISITED: THE ROLE AND FUTURE OF THE FEDERAL RULES"

STEVEN S. GENSLER*

After taking effect in 1938, the Federal Rules of Civil Procedure (Federal Rules) have had a rather amazing seventy-year run. Their adoption fundamentally transformed the landscape of federal procedure. Out went the era of conformity to oftentimes inflexible and technicality-bound state court practice.[1] In came the era of uniform federal procedures modeled after flexible equity practices.[2] But it was not just federal practice that was transformed. Since 1938, the core tenets of the Federal Rules—including notice pleading, liberal amendments, and liberal discovery—have exerted a strong influence on the state-court procedural landscape as well.[3] As the original rulemakers had anticipated,[4] the Federal Rules ended up setting something of a national model for court procedures. Of course, not all states have adopted that model, and even in states that have done so, generally the state rules can vary significantly

* President's Associates Presidential Professor, University of Oklahoma College of Law. Unlike the selected presenters, I did not earn my participation in this symposium; the privilege of introducing the symposium papers is mine solely because I served as Chair of the AALS Civil Procedure Section for 2007. Since 2005, I have served as a member of the Advisory Committee on Civil Rules. In this introduction, I speak only for myself and not for the Section or for the Advisory Committee. Thanks go to Ed Cooper and Tom Rowe for reading a draft of this paper. The errors and heresies that follow are, of course, mine and mine alone.

1. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1039 (1982) (describing practice under the Conformity Act of 1872).

2. *See* Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987).

3. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986); *see also* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989) ("The Federal Rules have not just survived; they have influenced procedural thinking in every court in this land . . . and indeed have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure.").

4. *See* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 307 (1938); *see also* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2005-06 (1989).

in certain areas.[5] But any such variations are inevitably compared to the Federal Rules and judged against them.

Seventy years is a long time, maybe even a lifetime. I don't mean to make a eulogy. The Federal Rules remain in effect, and indeed just emerged from a badly-needed makeover.[6] But all eras end. And for (at least) the past three decades, both the Federal Rules and the federal rulemaking enterprise have been beset with criticism.[7] Some have suggested that the status of federal rulemaking as a reform leader reached its zenith years ago and has since suffered from a long decline.[8] Is it really possible that we have seen, or are presently witnessing, the end of an era?

That question sets the stage for the topic the Executive Committee selected for the 2008 Annual Meeting Section Program. Proceeding from the recent criticisms of the Federal Rules and federal rulemaking, and following up the suggestion that both are past their prime, the Executive Committee issued a Call for Papers on the following topic: *"The Revolution of 1938 Revisited: The Role and Future of the Federal Rules."* We broadly defined the topic as questioning whether the Federal Rules and the federal rulemaking process were still equipped to lead rules reform in the United States.[9]

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5. *See* Oakley & Coon, *supra* note 3, *passim* (listing degree of conformity for each state); *see also* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2002) (finding that the trend was against conformity as the states failed to adopt the more recent amendments to the Federal Rules).

6. *See* FED. R. CIV. P. 1 advisory committee's note (discussing purpose and principles of the Style Project). Not everyone agreed that the makeover was needed, or a good idea. *See, e.g.*, Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155 (2006). I think the project was important and that its long-term net benefits will be substantial. But that's a question that can't be fully answered for another ten years at least, and even then the assessment will necessarily be impressionistic given that most of the costs and benefits will not be tracked and that many of them—e.g., improved understanding—will defy measurement in any event.

7. Professor Marcus chronicles a representative swatch of these criticisms in his contribution. *See* Richard Marcus, *Not Dead Yet*, 62 OKLA. L. REV. ____ (2008) [hereinafter Marcus, *Not Dead Yet*]. For a more detailed discourse on the rulemaking "crisis," see Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U.L.Q. 901, 908-12 (2002) [hereinafter Marcus, *Reform*].

8. *See, e.g.*, Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1173 (2005) (arguing that the "top-down" model of procedural reform has failed to achieve the goal of national—including inter-state—uniformity); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 801-02 (1991) (tracing "demise" of federal rulemaking to the 1988 Judicial Improvements and Access to Justice Act, which "politicized" rulemaking by granting the public access to the rulemaking process).

9. The full text of the Call for Papers read:

Alternatively put, if one accepted that the Federal Rules had been leading the way for the last seventy years, what was the outlook for the next thirty years? From an impressive group of submissions, the Executive Committee selected three papers for presentation at the annual meeting. They are introduced here in the order in which they were delivered at the AALS program.

Professors Rex Perschbacher and Debra Lyn Bassett lead us off with their paper titled *The Revolution of 1938 and Its Discontents*.[10] Directly taking on the challenge posed in the Call for Papers, they assess the current state of rulemaking and conclude that the Federal Rules developed in 1938 were a product of their time and that their "moment" is over.[11] To be precise, Perschbacher and Bassett contend that while the 1938 rules perfectly captured the yearning of that era to refocus on getting to the merits, they now chafe against the modern obsession with case management and judicial efficiency.[12] As Perschbacher and Bassett see it, the Revolution of 1938 ended when the dominant litigation value stopped being to advance disputes to the merits fairly (and efficiently) and turned into "ending litigation at all costs."[13] Perschbacher and Bassett invoke the imagery of the French Revolution, equating the

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> 70 years ago, the Federal Rules changed the landscape of civil litigation. Procedure in the federal courts became uniform and adopted a flexible, notice-based model that contemplated liberal access to discovery. Over time, most states followed suit. Some have called this the Golden Age of Rulemaking.
>
> What will the next 30 years of rulemaking look like? What should they look like? From pleading standards to discovery to summary judgment practice, there is no shortage of critics of the federal model. And, increasingly, questions are raised about the extent to which state practice should continue to follow the lead of the Federal Rules. States might adopt different practices out of a belief that the state and federal courts hear different types of cases and are designed to do different things. States might adopt different practices in a spirit of local experimentation, supplementing or even displacing the federal rulemaking process as the leader in innovation and reform. Or, states might simply depart from the Federal Rules model out of a belief that the federal model proceeds from flawed first principles. Different models of judicial federalism could support very different conclusions about the proper interaction between state rulemaking and federal rulemaking.

Ass'n of Am. Law Sch. Section on Civil Procedure, Call for Papers (June 12, 2007) (on file with author), *available at* http://www.concurringopinions.com/archives/2007/06/another_aals_ca_1.html. [NTA: IS THIS DATE AND THE NOTATION THAT IT IS ON FILE WITH YOU OK?]

10. Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 62 OKLA. L. REV. ____ (2008).

11. *Id.* at 2.

12. *Id.* at 3-4.

13. *Id.* at 4.

transformation of the Federal Rules with the Thermidorian Reaction,[14] in which Robespierre fell victim to his own guillotine after taking his revolutionary ideals and bloody tactics too far for the tastes of the masses. In this metaphor, it is the spirit of the 1938 rules that loses its head, only instead of suffering a swift and public execution, the spirit of the 1938 rules has been gradually and quietly deposed by a thirty-year change in attitude.

In large part, Perschbacher and Bassett's article is a valediction, one in which they bid a sad farewell to the litigation values that they saw as forming the heart of the 1938 rules. This sentiment is most clearly expressed in a paragraph in which they contrast the way that litigation was perceived in 1938 with the way it is perceived today. In 1938, they assert, the original drafters viewed litigation as a positive and worthwhile endeavor; thus, the goal of the original drafters was to *facilitate* litigation by removing the technicalities that plagued code pleading, as well as by adding a liberal discovery scheme.[15] In contrast, Perschbacher and Bassett perceive a very different attitude towards litigation today—namely, that litigation is a bad thing, such that the dominant goal is to find ways to minimize our investment in litigation[16] and resolve those cases that do get litigated as quickly and cheaply as possible.[17]

Perschbacher and Bassett's article is not a call to arms. Given their fondness for the values underlying the 1938 rules, one might have anticipated a clear call to reinstate the 1938 regime and usher in a return to the good old days. Instead, Perschbacher and Bassett explore a number of reasons why a return to the 1938 rules is unlikely. Principally, they chronicle how the federal judiciary and the federal docket have changed since 1938, metamorphosing from a relatively small cadre of 179 district judges with roughly 100,000 pending cases to now comprise 667 district judges with 320,000 pending cases.[18] They also point to a stark change in what the judges do: whereas 22.3% of cases reached trial in 1938, a mere 1.3% did so in 2006.[19] Perschbacher and Bassett also carefully develop the thesis that 1938 presented a kind of perfect storm of reform factors, including the contemporaneous development of the modern Erie Doctrine and its preference for vertical uniformity rather than horizontal uniformity in substantive law.[20] While not expressly stated, the implication is that the conditions required to

14. *Id.* at 1-2.
15. *Id.* at 29.
16. *Id.* at 20-27 (discussing the rise in private adjudication modes like arbitration and rent-a-judge).
17. *Id.* at 20, 29.
18. *Id.* at 7-8.
19. *Id.* at 8-9.
20. *Id.* at 8-15.

return to the 1938 values simply don't exist in today's world of larger courts, crowded dockets, and managerial judges.[21] Later in the paper, Perschbacher and Bassett discuss Congress's increasing meddling with federal procedure.[22] This discussion suggests a fear that any attempt to retreat from active case management would prompt Congress to intervene in ways that prevent the 1938 values from retaking the throne or, worse yet, that crown an even worse regime than the efficiency-driven system that developed during the past thirty years.

Whatever the reason, Perschbacher and Bassett stop short of calling for another revolution—one that would reinstate the deposed 1938 rules regime. While they briefly raise the prospect that a "tweaking" or "updating" might be enough to save the spirit of the 1938 rules,[23] they do so tepidly and without conviction. In the end, their paper seems more of a resigned farewell than a rallying cry. And as a farewell, it has a ring of finality—sounding more "adieu" than "au revoir"—suggesting their belief that the spirit of the 1938 rules is not merely in exile, but rather is gone for good.

Professor Marcus interrupts the processional, declaring that the Federal Rules are *Not Dead Yet*.[24] Indeed, due principally to the structural advantages of national-scope reform activities[25] and the resource wealth that has accumulated around the federal rulemaking enterprise,[26] Marcus proclaims that the Federal Rules have been endowed with a hardiness far beyond that of most septuagenarians. Citing the recent E-Discovery amendments as evidence, Marcus suggests that there is reason to believe that the Federal Rules—and the federal rulemaking process—are in a period of renaissance rather than retreat.[27] (Marcus might also have cited to the recent cooperation between Congress and the Judicial Conference to produce the proposal to create Federal Rule of

21. Professor Marcus makes a similar point in his paper, noting that the conditions that gave rise to (or at least gave fuel to) the "Big Bang" of 1938 are unlikely to occur again any time soon. *See* Marcus, *Not Dead Yet*, *supra* note 7, at ____. For related commentary linking the Revolution of 1938 with the principles underlying the New Deal, see Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272-80 (1997).

22. Perschbacher & Bassett, *supra* note 10, at 29-31.

23. *Id.* at 5.

24. Marcus, *Not Dead Yet*, *supra* note 7, at 2.

25. *Id.* at 22-25.

26. *Id.* at 25-27 (discussing the support provided by the Rules Committee Support Office and the Federal Judicial Center).

27. *Id.* at 27-34.

Evidence 502.[28]) Federal rulemaking may have its limits,[29] but within those limits Marcus sees more reason for hope than despair.[30]

More fundamentally, Marcus contests the idea that the "good old days" of 1938 ever left us. In particular, Marcus questions the view that the discovery and case management reforms since 1983 have retreated from the "Liberal Ethos" embodied by the 1938 rules.[31] Marcus agrees that the discovery and case management reforms since 1980 represent a pullback from the most liberal pretrial practices. But according to Marcus, these were a retreat not from the 1938 rules or their underlying values but from reforms in the 1960s

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28. In the past, a number of commentators have complained of a lack of meaningful cooperation between the rulemakers and Congress. *See* Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 222 (1997); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996). Proposed Federal Rule of Evidence 502 reflects the sort of inter-branch cooperation that these critics hoped to see. During the development of the e-discovery rules, one of the consistent concerns voiced by litigants was the cost and time consumed by privilege review of electronic documents. *See Need for Change Balanced by Deliberate Pace: An Interview with Judge Lee H. Rosenthal*, THIRD BRANCH (Admin. Off. of the U.S. Courts, Washington, D.C.), March 2008, http://www.uscourts.gov/ttb/2008-03/article01.cfm. The e-discovery amendments included changes to Rules 16(b) and 26(f) to spur litigants to think about ways of addressing the issue. *See* FED. R. CIV. P. 16, 26, advisory committee's notes. And Rule 26(b)(5) was amended to create a mechanism for litigants to alert the other parties when they had made an inadvertent disclosure of privileged material and to place a hold on the use of that material until a court ruled on the questions of privilege and waiver. *See id.* 26(b)(5). But the Civil Rules Advisory Committee made no attempt to alter any of the underlying law of privilege or waiver, due to Rules Enabling Act limits and concern that the topic might properly lie with the Evidence Rules Advisory Committee. *See* 28 U.S.C. § 2074(b) (2000) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."). Thus, the need for further reform remained. *See* S. REP. NO. 110-264, at 1-3 (2008). At the behest of the House Judiciary Committee Chair in 2006, the Judicial Conference tasked the Evidence Rules Advisory Committee with developing a proposal to address privilege and waiver. *See* Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, to Senator Patrick J. Leahy and Senator Arlen Specter (Sept. 26, 2007), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf. The proposal was forwarded to the Senate and proposed as Senate Bill 2450. *See* S.2450 110th Cong. (2007). The Bill passed both houses of Congress and was signed by the President on September 19, 2008. *See* 154 CONG. REC. S8373-01 (2008); *see also* 154 CONG. REC. H7817-01 (2008) (presentation in House, including Statement of Congressional Intent). The cooperative process used to develop and implement Federal Rule of Evidence 502 follows a path suggested by Professor Burbank among others. *See* Burbank, *supra*, at 249; Burbank, *supra* note 1, at 1195 n.775.

29. In other writing, Professor Marcus has cautioned people against expecting modern rulemaking to produce the types of dramatic breakthroughs and reforms associated with the 1938 revolution. *See* Marcus, *Reform*, *supra* note 7, at 943-44.

30. Marcus, *Not Dead Yet*, *supra* note 7, at 34-35.

31. *Id.* at ____.

and 1970s that removed even the minimal discovery limits contained in the original 1938 rules.[32] Marcus argues that, while the reforms since 1980 have empowered judges to control lawyers, the Federal Rules remain loyal to the notions of notice pleading and liberal discovery. Thus, what the critics of the changes since 1980 are actually upset about is not that the 1938 values have been discarded, but that the 1970s movement to even more liberal discovery did not stick.[33]

If Marcus is right, perhaps that makes the reference to the Thermidorian Reaction all the more apt, albeit with a small tweak. When Robespierre was guillotined on the evening of 10 Thermidor, year 2 (July 28, 1794), it was not because of any backlash to the ideals of the French Revolution, often denoted by the slogan "Liberté! Egalité! Fraternité!" Rather, it was a reaction to the Reign of Terror that had taken place under Robespierre's control of the Committee of Public Safety. Marcus's point is that the reforms since 1980 were a reaction to what he calls the "apogee" of the Liberal Ethos, which occurred not in 1938 but in 1970.[34] If that is the case, then Professors Perschbacher and Bassett may well be correct to characterize the reforms since 1980 as a type of Thermidorian Reaction, but in this version the role of Robespierre is played by the forces of discovery unleashed during the 1970 apogee (with a guest appearance by the 1966 amendments to Rule 23 as St. Just). There are certainly those who saw (and still see) "unbridled discovery" as its own Reign of Terror.[35]

In the final paper in this symposium, *Making Effective Rules: The Need for Procedure Theory*, Professor Robert Bone looks to the future of federal rulemaking and challenges us to rethink how we make and evaluate the

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32. *Id.* at 11-13.

33. *Id.* at 16.

34. *Id.* at ____. Professor Subrin similarly identifies 1970 as the "apex" of the "spirit of extensive attorney latitude" in discovery. *See* Subrin, *supra* note 4, at 2022.

35. Most trace the beginnings of the backlash against discovery to Chief Justice Burger's remarks at the 1976 Pound Conference, where he noted "widespread complaints" of the misuse and abuse of pretrial procedures. *See* The Honorable Warren E. Burger, *Keynote Address*, 70 F.R.D. 79, 95-96. *See generally* Griffin B. Bell et al., *Automatic Disclosure in Discovery – The Rush to Reform*, 27 GA. L. REV. 1, 8-11 (1992) (discussing criticisms of the discovery process); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. LAW. REV. 747, 753-68 (1998) (chronicling multiple rounds of "discovery containment" efforts that followed Chief Justice Burger's remarks). For a hot-off-the-presses call for another round of discovery reform to address the costs of e-discovery and other issues that are claimed to have "broken" the discovery system, see Interim Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System (Aug. 1, 2008), *available at* http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650.

Federal Rules.[36] In 1938, the prevailing view was that procedure and substance were separate, such that the drafting of procedural rules was seen as a matter of technical expertise rather than policy. From the so-called "Handmaid" viewpoint,[37] it was only natural that court rules would be drafted by procedural experts and designed to advance procedural values like maximizing flexibility or minimizing delay and cost.[38] But today, Bone argues, now that we see clearly the interconnection between procedure and substance, the original "procedural values" justification for the design of the rules is no longer convincing or sufficient. Worse yet, Bone asserts, no other norms or values have developed to fill the void. The result, Bone contends, is that the Advisory Committee, lacking any compass to guide it, has developed a habit of sidestepping the hard questions by deferring to consensus or, where no consensus can be had, by drafting general rules that leave the hard questions to trial judge discretion.[39]

Bone seeks to fill the void. He asserts that the federal rulemakers must develop normative metrics drawn from "core features of litigation practice" to assess future rule changes.[40] And to do that, Bone argues, the rulemakers must directly confront the relationship between substance and procedure.[41]

Bone begins with the premise that whatever else rules should strive to do, they must strive to yield "quality" outcomes, with quality defined as conformity to the substantive law.[42] In other words, "good rules" will yield correct legal outcomes. While that may seem substance-neutral on the surface, Bone explains that the quest for quality outcomes leads inevitably to value questions that depend on the underlying substance. First, because we do not insist that rights be enforced regardless of cost, outcome quality must be defined—at least in part—by how well a rule enforces the policies underlying those rights in the absence of full enforcement.[43] Thus, Bone says, the rulemakers must identify the policies that the substantive law seeks to promote. Second, because outcome errors are inevitable, procedural rules

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36. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 62 OKLA. L. REV. ____ (2008).

37. *See* Clark, *supra* note 4, at 304, 306.

38. Bone, *supra* note 36, at 13.

39. *Id.* at 10.

40. *Id.* at 3.

41. Bone's full thesis is broader than I describe here. He also argues that the rulemakers must directly confront the role of settlement and the value of participation. *Id.* at 39-43. While these areas are worthy of their own examination, I have focused on his comments regarding the substance-procedure relationship both because they comprise the bulk of his argument and because I think they strike closest to the heartland of ascertaining the role of the rulemakers.

42. *Id.* at 27.

43. *Id.* at 14-17.

must seek to minimize the worst types of errors.[44] And to avoid the worst errors, Bone says, the rulemakers must place relative values on different substantive rights to know how to distribute error risks away from the rights that we consider most important.[45] In summary, while Bone agrees that the pursuit of outcome quality can justify procedural rules, he cautions that any meaningful justification based on outcome quality is not substance-neutral because it still requires the rulemakers to consider substantive values in at least two ways: (1) to determine what makes an outcome a "quality" outcome; and (2) to distribute error risks according to the relative importance of the underlying substantive values. Bone then argues that once one starts looking for justification in substantive values, it is no longer tenable to cling to the principle of rule trans-substantivity.[46] Thus, the case for substantive justification becomes, at least in some sense, the case for adopting substance-specific rules.

Professor Bone's thesis is provocative on several levels. If nothing else, his vision of an Advisory Committee actively engaged in identifying substantive values, assessing their relative importance, and striving to write rules that maximize the most important values is sure to provoke a wide range of responses. Those of us who have had the good fortune to be involved in the rulemaking process probably should resist any temptation to take Bone's proposal as a vote of confidence in our abilities. In earlier work, Bone has examined whether Congress or a centralized rules committee would be better suited to perform such a task, and he concluded that it was the committee.[47] But that conclusion is perhaps more accurately seen not as a vote of confidence for the Advisory Committee but as a vote of no confidence in Congress. Needless to say, even if one agrees that a centralized rules committee could do the task better than Congress, that does not lead to the conclusion that a centralized committee could perform the task easily or well.[48]

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44. *Id*. at 17-18. For a more complete discussion of this approach, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 935-37 (1999).

45. Bone, *supra* note 35, at 37.

46. *Id.* at 20.

47. *See* Bone, *Process of Making Process*, *supra* note 43, at 938.

48. The Advisory Committee's ability to fulfill that role may be just the tip of the iceberg. While the Advisory Committee bears the frontline responsibility for considering amendments, it does not have the authority to enact anything. Rather, its proposals are forwarded up the approval process to, respectively, the Standing Committee on Rules of Practice and Procedure, the United States Judicial Conference, the United States Supreme Court, and Congress. *See* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1671-75 (1995) (describing rules amendment process). It is not immediately apparent to me what role any of these other entities would have in (1) making the substantive policy choices Bone

The task Bone envisions would be daunting, even for the "giants" of rulemaking from the past. And the idea that the current members of the Advisory Committee (giants or not) would undertake that effort is likely to be as frightening to some observers as it is tantalizing to its proponent.

Bone's proposal is provocative in yet another sense—it provokes renewed and serious consideration of a number of questions that go to the heart of rulemaking under the Rules Enabling Act. Without meaning to limit what those questions might be, I briefly explore four of them in the following discussion. These thoughts are not offered as an exhaustive critique (and certainly not as a criticism), but rather to give some content to my claim of "provocation."

First. Bone's proposal raises a fundamental question about the role of the rulemakers. Specifically: what is the job Congress gave them? As readers of this symposium will already know, the rulemaking process exists as an exercise of power delegated from Congress via the Rules Enabling Act.[49] So what exactly is it that Congress asked the Court to do? Starting with the text of the original Rules Enabling Act, Congress described the job this way: "to prescribe, by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law."[50] Of course, Congress added this proviso: any such rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[51]

The text of the original Rules Enabling Act says rather little about what *norms* the rulemakers should advance through the Federal Rules. Most discussions of the Enabling Act focus on the *scope* of the delegation; they are attempts to define the boundaries of permissible rulemaking, as set either by the grant of rulemaking power or the limiting proviso.[52] Our focus here,

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envisions; or (2) scrutinizing the Advisory Committee's proposals for fidelity to those choices.

49. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941). It is unnecessary here to consider arguments regarding whether the courts possess inherent authority over certain aspects of rulemaking. *See, e.g.*, Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1472-82 (1994) (discussing extent to which court rulemaking power is an exercise of delegated versus inherent power).

50. Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934).

51. *Id.*

52. Depending on one's view, that proviso may take back some of the rulemaking authority granted in § 2072(a), or it may simply restate and emphasize a limit inherent in § 2072(a). *Compare* Burbank, *supra* note 1, at 1107-08 (limiting proviso is "surplusage"), *with* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718-19 (1974) (grant and limiting proviso operate separately). *See generally* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. (forthcoming Nov. 2008) (discussing different approaches to reconciling the grant in subsection (a) with the limiting proviso of subsection(b)), *available at* http://ssrn.com/abstract=1121946.

however, is to identify rulemaking criteria *within* the Enabling Act limits. (I will return later to what traditional *Erie* jurisprudence might have to say about this topic.)

In this context, the only drafting directive in the original Rules Enabling Act is the instruction that the rulemakers proceed "by general rules." While this language seems inexorably to lead us into the debate about substance-specific rules,[53] I need not rehearse that debate here. As scholars on both sides of the question have noted, both the legitimacy and the wisdom of substance-specific rules are likely questions of degree.[54] That is to say, one can accept that the Federal Rules can and should have specialized provisions for *some* matters, while still articulating generally applicable rules in the main. It seems therefore sufficient for these purposes to note that the enterprise proposed by Bone assumes (he might say, "positively yields") an unspecified number of new substance-specific rules. Whether one sees the end result as consistent with the text of the Rules Enabling Act would then likely depend on just how many—and perhaps also on which kinds of—substance-specific rules would emerge from the process Bone envisions. Beyond that question, however, the text of the Rules Enabling Act yields no normative directives for drafting the Rules.

If we go beyond the text of the 1934 Rules Enabling Act, we might find other clues about what rulemaking norms Congress might have had in mind when it tasked the Court with crafting the Federal Rules. One can find in the legislative history of the Rules Enabling Act—Professor Burbank's "antecedent period of travail"—evidence that the proponents of court rulemaking expected the rulemakers to focus on writing rules that would be simpler to follow, reduce cost and delay, and promote the resolution of cases based on the merits rather than technicalities.[55] That is how the Supreme Court characterized the mission in *Sibbach v. Wilson & Co.*, its first case to discuss the Enabling Act, commenting that "the new policy envisaged in the enabling

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53. *Compare* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074-87 (1989) *and* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244-47 (1989), *with* Robert M. Covert, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975) *and* Subrin, *supra* note 4, at 2048-51.

54. *See* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 846 (1993); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 778-79 (1993).

55. *See* Burbank, *supra* note 1, at 1067 (Sutherland Bill); *id.* at 1085 n.298 (Senate Report on Cummins Bill).

act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."[56]

This is where Bone attempts to forge a new conceptual path. Accepting that "justness" is a valid goal, Bone argues that the rulemakers cannot measure "justness" without treading into the realm of substantive values. To put it in Bone's terms, because perfect "justness" is not obtainable, courts must attempt to maximize the justness that is realistically attainable by maximizing the attainment of the values underlying substantive law and by minimizing error costs in the substantive areas deemed most important. One could hardly quarrel with Bone about whether that is one way of measuring justness. Perhaps it might even be the optimal way. But is that what Congress was envisioning when it delegated rulemaking authority to the Court? Nothing like that appears in either the text of the Rules Enabling Act or the record from the "antecedent period of travail." Even accounting for changes in vocabulary between that era and our own, one finds little to suggest that Congress equated the goal of justness in the rules with a rulemaking process driven by normative metrics, the policy values underlying substantive laws, or the distribution of error costs according to the rulemakers' beliefs about which substantive laws were most important.

Second. Regardless of what Congress thought in 1934, one must consider whether subsequent developments have altered or clarified the task assigned to the rulemakers. As Bone explains, we no longer live in a world that accepts the Handmaid model of procedural rules. Perhaps Congress's views about rulemaking have changed as well. But while Congress has amended the Rules Enabling Act several times since 1934, the picture does not seem to have changed. For example, while the Rules Enabling Act was altered when it was incorporated into title 28 as part of the 1948 revision of the judicial code, none of those alterations suggest any change to the rulemakers' mission.[57] Of course, the most significant development in the life of the Rules Enabling Act occurred when Congress re-authorized it in 1988. Yet even if we focus on Congress's intent in 1988, there is good reason to believe that Congress was at least as attached—if not more so—to the view that the rulemakers stick to procedural values and not venture into substantive concerns.[58]

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56. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

57. *See* Burbank, *supra* note 1, at 1103-04. The same conclusion holds for the various technical amendments made to the Rules Enabling Act during this period. *Id.*

58. *See* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's* "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1030-35 (quoting H.R. REP. NO. 422, 99th Cong. 21 (1985)) (noting strong sentiment in House Report that policy choices "extrinsic to the business of the courts" be left to Congress, but recognizing that the Senate record was less clearly supportive of that view).

One more piece of evidence is worth noting. In 1956, the Supreme Court discharged the Advisory Committee created under the 1934 Act.[59] Two years later, Congress reconstituted the Advisory Committee scheme by moving it to the Judicial Conference of the United States.[60] By statute, Congress directed the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" and to make recommendations to the Supreme Court.[61] Thus, "[t]he Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference."[62] The Act transferring the frontline responsibility for rulemaking from the Court to the Judicial Conference expressly directs the Judicial Conference to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[63] Here too, there is nary a whisper about normative metrics, maximizing the policy values underlying different substantive laws, or the distribution of error costs away from the rights deemed by the rulemakers to be the most treasured or fundamental.

Third. Bone's proposal raises important questions about the relationship between our "Erie" jurisprudence and rulemaking. Bone emphasizes that, unlike the original drafters, modern procedural thinkers no longer believe that there is a clear line between substance and procedure.[64] Indeed, it is now generally accepted that one cannot draft rules based on the so-called procedural values without exerting some tug or pull at substance.[65] For many

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59. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1006 (3d ed. 2002).

60. *See id.* § 1007.

61. 28 U.S.C. § 331 (2000).

62. McCabe, *supra* note 47, at 1659. The process actually begins two stages earlier. The individual Advisory Committees—there are five: Appellate, Bankruptcy, Civil, Criminal, and Evidence—are generally responsible for fielding suggestions and developing proposed amendments. The Advisory Committees forward their proposals to a Standing Committee on Rules of Practice and Procedure, which considers them initially for permission to publish for comment and later for approval. Proposals that are approved by the Standing Committee are then forwarded for consideration by the Judicial Conference. For a more detailed description of the rulemaking process, an excellent summary is available at the Federal Rulemaking website at http://www.uscourts.gov/rules/proceduresum.htm. *See also* McCabe, *supra* note 47, at 1671-75.

63. 28 U.S.C. § 331.

64. Bone, *supra* note 36, at ____. The original drafters seem at least to have been aware of the emerging scholarly thinking on the ephemeral nature of the line between substance and procedure. *See* Burbank, *supra* note 1, at 1136.

65. *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling*

years, one of the vexing questions for procedural scholars (and judges, of course) has been to try to determine how much of an impact the Federal Rules may have on substance before they are found to exceed the rulemaking authority conferred by the Rules Enabling Act.[66] So Bone is surely right that modern views on the ephemeral line between substance and procedure say something about the rulemaking enterprise. And one important manifestation lies in determining the outer limits of rulemaking power.

But does it also speak to rulemaking *within* the Rules Enabling Act limits, and if so, how? The "Erie" scholarship noted above seeks to map the outer limits of rulemaking power, whereas Bone's thesis urges the rulemakers to develop normative, substance-attentive standards for choosing rule content from among the options located within the Enabling Act limits. In other words, Bone sees the difficulties in the substance-procedure relationship not just as a basis to cabin rulemaking, but to inform it. Those are very different questions that might best be kept separate. One can accept that the absence of any clear divide between substance and procedure makes it difficult to define the outer boundaries of court rulemaking without also accepting that Congress has directed the rulemakers—in the pursuit of "justness"—to attempt to determine and weight the policy choices animating the substantive laws that the rules will be used to enforce.

Fourth. Finally, Bone's proposal prompts us to consider whether the Rules Enabling Act strikes the right note in terms of delegated authority. Underlying Bone's thesis is, I think, a belief that the traditional procedural values are not sufficient to justify or guide rulemaking and that therefore rulemakers *ought* to work from a different set of instructions—one that includes some of the normative principles he suggests.[67] Within as-yet undefined delegation limits, Congress certainly might see fit to pass a new Rules Enabling Act along those lines. But let's not be too hasty to toss aside the traditional procedural values.

Rulemaking that flows from our Rule 1 ideals—the just, speedy, and inexpensive administration of the law—is not without its benefits.[68] As all three of our presenters noted, Congress is well aware of its power to legislate procedure directly and has become more active in doing so.[69] A uniform rule designed to promote efficiency and accuracy creates a clear baseline against

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Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications, 90 MINN. L. REV. 1303, 1314-15 (2006).

66. *See, e.g.*, Burbank, *supra* note 1, at 1128; Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 287; Ely, *supra* note 52, at 722-27.

67. Bone, *supra* note 35, at ____.

68. FED. R. CIV. P. 1.

69. *See also* Marcus, *Reform*, *supra* note 7, at 940.

which Congress can superimpose—by substantive or procedural legislation—the types of substantive concerns Bone raises.[70] Indeed, I suspect that to be the type of dynamic that Congress envisioned when it re-authorized the Rules Enabling Act in 1988. And, of course, there is the persistent (and, I think, substantial) risk that overt consideration of substantive policies might erode the credibility of the rulemaking process while, ultimately, serving only to invite even greater meddling by Congress.[71]

At the risk of being selectively anecdotal, it also bears mentioning that modern rule-drafting and rulemaking bodies continue to invoke the norms of justness, speed, and efficiency. The American Law Institute recently approved certain parts of the Principles of the Law of Aggregate Litigation, including a section titled, "General Principles for Aggregate Litigation." As presented in April, section 1.03 provided:

> Aggregation should further the pursuit of justice under the law by:
> (a) promoting the efficient use of litigation resources;
> (b) enforcing substantive rights and responsibilities;
> (c) facilitating binding resolutions of civil disputes; and
> (d) facilitating the accurate and just resolution of civil disputes by trial and settlement.[72]

Though there are differences, these general principles bear a strong relation to the goals Professor Bone attributes to the original drafters and memorialized

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70. The recently-approved parts of the Principles of the Law of Aggregate Litigation offer this support:

> A policy of pursuing justice under the law efficiently also creates stable and appropriate expectations within legislative bodies. These bodies must expect routine, expeditious, and improving enforcement of the laws they enact. If and when they desire something other than this, they can, within broad limits, design new, generally applicable procedures themselves and require their application. Or, knowing how courts enforce laws and not wanting particular laws to be enforced in the usual way, Congress may establish special procedures intended to better serve its policies.

Principles of the Law of Aggregate Litigation § 1.03 cmt. a, at 50 (Tentative Draft No. 1, 2008). For a recent example of federal legislation that creates special procedural rules designed to address perceived enforcement problems in a specific substantive area, see the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. §§ 77-78).

71. *See* Carrington, *supra* note 53, at 2074-79; Geyh, *supra* note 28, at 1222-23; Marcus, *Reform*, *supra* note 7, at 939-40.

72. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (Tentative Draft No. 1, 2008). In response to comments from the floor, the Reporters indicated they would revise this section to emphasize the enforcement of rights *in accordance with law*.

in Federal Rule 1.[73] A more direct example is found in New South Wales's Civil Procedure Act of 2005. In a section titled "Overriding purpose," the Act states: "The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings."[74] While these few modern equivalents certainly do not establish that a procedural values approach is the only possible approach, or even the best possible approach, they do illustrate that the procedural values approach remains viable in the minds of many even in a world enlightened about the impact of procedure on substance.

All of this is not to say that rulemaking must lash itself to the mast of procedural values, cutting itself off from all other considerations lest they prove too tempting. Ignorance in the content of rulemaking is surely as great a sin as ignorance in the allocation of rulemaking power.[75] Nor is there any reason to operate in a "procedural values bubble"; nothing about a procedural values-driven approach precludes either the awareness or the consideration of complementary norms. What I do mean to say, though, is that the quest to define "good" rulemaking must begin by recognizing that it is within Congress's power to define what "good" means. And in determining how Congress might have defined "good"—either in 1934 or today—one must account for the historical evidence and policy reasons that would support a finding that Congress envisioned rules designed to promote a more traditional view of the so-called procedural values.

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After seventy years, and in light of the criticisms raised during the past few decades, the current health of the federal rulemaking enterprise is a fair matter for debate. So too is its future. Important questions remain to be answered regarding the success of rulemaking today and the path that rulemaking will follow in the next thirty years. The symposium contributions of Professors Perschbacher and Bassett, Marcus, and Bone provide valuable insights into these questions and are sure to stimulate and inform the continuing dialogue.

In this Introduction, I have indulged the reference—first made by Professors Perschbacher and Bassett—to the French Revolution and the Thermidorian Reaction. Such conceits can turn quickly to silliness, but I find myself drawn back to it when I think about the rallying cry of the French Revolution: "Liberté! Egalité! Fraternité!" To the extent the Federal Rules of Civil Procedure have a rallying cry, it is found in Rule 1 and it is this: "Justness!

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73. *See Bone*, *supra* note 36, at ____.

74. I can give you a hard copy or a cite to the website, your choice. Just let me know. [NTA: PLEASE CITE THE WEBSITE. THANK YOU.]

75. *Cf.* Burbank, *supra* note 54.

Speed! Inexpense!" While these terms are not to be found in the text of the Rules Enabling Act, they are, as Professor Carrington has noted, the "aims of that movement" and an "expression of an ideal."[76] And as guideposts for rulemaking, they are ideals which "in the main ha[ve] been faithfully observed by the rulemakers over the years."[77]

One is unlikely to hear those ideals shouted from the barricades these days. Indeed, in the eyes of some, they may be a construct made weary by time and familiarity.[78] Yet I think they remain a powerful call. Who doesn't want their procedural system to produce just results quickly and cheaply? If there is agreement among our contributors, it may be that the future of federal rulemaking depends not on finding new ideals but on fidelity to the ones we have (though of course they vary in how they define and assess fidelity). I hope it is not too glib to say that, if the rulemaking enterprise should fail in the next thirty years, it won't be for lack of an inspiring slogan.

76. Carrington, *supra* note 66, at 300.
77. *See* WRIGHT & MILLER, *supra* note 59, § 1008.
78. *See* Marcus, *supra* note 54, at 813.

Trial Balloon

Federal Litigation—Where Did It Go Off Track?

by Gregory P. Joseph

Editor's Note: The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Section of Litigation or the Editorial Board.

Twenty-five years ago, on January 1, 1983, it cost parties roughly the same to litigate in state and federal court. Plaintiffs sometimes chose federal court to obtain expansive discovery or a preferred judge, even though state court was an available alternative and additur impermissible in federal court. Today, plaintiffs with non-federal causes of action flee federal court, and those with federal claims scour the books for state law analogues. What happened? Here are some highlights.

1983: Rule 11. Federal Rule of Civil Procedure 11 has become a symbol of the disesteem into which contemporary litigation has fallen. Although the rule was originally adopted in 1938, it had no real bite for 45 years. All of that changed in August 1983, when it was amended to mandate compliance with objective standards and require judges to impose sanctions if those standards were not met. There were more than 7,000 Rule 11 decisions reported on LEXIS during the first ten years following the August 1983 amendment, and it is apparent from the Federal Judicial Center's empirical studies that the actual activity under the rule dwarfed this number. (*See, e.g., FJC Directions* No. 2, at 7 (Nov. 1991) (in five districts studied, there were 66 published Rule 11 opinions from 1983-89, but the FJC found that almost 1,000 cases actually involved Rule 11 activity in the shorter period of 1987-90).) Rule 11 created a momentum for parties to seek sanctions against one another (predominantly, defendants seeking sanctions against plaintiffs) that did not abate even after the mandatory features of the rule were excised in 1993.

1986: Summary Judgment Trilogy. In 1986, the Supreme Court rendered three decisions intended to reinvigorate summary judgment practice in the federal court, and summary judgment practice has certainly been reinvigorated ever since the decisions in *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Distinguished researchers at the Federal Judicial Center take the view that the increase in summary judgment is due more to the emphasis on managerial judging and changes in the civil rules that preceded the Summary Judgment Trilogy, rather than the trilogy itself (*see, e.g.*, Joe S. Cecil, *et al.,* "A Quarter Century of Summary Judgment Practice in Six Federal District Courts," 4 *J. Empirical Legal Studies*, 821 (2007)). Whether the Summary Judgment Trilogy is the cause or was an effect, there is no doubt that summary judgment has become a centerpiece of federal litigation over the past 25 years. Coupled with subsequent developments (read: *Daubert*), summary judgment motions have become part of virtually all substantial federal civil litigation.

1991: *Chambers v. NASCO.* Just in case Rule 11 was not bad enough, the Supreme Court declared in 1991 that the rules of civil and appellate procedure do not completely describe and limit the power of federal judges to sanction litigation misconduct. In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Court described and contoured the inherent judicial power to levy sanctions in response to abusive litigation practices. If sufficient time, money, and vitriol had not been spent on sanctions motions before *Chambers*, the Supreme Court's decision accelerated the trend (with more than 2,300 reported inherent-power sanctions cases since *Chambers* was decided).

1993: *Daubert* and New Rules. The year 1993 witnessed a trifecta. First, the Supreme Court decided *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). Initially, *Daubert* was perceived as liberalizing the admissibility of expert evidence—especially, novel scientific evidence—because it rejected the strictures of the *Frye* test. What a misperception. In December 2000, when the Advisory Committee on the Federal

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Rules of Evidence codified *Daubert* in Rule 702, it stressed in the Committee Note that "A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a 'seachange over federal evidence law,' and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system" (citation omitted). Seven years later, compare the Third Circuit's observation in *United States v. Ford,* 481 F.3d 215, 220 n.6 (3d Cir. 2007): "Although we do not adopt the apparent *presumption of exclusion* enunciated by the Ninth Circuit, we agree with the spirit of our sister court's exhortation. In particular, district courts should tread carefully when evaluating proffered expert testimony, paying special attention to the relevance prong of *Daubert*." The sea change may have approached quietly, but it has overtaken us.

Second, the Supreme Court promulgated the first mandatory disclosure rules. The expert disclosure rule (Rule 26(a)(2)(B)) immediately went into effect nationwide, mandating detailed reports and authorizing expert depositions as a matter of course. District courts were allowed to opt out of fact disclosure (Rule 26(a)(1)) and the default pretrial order provision (Rule 26(a)(3)).

Third, the Supreme Court promulgated Rule 37(c)(1), the most important rule of evidence contained in the Federal Rules of Civil Procedure. Rule 37(c)(1) provides a self-executing sanction for a party's failure to disclose information required by Rule 26(a) without substantial justification. It bars the derelict party from using at trial, at a hearing, or even on a motion any information—including the testimony of any witness—that was not but should have been disclosed pursuant to Rule 26(a) or (e)(1).

1995: PSLRA (with RICO Bar). Over a presidential veto, Congress enacted the Private Securities Litigation Reform Act (PSLRA) to curtail securities class actions by imposing a series of procedural, pleading, and substantive hurdles. In addition, the PSLRA barred Racketeer Influenced and Corrupt Organizations Act (RICO) claims based on conduct that would be actionable as securities fraud. Putting aside the wave of litigation associated with the huge corporate scandals of the early 2000s (Enron, WorldCom, Adelphia, Global Crossing) and the thus-far unsuccessful initial public offering litigation, which are now largely behind us, the number of securities class actions has fallen substantially. And the RICO bar now extends to conduct that is not actionable by any private plaintiff, let alone the plaintiff before the court.

1998: SLUSA and Rule 23(f). To prevent plaintiffs from circumventing the PSLRA by filing class actions in state court, Congress passed and the president signed the Securities Litigation Uniform Standards Act of 1998 (SLUSA). SLUSA permits defendants to move securities cases from state to federal court, including cases brought on behalf of plaintiffs who have no standing to sue for securities fraud in federal court. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006). Once in federal court, SLUSA abrogates all state law claims for relief.

The 1998 amendment to Federal Rule of Civil Procedure 23(f) permitted appeals of class certification decisions, under the discretion of the appellate court. By 2006-07, this had effectively become a vehicle for appellate review of denials of motions to dismiss (which are unreviewable orders) under the Second Circuit's decisions in the initial public offering (IPO) securities litigation (*Miles v. Merrill Lynch & Co.*, 471 F.3d 24 (2d Cir. 2006) and 483 F.3d 70 (2d Cir. 2007)) and the Fifth Circuit's decision in Enron. *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372 (5th Cir. 2007).

2000: Nationwide Mandatory Fact Disclosure. In 2000, mandatory fact disclosure became the law of the land (no more opt-outs), and additional teeth were put in Rule 37(c)(1). The self-executing preclusion sanction was expanded to cover discovery as well as disclosure. Failure to disclose the existence of a document or witness unearthed in the course of an ongoing investigation after the initial disclosures or discovery responses were filed resulted in a forfeiture of the right to use the document at, say, a deposition, or to file an affidavit from the witness at any evidentiary hearing.

2005: *Dura* and CAFA. The Supreme Court's 2005 decision in *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336 (2005), ostensibly concerned only the loss-causation requirements of the PSLRA. Much like *Daubert*, the *Dura* opinion appeared relatively uncontroversial on first reading—just a pleading decision, and not a harsh one at that. As reflected in the fact that *Dura* was cited in more than 750 cases in the first 36 months after it was decided, the case has taken on a life of its own, imposing demanding causation requirements in cases of all sorts, with rare exception (e.g., *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171 (2d Cir. 2007)). In 2007, *Dura* became one of the progenitors of *Twombly*, a non-securities case of universal civil application.

Ever sensitive to the caseloads of state courts, Congress also enacted the Class Action Fairness Act (CAFA) in 2005 to pull into federal court as many state court class actions as possible, leading to more than 600 reported remand opinions in the first three years of the statute's existence. By April 2007, the Federal Judicial Center had empirically demonstrated that CAFA "has had its intended effect of bringing more state-law diversity class actions into federal district courts." Thomas E. Willging *et al.*, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules* at 21 (Federal Judicial Center, April 2007).

2006: Electronic Discovery Rules. The electronic discovery amendments to the Federal Rules of Civil Procedure in 2006 build additional cost into every case not only by mandating that the parties focus on electronic discovery from the outset of the litigation but also by erecting a series of battlegrounds (format, accessibility, cost-shifting) over which the parties wage war, as they search incessantly for spoliation. The lasting legal legacy of the current era of electronic discovery likely will lie in the area of spoliation and sanctions. Parties long not so much for data as for evidence that data have been lost or destroyed. The prospects for meaningful sanctions are generally much higher in federal court than in state court.

2007: Supreme Court Opinions in IPO Antitrust and *Twombly*. In 2007, the Supreme Court decided in the IPO antitrust litigation (*Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007)) that antitrust law is so complicated it could not even trust federal judges to get it right—"there is a serious risk that antitrust courts, with different nonexpert judges and different nonexpert juries, will produce inconsistent results"—leading the Court to conclude that certain behavior subject to Securities and Exchange Commission

regulation should be permitted no matter how anticompetitive it may be.

The Supreme Court also rewrote federal pleading requirements in 2007, without even amending the pleading rules, by issuing its decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). *Twombly* reversed a 50-year-old precedent holding 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." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Instead, the plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief," and this necessitates "some factual allegation in the complaint. . . ." The new duty is to furnish factual "allegations plausibly suggesting (not merely consistent with)" an "entitlement to relief."

As of July 1, 2008—13 months after it was rendered—the revolutionary *Twombly* opinion had been cited in a remarkable 7,000 cases.

Collectively, rule changes, legislation, and Supreme Court decisions over the past quarter century have made federal civil litigation procedurally more complex, risky to prosecute, and very expensive. It is a Bentley, not a Ford. Plaintiffs who can avoid federal court do so, while defendants strain to achieve a federal forum. Forum-shopping incentives have been institutionalized.

TAB 5

MEMORANDUM

20 October 2008

TO: Executive Committee, Judicial Conference of the United States

FROM: Hon. Mark R. Kravitz, Chair, Advisory Committee on the Federal Rules of Civil Procedure

RE: Subcommittees

As detailed below, the Advisory Committee on the Federal Rules of Civil Procedure does utilize subcommittees from time to time but does so consistently with the policy of the Judicial Conference and, for the most part, consistently with the Best Practices Guide To Using Subcommittees. The Advisory Committee does much of its work in the Committee of the whole. When the Advisory Committee decides to use subcommittees to facilitate the Advisory Committee's work, the Committee itself directs the scope of the subcommittee's work, maintains close control over the subcommittee's work, and closely scrutinizes that work. Subcommittees do not work independently of the full Advisory Committee. In short, subcommittees are a valuable resource for the Advisory Committee but subcommittees do not replace or displace the Advisory Committee.

The Advisory Committee currently has two subcommittees. The Subcommittee on Rule 56 has assisted in developing the proposed revision of Civil Rule 56 that was published for comment in August 2008. The Rule 56 Subcommittee is likely to be dissolved when the current Rule 56 work is completed. The Discovery Subcommittee has assisted in developing the proposed revisions of the rules on discovery as to expert trial witnesses that also were published for comment in August 2008. The future of the Discovery Subcommittee after completion of work on those proposals is uncertain; experience has shown that discovery work is a nearly constant part of the Advisory Committee agenda, and that preliminary work by a subcommittee greatly advances the Committee's deliberations.

RECENT HISTORY

The Advisory Committee's use of subcommittees in current practice grew up more than ten years ago. Subcommittees were not used while Judge Pointer and then Judge Higginbotham chaired the Committee. When Judge Niemeyer became chair he concluded that it was important to work simultaneously on both the class-action rule and on discovery. He also concluded that both subjects were so important and so complex that the work would be best accomplished if subcommittees were appointed to sort out the many possible approaches. Each subcommittee worked long and hard. Their work greatly advanced the amendments that were adopted, both in developing the proposals for publication and in revising the proposals in light of massive and extremely helpful public comments.

The Class-Action Subcommittee was dissolved when the Committee concluded that further work on Civil Rule 23 should be held in abeyance pending experience with the revised rule and developments in other aspects of practice. The full Advisory Committee continues to consider Rule 23 with the help of ongoing studies by the Federal Judicial Center. When the time comes to focus on possible rule changes, a new subcommittee may be appointed.

Subcommittees have been used to advantage in addressing several other subjects. Two Style Subcommittees were appointed — although each was responsible for initial review of half of the rules, they worked in tandem on common issues presented by the Style Project. Their hard and

constant work made it possible to complete the Style Project in a concentrated period that substantially enhanced the quality of the final product. The Subcommittees dissolved on completion of the project.

Another subcommittee undertook the work of developing an entirely new Supplemental Rule G for civil forfeiture actions. It too was dissolved upon completion of Rule G.

The Committee has experimented with reliance on subcommittees to review the public suggestions that accumulate on the agenda, but for the last several years it has undertaken periodic agenda reviews by the full Committee without advance subcommittee work.

Of course much Committee work is accomplished without involving a subcommittee. Some of the proposals recommended to the Standing Committee for adoption last June, for example, were developed by the Committee alone. These proposals include revisions of Civil Rules 48 and 81, as well as new Rule 62.1. A major project may remain under consideration for many years as a full Committee agenda item, leaving open the question whether a subcommittee might be formed if a time comes to develop a working model. Perhaps the most dramatic example is the Rule 68 offer of judgment. Extensive revision efforts were abandoned in the early 1980s. The topic came back for consideration in the early 1990s; an elaborate draft evolved through successive Committee meetings, without the help of a subcommittee, and ultimately was deferred. The Rule 68 questions continue to be pressed on the Committee by outside suggestions, including a specific suggestion from the Second Circuit advanced in a reported opinion. Rule 68 has been on the agenda for three recent Committee meetings, without yet creating a subcommittee to help. But if Rule 68 is taken up with an eye to developing an elaborate new rule, the complexity and sensitivity of the problems likely will lead to appointment of a subcommittee.

SUBCOMMITTEE OPERATIONS

These subcommittees have accomplished much of their work by frequent electronic exchanges and periodic telephone conference calls. Face-to-face meetings often are held in conjunction with Advisory Committee meetings, public hearings on proposed amendments, and at least once a Standing Committee meeting. Meetings also may be held in conjunction with conferences held during the pre-publication phase to gather information from practicing lawyers and academics; these events also may be scheduled to adjoin regular Committee meetings. Face-to-face meetings scheduled apart from other occasions for bringing Committee members together have been relatively rare, but always have advanced the work in important ways.

Subcommittees typically include five or six Committee members, designated to achieve a cross-section of views. Only Advisory Committee members have been appointed to subcommittees. Some subcommittees have found it helpful to seek advice from groups in "miniconferences" that bring together fifteen or twenty practicing lawyers, judges, and academics. These events have provided invaluable information and guidance, but the participants are involved only for the specific event, and all of the members of the Advisory Committee are invited to participate (and usually do participate) in the miniconferences. The decision to schedule a miniconference is commonly discussed in the full Advisory Committee, always approved by the Committee chair, and the letter inviting participation is always framed jointly by the Committee chair and the subcommittee chair.

The Civil Rules Committee's subcommittees have always been composed of Advisory Committee members only. Occasionally it has proved useful to seek sustained participation by people outside the Committee. Developing the civil forfeiture provisions of new Supplemental Rule G benefitted greatly from the continual involvement of the Department of Justice (where the proposal originated), the National Association of Criminal Defense Lawyers, and the Maritime Law

Association. Full and enthusiastic participation by others has been won by asking them to serve as advisers only. The advisers drawn from these sources were not subcommittee members, and offered advice without having voting rights. The result has been to obtain all the likely benefits without needing to worry about having nonvoting "members" or, alternatively, about having voting members who are not eligible to vote in the Advisory Committee.

All subcommittees have worked hard on their assignments. They have greatly expanded the Committee's capacity to develop proposals through a process of repeated review and refinement. Each draft of Rule 56, for example, was changed and adjusted until the number of changes suggested it was time to designate a new draft. The draft published for comment, emerging in June 2008, was draft 56.32. Draft 56.1 was prepared in November 2006. Without the Subcommittee, the full Committee could not have managed this intense, uninterrupted focus. Continuing intense focus has advantages in addition to enabling work at a pace that, by its continuity, enhances the final product. It also facilitates more penetrating analysis by avoiding the need to continually recall — and perhaps reinvent — past work.

The Advisory Committee's experience with all of its subcommittees has been good. The most important part of the experience has been success in avoiding the traps of delegating too much authority. Each subcommittee is created with the approval of the full Advisory Committee, and is directed to undertake work defined by the Committee. The Advisory Committee Chair participates in subcommittee meetings, including conference call meetings as well as face-to-face meetings and conferences arranged to explore problems and proposals with other lawyers, judges, and academics. The Committee Reporter participates in all subcommittee work, maintains notes on the meetings, and does the drafting. In some cases both the Reporter and the Associate Reporter undertake this work. Subcommittees that are formed for a specific purpose provide reports that become part of the Advisory Committee's public record and that are debated in the Committee's open meetings. When the subcommittee's assigned task is completed the subcommittee ordinarily is dissolved. The discovery subcommittee at times has seemed to have perpetual existence, but there have been periods without a subcommittee and the subcommittee is reconstituted if new projects are assigned after one identifiable set of tasks is completed.

For all the hard work done by subcommittees, their proposals have never been accepted without searching review. Subcommittee reports are received with respect for the work they represent, but there is no presumption for adoption. To the contrary, all aspects of any proposal are debated vigorously; subcommittee members feel free to revise their own initial positions and to depart from subcommittee recommendations in light of the discussion. No significant subcommittee proposal has emerged from the Committee without important modifications. Good illustrations are provided by the current Rule 26 and Rule 56 proposals. The most recent Advisory Committee deliberations are described in the Minutes for the April 2008 meeting, which can be found in the Administrative Office site or in the agenda books for the June 2008 Standing Committee meeting and the November 2008 Advisory Committee meeting. Only modest changes were made in the Rule 26 proposal, but that is because it had been continually redirected and refined by discussions at earlier Advisory Committee meetings. Even then the discussion remained sharp, challenging, and detailed — the summary in the minutes runs more than 6,000 words. The Rule 56 proposal, which also had been revised repeatedly in light of discussion in two conferences and Advisory Committee directions in several meetings, was discussed at even greater length — this summary runs more than 10,000 words. The Subcommittee's recommended draft rule text was revised and rearranged by the full Advisory Committee. A longstanding difficulty in addressing "partial summary judgment" was finally put to rest. The Committee Note was substantially revised as well. To repeat: The Advisory Committee has successfully used its subcommittees, but it has retained and vigorously exercised final authority over all ultimate Advisory Committee recommendations.

PRESENT SUBCOMMITTEES

Judge Michael Baylson chairs the Rule 56 Subcommittee. Its members include Hon. C. Christopher Hagy; Robert C. Heim, Esq. [emeritus member]; Hon. Randall T. Shepard; Hon. Vaughn R. Walker; and a Department of Justice representative. As noted in the introduction, it is expected that the Subcommittee will disband when work on the current Rule 56 project is finished.

Judge David G. Campbell chairs the Discovery Subcommittee. Its members include Daniel C. Girard, Esq.; Hon. John G. Koeltl; Anton R. Valukas, Esq.; Chilton Davis Varner, Esq.; and a Department of Justice representative. As noted in the introduction, the duration of this Subcommittee is uncertain. Discovery proposals arrive in a constant stream. The Subcommittee will be reconstituted should it prove desirable to carry forward with subcommittee work after concluding work on the proposals currently published for comment.

DRAFT BEST PRACTICES GUIDE

The Civil Rules Committee's use of subcommittees, as detailed above, generally conforms to the best practices identified in the draft guide. The nature of rules committee work, however, has led to some variations that should be recognized, at least in the context of the Rules Enabling Act process. That process is open. Proposals originate in an advisory committee, are reviewed by the Standing Committee, submitted for public comment, reevaluated by the advisory committee (or, with related proposals, plural advisory committees), reviewed again by the Standing Committee, approved by the Judicial Conference, adopted by the Supreme Court, and submitted to Congress. It takes a lot of time to make a rule. It is often important — at times necessary — to use subcommittees to advance the course of deliberations that otherwise could occur only at full Advisory Committee meetings, typically held only twice a year.

In this setting,it may be useful to add detail to the suggestion for a "sunset date, subject to renewal, and reviewed periodically." Civil Rules subcommittees have been appointed for a specific purpose. The "sunset date" is completion of the project, whether by abandonment or by eventual adoption of rules amendments. Some projects carry on for several years. It may be difficult to predict in advance just how long the work may take. It seems wise to recognize that the sunset date may be set by completion of the assigned task.

Real inefficiencies could result from the alternative suggestion that communications with AO staff should be made through the Advisory Committee chair. Although the Advisory Committee chairs have participated actively in all the work of all the subcommittees, there have been occasions when it is more efficient for the subcommittee chair or the Committee Reporter to deal directly with the Rules Committee Support Office. The reasons may be distinctive to the Support Office, but whatever the source of advantage it would be unwise to require artificial and circuitous communications. Similar concerns might arise from the provision requiring advance approval by the Advisory Committee chair of "use of AO staff and expenditures by subcommittees." A subcommittee chair or the reporter often seek help from Support Office staff in routine matters that need not bother the Advisory Committee chair. When such communications or assistance have been desirable, however, the Committee Chair and Reporter are ordinarily copied on any written communications so that they maintain awareness of the work of the subcommittees.

Like concerns are posed by the guide suggesting that a subcommittee chair should communicate with "recipients" who are not members of the full committee only "in rare instances," and only with express approval of the full committee's chair. This practice would be cumbersome at best when the subcommittee is dealing with advisers. The example of the Rule G Subcommittee noted above is one illustration. Other illustrations arise when a question arises that can be

illuminated by asking a clerk of court about actual practice; not only the subcommittee chair but other subcommittee members may seek advice from a trusted clerk. As yet a third example, when a "miniconference" has been scheduled there may be occasions for direct communications between participants and the subcommittee chair or the Reporter.

The advice that in-person subcommittee meetings "should normally" be held in conjunction with meetings of the full committee is borne out by the experience of the Civil Rules Committee. Many subcommittee meetings are held in conjunction with full committee meetings. The purpose may be to "focus on final deliberations and fine tun[e]" recommendations on the full committee agenda, supported by agenda materials that cover the important elements to be considered by the committee. Often the purpose is to work forward to the next stage. Face-to-face subcommittee meetings at other times are restrained by at least two costs — the financial outlay and interrupting the very busy lives of the participants. But occasionally it is important to convene a subcommittee between full committee meetings. The current discovery subcommittee provides a recent example. The subcommittee held a "miniconference" on the eve of a committee meeting to discuss experiences of a broad cross-section of New Jersey lawyers with the New Jersey rule on discovery of expert trial witnesses. The conference helped to illuminate discussion in the committee meeting, but was primarily aimed at helping to shape final recommendations that were yet to be made. Somewhat later, between the fall 2007 and spring 2008 Committee meetings, the subcommittee concluded after a series of conference calls that final recommendations could be best shaped by a face-to-face meeting. The Advisory Committee Chair approved of the recommendation and then sought and obtained approval from the Chair of the Judicial Conference Executive Committee to permit the subcommittee to hold a face-to-face meeting. The meeting was scheduled for one day, and concluded by early afternoon. It resolved a number of difficult issues that had continually eluded resolution in conference calls. Everyone involved counted it a true success.

Even though the Civil Rules Committee's subcommittees have always been composed of Advisory Committee members only, it is certainly possible that it might be desirable to include a nonmember as a subcommittee member. The most likely occasion would arise if an Advisory Committee member's term ends before the conclusion of a subcommittee's work. Continuity might be well served by carrying forward with subcommittee membership. Another possibility might be formation of a subcommittee from members of two or more advisory committees. Topics emerge from time to time that involve two advisory committees — the Appellate Rules Committee and Civil Rules Committees often need to coordinate their work. Rather than create a subcommittee of the Standing Committee, as is done when a project involves most or all of the advisory committees, a two-committee subcommittee might be useful. It may be that each of these illustrations falls outside the part of the current Conference Policy on Subcommittees that requires "approval of the Chief Justice, through the Conference Secretary, to appoint nonmembers to subcommittees." But if there is any doubt, it might be desirable to provide for approval by the Director, acting on behalf of the Chief Justice.

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

October 7, 2008

Dear Committee Chairs and Reporters:

The Judicial Conference's Executive Committee has asked all committee chairs to comment on a draft of "Best Practices Guide to Using Subcommittees of Judicial Conference Committees." The Executive Committee also asks each committee to submit a written report "on each of its existing subcommittees, detailing the need for the subcommittee, its composition and mission, and its sunset date." Both the comments and report are due by January 16, 2009. For your convenience, I attach a copy of Chief Judge Scirica's memo to committee chairs with the draft "Best Practices Guide." I also attach the "official" listing of Conference-committee subcommittees, including for each of your committees.

Although each committee has different experience with subcommittees, the six Rules Committees have much in common. The Executive Committee's invitation provides a welcome opportunity for the Rules Committees to emphasize how the nature of our work of deciding whether and when to change the federal rules of procedure and evidence and how to draft rule and note language makes subcommittees particularly valuable and important. The invitation also allows us to explain how our use of subcommittees is consistent with the Judicial Conference policy that subcommittees be formed after careful consideration and not do work that should be done by the committee as a whole. A coordinated response from the Rules Committees will be the most helpful to the Executive Committee.

Some of the approaches taken in the draft "Best Practices Guide" do not seem to fit the Rules Committees well. For example, the alternative requirement under "Mission and Authority" that all communications with AO staff should be through the committee chair, and the prohibition under "Subcommittee Records and Correspondence" on subcommittee chairs communicating with non-committee members except in "rare instances," may be difficult or inefficient for Rules Committee subcommittees. And the statement in the "Meetings" section and the last paragraph of the draft, that in-person subcommittee meetings should "normally" be held in conjunction with meetings of the full committee may not work well if, as is often the case, the full committee needs time before its meeting to study the subcommittee's rules recommendations. These are offered merely as examples of the kinds of issues you and your committee may want to consider.

I also ask you to consider concurring in a recommendation that the existing Judicial Conference procedures be amended expressly to authorize the Director, acting on behalf of the Chief Justice, to designate an individual who is not a current committee member to serve on a subcommittee. The Rules Committees have found that such individuals can provide important assistance to subcommittees working on proposed rules changes involving highly specialized or technical areas. In recent years, for example, the Civil Rules Committee enlisted the help of admiralty lawyers and forfeiture experts on subcommittees studying proposed changes to the civil forfeiture rules. The Rules Committees have often needed to consult clerks of court and other court staff to understand the impact of proposed rule changes on their operations. Committee chairs can of course invite people who are not committee members to attend a meeting, but that does not meet the need for individuals with important expertise to work with a subcommittee over an extended period in developing proposals before they are presented to the full committee.

The Judicial Conference policy language states: "The approval of the Chief Justice, through the Conference Secretary, is required to appoint non-members." This language allows the Director to designate such individuals as subcommittee members, on behalf of the Chief Justice. But the AO interprets this language to mean that the Chief Justice must personally approve all such designations. This interpretation has caused problems. Obviously, committee chairs do not want to impose such a task on the Chief Justice, and there is no need to do so. It would be helpful to have the procedures revised to make clear that the Director may make such designations on the Chief Justice's behalf. This could easily be accomplished by stating: "The approval of the Director, acting on behalf of the Chief Justice, is required to appoint non-members."

Some of you have already placed the Executive Committee's request for comment and report on your fall meeting agendas. Some of you may be able to draft the response without such discussion, particularly if your committee does not have subcommittees. Before your response is sent to the Executive Committee, I ask that you first send it to me (before November 24) so that I can circulate it to the other Advisory Committee chairs and reporters to give them the benefit of your thoughts. If you will send me your final response (before December 19), I can send it to the Executive Committee together with the responses of the other Advisory Committees and the Standing Committee.

Please call me if you have any questions or want to talk about this. The fall meetings are a welcome opportunity to see you all. I hope you are all well and thank you for your work on this as well as all the matters we will be talking about in the months ahead.

Best regards,

Lee H. Rosenthal

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

ANTHONY J. SCIRICA
CHAIRMAN, EXECUTIVE COMMITTEE

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August 26, 2008

MEMORANDUM TO ALL COMMITTEE CHAIRS

SUBJECT: USE OF SUBCOMMITTEES

As you know, it has been the policy of the Judicial Conference, as reflected in *The Judicial Conference and Its Committees*, that the work of its committees be done by each committee as a whole as much as possible. To assure that this policy is advanced to the greatest degree possible consistent with efficient operation of the committees, the Executive Committee has been looking at the extent to which subcommittees are being used. The attached draft best practices guide has been developed, using input from committee staff, to assist committees in the management of subcommittees. The Executive Committee requests that you review it with your committee and provide any comments to the Judicial Conference Executive Secretariat. In addition, the Executive Committee asks that no further subcommittees be created until it has completed its review of this subject.

To further assist in this effort, the Executive Committee would like each committee, no later than January 16, 2009, to report on each of its existing subcommittees, detailing the need for the subcommittee, its composition and mission, and its sunset date.

We look forward to your comments and hope that this process will assure that policy formulation is both as broad-based and as efficient as possible.

Anthony J. Scirica

Attachment

cc: Committee Staff

DRAFT

BEST PRACTICES GUIDE TO USING SUBCOMMITTEES OF JUDICIAL CONFERENCE COMMITTEES

INTRODUCTION

In recent years, it has become apparent that subcommittees can be an important tool in the accomplishment of the business of the Judicial Conference committees. Chairs have established subcommittees for a variety of reasons, such as to address complex or technical issues, to increase oversight of a particular program, to address emergencies, or to prepare to implement a specific statute. However each subcommittee created can cause additional bureaucratic complications, call on staff resources and expense. Approximately 81 subcommittees have been created, sometimes without careful consideration of the benefits and burdens.

The Judicial Conference policy quoted below seeks to accommodate these practical realities while assuring that subcommittees are used in a focused manner to support the collegial decision making of, and not as a surrogate for, the full committee.

This guide is designed to help in maximizing the effectiveness of subcommittees, while maintaining appropriate accountability and resource constraints. It is not comprehensive. We welcome any and all suggestions for improving it and for keeping it relevant as the work of committees evolves.

CURRENT CONFERENCE POLICY ON SUBCOMMITTEES

> It is the Conference's preference that work be performed by full committees, and *standing* subcommittees are discouraged. Chairs may appoint subcommittees composed of committee members to consider specific topics as necessary, but the number of subcommittees and meetings should be held to the minimum needed to accomplish the work of the committee. The approval of the Chief Justice, through the Conference Secretary, is required to appoint non-members [*i.e.*, persons who are not already members of any Judicial Conference committee] to subcommittees, ... The Conference Secretary maintains a list of all existing subcommittees, and chairs should notify the Secretary when one is established.

The Judicial Conference of the United States and Its Committees, p. 4 (Sep. 2007) (parenthetical and emphasis added).

ROLE OF COMMITTEE CHAIR

The chair of the full committee may establish a subcommittee and designate its members and chair. At the time the chair of a subcommittee is designated, the committee chair should discuss with the chair of the subcommittee such subjects as subcommittee procedures, the relationship of the subcommittee with the full committee, and how best to coordinate with the committee chair. The chair of the full committee should consider the impact on committee staffing resources when creating and assigning tasks to subcommittees.

MEMBERSHIP

It is preferable that the chair of a subcommittee have at least one year of service on the full committee before being designated. The chair might consider committee members' special interests, experience, or expertise when selecting subcommittee members. Membership should be balanced in terms of points of view, experience, etc. The size of the subcommittee should be as small as is consistent with the requirements imposed by workload, deadlines, and need for expertise. Experience has shown that it is beneficial for the chair of the full committee to participate in as many teleconferences and meetings of the subcommittee as possible.

DURATION OF SUBCOMMITTEE

All subcommittees (unless institutionally permanent, such as the Budget Committee's Economy Subcommittee and the Judicial Resources Committee's Judicial Statistics Subcommittee) should have a sunset date, subject to renewal, and be reviewed periodically to see if disbanding is appropriate; the chair of the full committee may dissolve a subcommittee whenever deemed appropriate. Some committees establish subcommittees to enable quick responses to emergencies and to maintain focus on recurring matters, such as long-range planning, and these may have a longer existence. Appointment of a new committee chair and the five-year committee jurisdictional review are also good times to review the need for each subcommittee.

MISSION AND AUTHORITY

The mission of each subcommittee should be clearly defined in the records of the committee. Subcommittees are creatures of the full committee and generally do not have independent authority, unless it is granted by the Conference or the Executive Committee. Use of AO staff and expenditures by subcommittees must be approved in advance by the chair. [Alternative: Communication with AO staff should be through the chair.]

MEETINGS

Telephonic meetings are encouraged, as is use of other technologies, such as collaborative electronic workplaces, and the like. It is occasionally appropriate for more than one subcommittee, either of the same or different full committees, to meet jointly on matters of common interest. In-person subcommittee meetings should normally be held in conjunction with meetings of the full committee. Out-of-cycle, in-person subcommittee meetings in venues other than Washington, D.C. must be approved by the chair of the Executive Committee of the Judicial Conference. *The Judicial Conference of the United States and Its Committees*, p. 4 (Sep. 2007).

SUBCOMMITTEE RECORDS AND CORRESPONDENCE

The chair of the full committee should sign any committee-related communication to recipients who are not members of the committee. In those rare instances when it is appropriate for the chair of a subcommittee to communicate with recipients who are not members of the committee, the communication must be expressly approved by the chair of the full committee.

Information considered by the subcommittee should be available to interested members of the full committee.

Subcommittees often complete the majority of their work between meetings of the full committee using telephonic meetings, e-mail, and other means to generate a report to the full committee. This enables the subcommittee report to be prepared in the same way as, and included in, other agenda materials for the full committee, giving the committee sufficient time to consider the issues. When the subcommittee chooses to hold an in-person meeting contiguous to the full committee meeting, this preparatory technique minimizes last-minute demands on the subcommittee and staff and enables the subcommittee to focus on final deliberations and fine tuning of its recommendations.

TAB 6

MEMORANDUM

To: The Honorable Mark Kravitz
Chair, Advisory Committee on Civil Rules

From: Steve Gensler

Date: October 13, 2008

Re: Issues Regarding Assertion of Privilege and Work-Product Protection

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Privileged information is not discoverable, even if relevant. Fed. R. Civ. P. 26(b)(1). The discovery rules also grant a rebuttable protection to material that qualifies for work-product protection under Rule 26(b)(3).

In 1993, Rule 26 was amended to add subdivision (b)(5). It requires parties withholding otherwise discoverable information on the basis of privilege or work-product to "expressly make the claim" and to describe the documents or information withheld in a manner that will allow others to scrutinize the claim (but without so much detail that the privilege or work-product protection is thereby waived by disclosure). Fed. R. Civ. P. 26(b)(5).[1]

In the ensuing 15 years, several questions have arisen regarding compliance with Rule 26(b)(5), including:

(1) What must be furnished in order to meet its requirements?;

(2) When must that material be furnished?; and

(3) What is the consequence of failing to timely furnish the required information?

Ultimately, it may be that only the second question would be profitably addressed by rule language. I provide background on all three below, however, in order to place the issues in context.

[1] In 2006, new subdivision (b)(5)(B) was added as part of the e-discovery package. It supplies a mechanism for parties to assert privilege or work-product protection *after* it has been produced. Fed. R. Civ. P. 26(b)(5)(B). This provision is not at issue here.

I. Background.

A. What Must Be Furnished to Meet the Requirements of Rule 26(b)(5)?

Rule 26(b)(5) requires the party claiming privilege or work-product protection to *"describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."*

It does not expressly require a privilege log. Partly this is because privilege and work-product protection can apply to non-document communications. For example, it would not make sense for a party asserting a privilege objection at a deposition or in an interrogatory answer to do so via a privilege log. Moreover, the Advisory Committee notes to the 1993 amendment suggest a desire for flexibility to accommodate the varied circumstances in which a privilege or work-product protection issue might arise. For example, the manner of asserting privilege might reasonably differ depending on whether a party was withholding an entire document or supplying a document with slight redactions.

Nonetheless, it has become customary for litigants and courts to expect that parties will supply privilege logs when they withhold documents or ESI due to a claim of privilege or work-product protection. The friction point tends to be the level of detail required. Courts universally reject "naked" or "boilerplate" objections that supply no detail whatsoever. And courts increasingly are criticizing the insufficiency of the details that are provided. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 263-267 (D. Md. 2008).

It is important to note that, ultimately, there are two separate questions concerning the specificity of privilege and work-product claims. The first is the level of detail required for the withholding party to make the claim. That is clearly addressed by Rule 26(b)(5). The second is the level of proof required to sustain the claim if it is challenged (and the parties cannot work it out) and presented to the court either by way of a motion for protective order or a motion to compel production. That issue is not, I think, addressed by Rule 26(b)(5), which requires enough detail to "enable *other parties* to assess the claim," but which does not speak to the burden of sustaining the claim before a court.

B. When Must the Party Make the Claim of Privilege or Work-Product Protection and Furnish the Information Required by Rule 26(b)(5)?

Rule 26(b)(5) does not expressly state when the party claiming privilege or work-product protection must either: (1) make its claim; or (2) supply the required information.

Courts consistently hold that the claim must be made at the time for responding to the discovery request in question. First, courts generally view this as implicit in Rule 26(b)(5). Second, courts point to timing provisions in other discovery rules. Under Rule 33, for example, all objections to interrogatories must be "stated with specificity" in the response. Fed. R. Civ. P. 33(b)(4). Similarly, Rule 34 requires a party responding to a document request to either state that inspection will be permitted or to "state an objection, including the reasons." Fed. R. Civ. P. 34(b)(2)(B). Courts generally read these provisions as collectively requiring parties to at least assert their claims of privilege or work-product protection at the time the discovery response is due.

The more complicated question is when the detailed information – generally, the privilege log – is due. Some courts have held that, absent a court order or party agreement, the privilege log is due when the discovery response is due. *See, e.g.*, *Kingsway Financial Services, Inc. v. Pricewaterhouse-Coopers LLP*, 2006 WL 1295409 at *1 (S.D. N.Y. 2006) (applying Local Civil Rule 26.2(c)[2]). Other courts hold that the withholding party may supply the detailed information within a reasonable time, thereby "perfecting" the claim of privilege. The Ninth Circuit is the only circuit to have addressed this issue. It adopts the "reasonable time" test but picks the discovery response due date as the default reasonable time. *See Burlington Northern & Santa Fe Railway Co. v. U.S. District Court for the District of Montana*, 408 F.3d 1142, 1147-49 (9th Cir. 2005); s*ee also Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 695 (M.D. Fla. 2005) (following Burlington Northern).

There are substantial practical issues here. In large document productions, it is probably impossible to produce a privilege log within the default 30-day response period. Moreover, it makes sense to allow parties to claim privilege initially – and get on with the production of the unobjected to materials – and then follow up with the supporting details later.

C. What Is the Consequence of Failing to Make or Perfect a Timely and Sufficient Claim of Privilege or Work-Product Protection?

Rule 26(b)(5) says nothing about the consequence of failing to make or perfect a timely and sufficient claim of privilege or work-product protection. The Advisory Committee notes to the 1993 amendment suggest that waiver might result, but do so in passing and without elaboration.

[2] Local Civil Rule 26.2(c) provides: "Where a claim of privilege is asserted in response to discovery or disclosure other than a deposition, and information is not provided on the basis of such assertion, [a privilege log] shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the court."

The specific discovery rules present a mixed bag. Rule 33 states that "[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." Fed. R. Civ. P. 33(b)(4). In contrast, Rule 34 does not mention waiver.[3]

For the most part, the courts recognize waiver as a possible but not automatic consequence. Rather, the courts look at many factors to determine whether waiver is appropriate under the circumstances, including how much detail was provided in a timely fashion and whether the document production was particularly difficult in its magnitude or otherwise. *See Burlington Northern & Santa Fe Railway Co. v. U.S. District Court for the District of Montana*, 408 F.3d 1142, 1147-49 (9th Cir. 2005); *First Savings Bank, F.S.B. v. First Bank System, Inc.*, 902 F. Supp. 1356, 1360-65 (D. Kan. 1995) (extensive discussion of waiver factors).

D. Subpoenas.

Rule 45(d)(2) is parallel to Rule 26(b)(5). It contains its own timing provisions which, unfortunately, have caused confusion in the courts.

Under Rule 45(c)(2)(B), a party may respond to a subpoena duces tecum with objections. The objections must be served within 14 days. Rule 45 does not expressly address whether a privilege log must be filed within that 14-day period. One district court has held that the privilege log may be provided within a reasonable period but has selected the 14-day deadline is the default deadline for what is reasonable. *See Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 698 (M.D. Fla. 2005)

The situation is further complicated by a possible ambiguity in Rule 45. Under Rule 45(c)(3), a party may move to quash a subpoena. The motion to quash must be filed before the time to comply with the subpoena. Oftentimes, the return date on the subpoena is longer than 14 days. Many courts hold that the failure to make objections within 14 days waives the ability to rely on those objections in a motion to quash. Other courts hold that a party may either object under Rule 45(c)(2)(B) or move to quash under Rule 45(c)(3). The research I have done so far has not identified any cases discussing when a party who moves to quash on the basis of privilege or work-product protection must supply a privilege log.

II. Topics for Consideration.

Neither the level of detail required nor waiver seem to be good candidates for new rules. Given the myriad contexts in which claims of privilege and work-product protection arise, it is unlikely that a new rule could express in general language any meaningful guidance about what details are required for any particular claim. Waiver

[3] Rule 32 provides that "correctable" errors in deposition questions are waived if not made at that time. Fed. R. Civ. P. 32(d)(3)(B).

also seems to be a topic that will defy general expression, and it is a topic further complicated by questions of rulemaking authority.

New rule language clarifying when the details supporting a claim of privilege must be provided seems more promising, at least at this stage of the inquiry. The existing rules do seem to be delinquent in not supplying a coordinated answer to the timing question. In particular, it would seem helpful for Rule 26(b)(5) and Rule 34 to provide a clear signal to parties about when to furnish the detailed information justifying their claims of privilege. The need for clear guidance is highlighted by the possibility of waiver should the court later conclude that the claim was not sufficiently justified in a timely fashion.

Whether we can identify rule language that would improve upon what the courts have been doing is perhaps a different question. While there might be any number of possible ways to clarify the due date, I will mention two here.

One option would be to require that the privilege log be supplied within the time required to respond to the discovery request absent a court order or party agreement. This approach would assume that, in most cases, the preparation of the privilege log is not so difficult that it cannot be provided with the discovery response. And in those cases where it is impractical to do so, the party will know that it needs to either work out the due date with the opposing party or obtain a court order setting a later due date. This appears to be the approach adopted by the Local Civil Rules of the Southern District of New York.

Another option would be to expressly allow the privilege log to be supplied within a reasonable time of the production. Courts and parties would then be left to determine what was reasonable under the circumstances of each case.

In any event, articulating a clear deadline for submitting privilege logs or their equivalent would not intrude into the waiver arena. Courts would remain free to determine whether the failure to meet the deadline warrants a finding of waiver under the circumstances.

If we were to propose a new rule setting a deadline applicable to claims under Rule 26(b)(5), it would make sense to propose a parallel change to Rule 45.

MEMORANDUM

To: Steve Gensler
CC: Mark Kravitz, Ed Cooper
From: Rick Marcus
Date: Oct. 11, 2008
Re: Rule 26(b)(5)(A)

This memo addresses the ideas you raise in your draft memo for the Advisory Committee. I thought it would be worthwhile to write down my reactions should we move forward -- educated by a discussion with the Advisory Committee -- on how (and whether) this rule might be revised. And I thought you might find them of interest.

Your message prompted me to go back and re-read § 2016.1 of vol. 8 of Fed. Prac. & Pro., which I originally wrote more than 15 years ago before Rule 26(b)(5)(A) went into effect. It actually reads fairly well, and foresees some of the issues to be resolved. I guess the question now is whether, with 15 years experience, it's come time to resolve those issues by rule in light of diverse judicial responses. At least the Ninth Circuit regards those rulings as quite diverse:

> A survey of district court discovery rulings reveals a very mixed bag, running the gamut from a permissive approach where Rule 26(b)(5) is construed liberally and blanket objections are accepted, to a strict approach where waiver results from failure to meet the requirements of a more demanding construction of Rule 26(b)(5) within Rule 34's 30-day limit. In general, a strict per se waiver rule and a permissive toleration of boilerplate assertions of privilege both represent minority ends of the spectrum.

Burlington Northern Ry. Co. v. U.S. District Court, 408 F.3d 1142, 1148 (9th Cir. 2005), cert. denied, 126 S.Ct. 428.

Since 1993, it appears about 100 reported cases have dealt with the rule, but the number of unreported cases is probably larger. You mention that criticisms of the lack of specifics in the rule have increased, but it seems to me that Judge Grimm's citations in the *Victor Stanley* case include quite a few that predate the rule. Maybe this is just a longstanding problem.

To my mind, the background for this discussion includes a number of things, and I'll mention several of them. The starting point for the rulemaking response to this problem was the 1991 amendment of Rule 45, which produced a requirement that was then added to Rule 26(b) in 1993. Before that, "boilerplate" privilege objections would be all that would normally be provided about what was held back on grounds of privilege. It might be worthwhile to ask whether anyone on the Advisory Committee thinks going back to that regime would be desirable. If not, it is important to keep in mind why the current regime is preferable. For some background, see Cochran, Evaluating Federal Rule of Civil Procedure 26(b)(5) as a Response to Silent and Functionally Silent Privilege Claims, 13 Rev. Litig. 219 (1994).

My recollection is that during the April meeting we heard some remarkable estimates of the cost of preparing a privilege log -- $1 million in cases of the dimensions some of our lawyer members handle. I wonder how much of that cost is due to the provisions of Rule 26(b)(5)(A). I recall a number of discussions of privilege waiver a decade and more ago during which some lawyer members would decry the idea of a "quick peek" whether or not that would work a waiver because "I'm not going to let the other side look at anything until I look at it, and I'm not going to let the other side look at anything I have a legal right to withhold."

Those discussions from long ago cause me to wonder whether the advent of Rule 26(b)(5)(A) really changed things so much. It could be that, without the rule, producing parties had to spend a lot of time and money reviewing the documents for responsiveness and privilege and culling the privileged ones before production. I imagine they had to do something to keep track of what they held back in case the matter came up later, and (presumably) keep track of why they believed these things were privileged. That sounds a lot like what is necessary to produce a privilege log. For a description of such a review in one case from the 1970s, see Transamerica Computer Co. v. International Bus. Mach. Corp., 573 F.3d 646, 649 (9th Cir. 1978).

After all that work was done, I'm not sure how much more work would have been necessary to prepare a privilege log, and it is quite unclear to me how that work could add up to $1 million in costs. I suspect that the estimates we heard about included activities parties felt they had to do before 1993.

But before 1993, it is probably true that challenges to privilege claims were less frequent. Rule 26(b)(5)(A) makes it a lot clearer what has been held back than was true before. And I suspect that obtaining the kind of information Rule 26(b)(5)(A) requires be disclosed through formal discovery was very difficult. So it was probably easier back then to make unjustified claims for privilege and withhold more. It would be interesting (but not possible) to know whether the opaqueness of discovery then regarding what was held back on grounds of privilege led to a larger number of unjustified assertions of privilege. It does seem clear that the rulemakers then regarded the existing practice as inadequate.

It may be that in the E-Discovery age document review has become so much more costly to do everything that the previous attitude that “I won't let the other side see something until I've looked at it” has passed from the scene. But if that's so, it would seem to me that, given the passage of Fed. R. Evid. 502, the possibility of “sneak peek” agreements could reduce that cost a lot by permitting the producing party to limit its attention to the things the other side says it really wants. Maybe the digital age has made the “sneak peek” irrelevant because there isn't a “peek” -- you just provide CDs with all the stuff to the other side. Otherwise, I would think one value of the sneak peek would be to reduce privilege review costs.

In any event, I would think that the digital age also could conceivably reduce some costs of complying with Rule 26(b)(5)(A). Indeed, I have attended E-Discovery events where vendors claim to have programs that can reliably identify privileged materials. I would think that relatively expeditious methods could be developed to produce some log-like listing for those identified materials, seemingly minimizing the costs of complying with Rule 26(b)(5)(A).

The privilege log idea was borrowed from Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, where it was developed to require agencies responding to FOIA requests to reveal what they had not turned over on claims that they could withhold that material. I wonder whether that FOIA requirement has remained viable in that context as we arrived at the digital age.

So it seems to me there is a lot to ponder here, and also that the variety of situations in which privilege logs are prepared makes designing a rule that provides a lot of direction quite difficult. With that background, a few more specific reactions:

(1) What must be furnished: The rule is, of course, quite delphic. It requires that the "nature" of the material be described "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." The 1993 Committee Note acknowledged that "[t]he rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection." It also notes that the wisdom of requiring specifics about each item depends on how much material is involved.

As you note, there are two issues -- the level of detail needed in the log, and the level of proof to back up the claim if challenged. It seems to me that we hope that the first issue is the only one that need be considered for most withheld material; ordinarily the other side should simply back off because the propriety of the privilege claim is clear enough. That's in a way consistent with our inclusion of Rule 26(b)(5)(B), which says that a privilege claim made after production requires all parties to return or quarantine the material unless they challenge the claim. Again, the hope is that there usually won't be a challenge, and that this will be the end of the matter.

The second issue is probably not within our Committee's jurisdiction so far as claims of privilege are concerned. Dealing with the question how to evaluate a crime/fraud challenge to the attorney-client privilege, the Court in United States v. Zolin, 491 U.S. 554 (1989), invoked Fed. R. Evid. 501 and "the developing federal common law of evidentiary privileges." Id. at 574. Perhaps our rulemaking on this topic would be appropriate as a regulation of discovery rather than privilege, but it seems initially to me that this argument is probably weaker on this question (the degree of proof needed) than on the inadvertent waiver issues new Rule 502 addresses.

Putting that aside, I think that some flexibility or slippage is probably not a bad thing here. Compared to what was true before 1993, the privilege log seems a step forward even if sometimes too general. Insisting that it be very detailed in all cases would probably drive up the costs I discussed above, but not be useful if it's true most assertions are not challenged right now. And however we tighten up the required showing, I doubt we could cut off the possibility that a court called upon to make a determination when there is a challenge to a privilege claim would not ask for more. In camera review can be a big burden for a court, and it is probably going to lean on the party whose objections have made that task necessary to provide all the help it can.

So I suspect that the most we can do is what we have done -- to call for enough information to "enable other parties to assess the claim." Once the parties do that and push forward, I think our Committee may well be out of the ball game in terms of devising rules for handling the privilege claim itself.

(2) Timing for providing the log: On one level, you could argue that the rule does include a timing provision, because it says specifics must be provided "[w]hen a party withholds information" on grounds of privilege. That's probably fairly easy with depositions and interrogatories. In a deposition, that happens when the question is objected to and the witness's lawyer (as still permitted by Rule 30) instructs the witness not to answer. Until 1993 (i.e., back in the old days when I was a lawyer), that was followed by a number of questions from the lawyer taking the deposition to probe the assertion of privilege. Perhaps that has changed, and nowadays in depositions the witness's lawyer not only instructs the witness not to answer but also proceeds and volunteers the information that backs up the privilege claim. If so, I wouldn't be surprised if the other side nevertheless asks the witness about these things anyway. With the interrogatory response, the time to say what you are not revealing is presumably when you provide the answer.

With Rule 34 requests, however, things are a good deal more complicated. It seems to me that parties may often provide their Rule 34(b)(2) response a considerable time before they provide the actual documents. With electronically stored information, indeed, our recent amendments require that sequence, because they say that the responding party must declare what form it intends to use for electronically stored information before producing the information. The idea is to permit the other side to object and go to the court before actual production. I suspect that it is often true that the Rule 34(b) response comes in a long time before the actual production occurs. One reason for this time lag is that during that time lag the actual review of documents for responsiveness and privilege occurs. Taking the $1 million figure for preparation of a privilege log that we have heard, I can't see how that kind of cost could be generated within the 30 days now allowed for the Rule 34(b) request. (Maybe that shows I'm out of touch with today's billing rates.)

So my suspicion is that, for a significant number of cases, the Rule 34(b) response comes in well before the actual production. Indeed (besides the question of form for electronically stored information), there may be a considerable advantage in getting any global disputes about what will be produced that can be resolved on the basis of the Rule 34(b) response out of the way before the document gathering is commenced or fully done. If that's right, a rule saying the log has to be done at the same time is probably not a good idea.

The alternative of saying the log should be provided a reasonable time after the Rule 34(b) response is probably much better, but I'm not sure how much that adds to where the courts probably are now. In some cases, a reasonable time may be no time. If only 100 pages of material are involved, why should it take long to pull the three privileged documents and to provide the specifics about them that Rule 26(b)(5)(A) requires? With a terabyte of electronically stored information, things are obviously different. So I approach this topic with diffidence.

(3) Consequences of noncompliance: My thinking is that Rule 37 is the place to look for consequences of noncompliance, and that in general Rule 37(b) should be the resource. My take back in 1993 was that some cases seemed too harsh even then in finding waivers due to failure to provide a log. On one level, those most sensitive to the limitations of 28 U.S.C. § 2074(b) could say that the addition of 26(b)(5)(A) in 1993 raised issues of rulemaking power because they added a requirement that could, if disobeyed, lead to loss of privilege protection. I don't think anyone has gone that far, and suspect that whatever we might do now would not magnify the risk of waiver. So the rulemaking power issue seems to me a bit tangential.

But that does not explain what we could offer that would improve on the multifactor attitudes seemingly displayed by cases under the current rule. Unless the responding party was really flaunting its obligations, I suspect that courts usually say the main consequence of failure initially to satisfy the log requirements is to supplement the log with the needed information. And that strikes me as a reasonable response.

(4) Subpoenas: Whatever the arguments for an understanding attitude toward responding parties with regard to timing and contents of a privilege log, and the consequences of failure to do things right, it seems to me that we should be more accommodating toward those nonparties served with subpoenas.

Maybe a starting point here would be to ask whether the addition of a log requirement to Rule 45 in 1991 was a mistake. Probably the answer is that nonparties are, if anything, more likely to make overbroad claims of privilege, and that the log requirement is therefore important.

If so, it is nonetheless true that for the nonparty the subpoena may come out of the blue. The party is not subject to formal discovery until after the Rule 26(f) conference, and otherwise a lot better informed about the litigation than the nonparty must be at the time it is hit with a short-fuse need to respond. Saying the nonparty has to do in 14 days what the parties get 30 days to accomplish, even with their advance knowledge about the case, seems odd to me.

At the same time, I note that there are a number of other issues before us (from the inbox) about Rule 45. It may be that the time has come for a comprehensive look at Rule 45, and if so folding this issue in seems sensible to me.

* * * * *

It is a sign of a bad correspondent when the reactions are longer than the thing that prompted them, so I guess that makes me a bad correspondent. In any event, I hope that these first reactions to the Rule 26(b)(5) issues prove of use as we move forward. It should be an interesting discussion in November.

TAB 7

CIVIL RULES AGENDA REVIEW

(The memorandum that appears below was circulated in September to garner initial reactions. Committee responses have moved several topics up the ladder toward formal consideration as agenda items. Estoppel has no place here; it is appropriate to ask consideration of any issue that remains designated for removal from the agenda, and to urge present consideration of issues designated to be carried forward. Otherwise, discussion will focus on the questions addressed in parts III and IIIA for present consideration or for possible consideration by the Discovery Subcommittee.)

This memorandum surveys a number of proposals for rules revisions that have accumulated on the agenda. They are tentatively sorted into three groups: Those that should be removed from the agenda, despite possible merit; those that should be carried along for possible future consideration in light of growing experience; and those that might be brought on for active consideration in the near future. The third group includes a separate section for a proposal that might be referred to the Discovery Subcommittee for further sorting.

Many of the proposals address features that might be added to the CM/ECF system. The Civil Rules do not address that system directly. These suggestions will be sent along to the appropriate Judicial Conference Committee when that has not already happened.

This summary is being circulated well in advance of the November 2009 Advisory Committee meeting. Committee members should consider which items in each category might benefit from discussion at the meeting, whether to confirm the tentative recommendation or to adopt a different approach. Advance notice of these suggestions will be welcome, but any item can be addressed at the meeting.

I Remove from Agenda

97-CV-V: This set of suggestions emerged from the Ninth Circuit's survey of local district rules within the circuit. Two of the three suggestions have already been considered. (1) Rule 5(d) has been amended to end the routine filing of discovery materials before use in the action. (2) Rule 51 has been amended to allow a direction to file proposed jury instructions before trial (and amended in many other ways as well). (3) The third suggestion is to amend Supplemental Rule C(4). Rule C(4) calls for notice of an in rem action and arrest by publication (or "[n]o notice other than execution of process * * * when the property that is the subject of the action has been released under Rule E(5)"). The admiralty bar has long been aware of the due process questions that might be addressed to this traditional notice practice. It has received at least some attention from the advisory committee in the past. Perhaps the best course is to consult the Maritime Law Association to see whether they believe the topic should be taken up again.

03-CV-E: The overall purpose of this proposal by Craig Reilly is to bring into rule text clear provisions for revising interlocutory rulings. The concern is that Rule 54(b) is too obscure, and Rule 72(a) simply does not address revision of magistrate judge rulings on nondispositive matters. Rule 54(b) would be revised to add a definition of interlocutory orders; to add a statement that an interlocutory disposition of less than all the action is not appealable as a judgment (as drafted, this might inadvertently repeal the collateral-order doctrine); and to set the standard for reconsidering an interlocutory order — "As justice requires, and in the discretion of the court." Rule 72(a) would be revised by adding a new paragraph (2) recognizing that a magistrate judge may reconsider a nondispositive order under Rule 54(b). If reconsideration is sought more than 10 days after the initial order, the district judge can review only new grounds raised by the motion to reconsider.

The concerns that underlie this proposal have some force. But they must confront the constant need to choose between ever-greater detail and more compact rules. Attempting a definition of interlocutory orders would be risky. Setting a standard for reconsideration could easily be a mistake; in many circumstances a court should be free to change its mind about the best approach without being constrained even by something as vague as "justice requires." (One Committee member responded that indeed it would be a mistake of add an "interests of justice" standard — it would have no fixed meaning, and might create confusion as to the different interests of justice that emerge in different contexts.) There may be more reason to consider the Rule 72(a) proposal, but only if there is a real risk that magistrate judges and district judges together fail to understand their authority to revise a nondispositive order after the Rule 72(a) time to object has passed.

04-CV-J: Judge Borman believes that it is a fraud on the jury, in which the court is complicit, when the parties reach a "high-low" settlement and ask that it be entered on the record but withheld from the jury. The arrangement he describes is familiar: the parties agree that the plaintiff will be paid at least $2,000,000, but no more than $5,000,000, no matter that the verdict falls below or above that range; the verdict controls only if it falls within the range. Judge Borman suggests alternative responses: tell the jury of the agreement; or treat the agreement as a settlement on terms that require damages to be determined by an arbitrator.

There are manifest objections to telling the jury of such arrangements. Treating them as settlements that waive a jury determination of damages raises serious questions about the line between substance and procedure, complicated by the interplay between federal and state law. Either approach presents difficult questions about the legitimacy of this tactic that may not be subject to disposition by referring to "fraud on the jury."

06-CV-B: Paul Levy, of Public Citizen Litigation Group, asks why there should not be a fillable/saveable PDF form for acknowledgment of service that can be filed through the ECF system and thus transmitted to counsel. This suggestion does not seem to require a provision in the Federal Rules of Civil Procedure.

06-CV-F: Judge Rosenthal forwarded a suggestion from Magistrate Judge Hedges that originated with the Clerk's office in the District of New Jersey. Rule 5(d)(1) provides: "Any paper after the complaint that is required to be served — together with a certificate of service — must be filed within a reasonable time after service." The suggestion is that the certificate of service is not necessary "because CM/ECF will generate the equivalent of that proof through a receipt." It is recognized that an exception would be needed for cases not filed under CM/ECF. Again the question is whether an explicit provision in the Civil Rules is required to reach this apparently sensible goal. Rule 5(d)(3) authorizes local rules that allow papers to be filed by electronic means. This provision should authorize local rules that automatically file a certificate of service when service is made through the system. It seems better to leave the matter for local development, at least for now. Different courts may become ready to take this step at different times. And experience in the courts that feel ready first may lead to better implementation over time.

06-CV-H: The Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association proposes two things for "Rule 45 or the Advisory Committee notes." The first responds to an issue that became prominent in the district courts in the District of Columbia Circuit but was resolved by the court of appeals. Several district courts ruled that the United States is not a "person" within the meaning of Rule 45, so it cannot be subpoenaed for discovery or trial when it is not a party to the action before the court. The court of appeals then ruled that indeed the government is a person. Absent further evidence of an intractable problem in other courts, there is no pressing need to amend Rule 45. At the end, the proposal raises a quite

different issue. These questions go to the grounds on which the government may seek to avoid compliance, including reliance on agency rules that purport to establish confidentiality. The proposal here is that the government, as other nonparties, should be left to standard arguments of burden and privilege as informed by the government's particular circumstances. "The standards of administrative agency review should not be applied to an action to enforce a subpoena against the federal government under Rule 45." This suggestion opens potentially difficult issues that are likely to prove too diverse to capture in reasonably useful rule text. Some of the issues may test the Enabling Act line between procedure and substance, particularly when an agency relies on its own rules in resisting discovery. There also may be sensitive issues relating to claims of privilege. In all, these issues seem better put aside until some clearer need appears.

07-CV-B: Kay Sieverding submits 32 numbered suggestions "[b]ased on my absolutely horrible life ruining experiences in federal courts." Many of them address matters outside the scope of the Civil Rules. The following suggestions at least potentially would touch on the Civil Rules: (2) recognized causes of action should be numbered, and the ECF system programmed to disallow a Rule 12(b)(6) motion as to any numbered cause. (3) Page limits should be prescribed to give a clear line within which a pleading cannot be dismissed as "too long." (4) Rule 8 should be eliminated because it is vague and unclear. (5) Judges should be required to rule on all motions within 90 days or face withholding of salary. (6) Findings of fact and conclusions of law should be required as to every order; the ECF system should not accept an order that does not comply. (8) An ECF form should be developed for injunctions; noncomplying injunctions would not be entered. (9) ECF should reject any res judicata defense unless the date of jury trial is given, along with the transcript page or document specifying decision of the matter. (10) A Rule 11 motion must state the fact or legal citation where the offending statement is made. (11) A motion for attorney fees must cite Rule 11 or a fee-award statute. (12) A defense counsel notice of appearance must state whether there is insurance that may pay the claim; show that the insurer is registered to sell that type of insurance and is in good standing; and enter the policy into ECF. (24) Judges should be prohibited from holding scheduling conferences. (27) A special ECF system should be established for prisoners challenging prison conditions.

07-CV-C: This is actually a comment on the time-computation rules.

07-CV-F: Judge Walker forwards for consideration an article by Kathy Carlson, State Law Librarian in Wyoming. The topic is in part familiar from work on discovery of electronically stored materials. Courts increasingly are citing to on-line sources, and are relying on digital media in reaching decisions and explaining opinions. A prominent example is the Supreme Court's reliance on the police videotape of a traffic pursuit in Scott v. Harris, 127 S.Ct. 1769 (2007). The recording is now available on the Court's website, but how long will the relevant program permit access? So of the copy in the clerk's file. "There needs to be some thought as to how these materials will be preserved and permanent access will be provided." This question deserves to be addressed, but probably not in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. The Administrative Office, working with other Judicial Conference Committees, seems better able to take on this task.

08-CV-A: B. Sachau offers a number of suggestions: (1) poor people should be able to submit amicus briefs without having to pay hundreds of dollars. (2) "a floppy disc version of a document should be allowed and should be easily gotten by poor people for low price." (3) Rule 30 should allow use by the public of audio tapes in the courtroom (it is not clear whether this relates to depositions or is more general). (4) An answer to an interrogatory or a request to admit that is prepared by an attorney should note the attorney's preparation. Other suggestions rather clearly do not go to the Civil Rules — something should be done to correct corruption by government officials; pro se litigants should be sitting in on committee meetings that make rules for pro se litigants; discrimination in the courts based on gender, age, or poverty should be stamped out.

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II Carry Forward

97-CV-V: This item is noted as the first item in part I. It may be wise to consult the Maritime Law Association before deciding whether to take up the topic of notice in an in rem action.

04-CV-H: Judge Snyder forwarded this suggestion that the Central District of California adopt a local rule authorizing plaintiffs to make offers of judgment under Civil Rule 68. The proponent of the suggestion urges that plaintiff offers have worked well under California Code of Civil Procedure § 998. When a defendant fails to beat a plaintiff's offer, the sanction under § 998(d), in the court's discretion, is "to require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial * * * or during trial * * *." (Section 998(f) adds this: "Police officers shall be deemed to be expert witnesses for purposes of this section * * *.")

Suggestions to revise Rule 68 run endemic. The Committee continues to carry them forward on the agenda. This one renews a long-running position that a meaningful sanction can be found to "give teeth" to a provision for plaintiff offers.

04-CV-I: The clerk of the Northern District of New York suggests that disclosure statements under Rule 7.1 should be eligible for electronic filing. The suggestion seems to recognize that they are eligible, but voices concerns that attorneys are asking questions. The actual recommendation is not so much for amendment of Rule 7.1 as it is for "creating a national event in the CM/ECF system for the filing of Supplemental Statement under Rule 7.1 * * *." It is noted that the court has created a "local event code" that enables electronic filing, and that the filing is entered in the automated recusal software system for judges using the system. Any response to this suggestion as it is formed seems better addressed by those responsible for the CM/ECF system. There is no apparent need to amend either Rule 7.1 or Rule 5(d)(3).

The reason for carrying this topic forward is that the Committee on Codes of Conduct has raised related questions, addressed to all of the procedure advisory committees. The Committee on Codes of Conduct is likely to sharpen the questions over the next few months. After that happens, the several advisory committees will consider them.

More generally, one Committee member has observed that some lawyers and judges continue to experience confusion about the relationship between some rules and ECF. "[S]ome open discussion" might be useful.

06-CV-D: This is the Second Circuit opinion in Reiter v. MTA New York City Transit Authority exploring the difficulties of applying Rule 68 when the offer of judgment includes specific relief. At the end of the opinion the court directs the clerk to send copies to the Advisory Committee. This question has been presented in two agenda books and carried forward for further consideration when the Committee returns to Rule 68.

III Present Consideration

05-CV-H: The Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association recommends that Rule 45(b)(1) be amended to authorize service of a subpoena by means other than personal delivery. Rule 45(b)(1) provides, in language carried forward from 1938, that, as restyled, provides: "Serving a subpoena requires delivering a copy to the named person * * *." The majority rule reads "delivering" to require personal in-hand service. A significant number of decisions depart from this reading. The proposal provides a clear

and helpful description of the history, present division of authority, and arguments on both sides. The recommendation is to authorize service by any means that Rule 4 authorizes for service of a summons and complaint.

Two reasons prompt the suggestion this topic be taken up. The first is that persisting uncertainty on this point is undesirable. The federal district courts in New York give inconsistent answers. It seems likely that subpoenas are often delivered by mail without worrying whether that satisfies Rule 45 — there may be more widespread inconsistency than reported decisions reveal. The second reason is that insisting on personal delivery seems unnecessarily expensive and perhaps delaying.

The main obstacle to revising Rule 45 may be uncertainty whether all of the Rule 4 methods should be available, even for service within the United States. It may be useful to distinguish between parties and nonparties despite the availability of discovery sanctions against a party even absent a subpoena. It may be useful to distinguish between individuals, business enterprises, and government entities. Other distinctions may be useful. This is a topic that will benefit from a clear sense of actual present practice and practical advice on possible problems that do not appear on first inspection.

07-CV-A, noted briefly below, makes the same suggestion. William P. Callahan, Esq., writes that the requirement of personal service requires "resort to all types of tricks and subterfuge since in most cases, the individual has already been served with the Summons * * *. [I]t is professionally distasteful to have to resort to chicanery and tricks to effect service, not to mention the time and expense and even danger to our servers."

Note that Criminal Rule 17(d) is similar, although the two style projects came out a bit differently: "The server must deliver a copy of the subpoena to the witness * * *." It is not clear whether the civil and criminal rules should be the same. The question should be put to the Criminal Rules Committee if this topic is taken up.

Several other Rule 45 suggestions are described in part III A. Still other Rule 45 questions have been noted in a Committee member's response: if privilege log issues are addressed, Rule 45(c)(2) or 45 (d)(2) should be examined in tandem; and recent district-court decisions divide on the question whether a motion to quash can raise issues that could have been raised by a Rule 45(c)(2)(B) objection to a subpoena after the time limit for objecting has expired. If — or is it when? — Rule 45 is taken up, it will be sensible to consider all Rule 45 topics at once.

05-CV-I: This terse suggestion to allow service by commercial carrier was forwarded by then-Reporter Schiltz from the Time-Computation Subcommittee. It may be worth taking up now, but there may be better reasons to defer if service by either mail or commercial carrier is likely to be generally displaced by electronic service through court systems.

Appellate Rule 25(c)(1)(C) allows service "by third-party commercial carrier for delivery within 3 calendar days." (c)(3) provides that when reasonable, service on a party must be by means at least as expeditious as the manner used to file the paper with the court. (This provision is a bit puzzling. Rule 25(c)(1)(D) allows service by electronic means if the party being served consents in writing. (c)(2) allows use of the court's transmission equipment to effect service if authorized by local rule. Suppose filing is by electronic means but the person being served has not consented to electronic service? For that matter, is service by mail as expeditious as 3-day service by a private carrier?) (c)(4) provides that service by mail or commercial carrier is complete on mailing or delivery to the carrier.

Civil Rule 5(b)(2)(F) allows service of papers other than the summons and complaint (Rule 4) or "process" (Rule 4.1) by "any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery." Rule 6(d) extends the time to act after service by 3 days when service is made by mail or by a means consented to by the person served.

The question is whether service by commercial carrier should be authorized without first obtaining consent by the person served. Reliance on express carriers is common, at least when not superseded by facsimile transmission or electronic communication. Express carriers seem as reliable as the most reliable methods adopted by the Postal Service. Why not allow routine resort to carriers when mail is allowed?

One niggling question would be whether to emulate the Appellate Rule provision requiring service by a means at least as expeditious as the means chosen for filing.

This question obviously ties to the question whether to allow electronic service without consent of the person served, either by local rule or in Rule 5 itself. That may be an added reason for taking it up now, but it also might be cause for delay if electronic service is better deferred for a while. Further reason to defer may lie in the burgeoning use of CM/ECF. Electronic filing with automatic service on everyone in the case under Rule 5(b)(3) solves the problem wherever local rules authorize the practice. If service of papers after initial process becomes limited to non-electronic cases — most likely to involve pro se litigants — Rule 5 may require additional broader revision.

06-CV-C: Judge Flaum's suggestion that the practice of sealing cases be studied is on the active agenda of the advisory committees through the Standing Committee Subcommittee on Case Sealing.

07-CV-A: This is noted in 05-CV-H above; it renews the suggestion that Rule 45(b)(1) should be amended to allow service of a subpoena by any means that Rule 4 authorizes for service of a summons.

07-CV-D: Supplemental Rule E(4)(f) concludes with a sentence stating that its procedure does not apply to suits for seamen's wages when process is issued under two identified statutes nor to actions by the United States for forfeitures. Professor David J. Sharpe writes for an MLA working group that the two statutes have been repealed. (The "official" edition of the Rules, 110th Congress, 1st Sess., Committee Print No. 2, for use of the Committee on the Judiciary of the House of Representatives, p. 139, n. 1, notes the repeal of these statutes in 1983.) Rule G, added in 2006, provides a comprehensive procedure for forfeiture actions in rem; the exception in E(4)(f) is now redundant. The suggestion that this sentence is redundant and should be deleted seems well taken.

The change could be accomplished like this:

Rule E. Actions in Rem and Quasi in Rem: General Provisions:

* * * * * *

(4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY; PROCEDURES FOR RELEASE.

* * * * * *

October 3, 2008

(f) *Procedure for Release From Arrest or Attachment.* Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. ~~This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.~~

* * * * * *

COMMITTEE NOTE

Paragraph 4(f) is amended by striking the final sentence. The sentence referred first to statutory provisions applying to suits for seamen's wages; those provisions have been repealed. The sentence also stated that this "subdivision" — apparently referring to paragraph (f) — did not apply to actions by the United States for forfeitures for violating a United States statute. Supplemental Rule G, added in 2006, provides a comprehensive procedure for forfeiture actions in rem. Supplemental Rule E applies only to the extent that Rule G does not address an issue. Rule G measures rights to a hearing in a forfeiture action. It is no longer necessary to state an exception in Rule E(4)(f).

(As an alternative approach, it would be possible to amend the rule text by revising the final sentence to read: "Supplemental Rule G governs rights to a hearing in a forfeiture action in rem." It would be wise to consult the forfeiture specialists at the Department of Justice before advancing a recommendation for publication.)

III A For Possible Consideration by Discovery Subcommittee

Several suggestions — it is redundant to say "inevitably" — relate to discovery issues. Responses to the initial polling of Committee members suggest interest in some of them. It may be useful to have at least a brief preliminary discussion focused on two questions: should the Discovery Subcommittee be asked to pursue any of these topics further? And if so, is there any sense of direction?

05-CV-G: It is a close call whether to carry forward this suggestion from the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. It calls attention to a surprising line of cases that assert nationwide "jurisdiction" to subpoena a party to testify at trial. Several responses to the initial poll show a sense that at least two Rule 45 questions might deserve further inquiry.

Rule 45(b)(2) seems to define the territorial reach of a subpoena by specifying the places where a subpoena may be served. Service may be made within the district; outside the district [and also outside the state] but within 100 miles of the place of the deposition, trial, production, or inspection; or within the state at a place authorized by state practice. Rule 45(c)(3)(A)(ii) seems to limit this authority further by requiring the court to quash or modify a subpoena that requires "a person who is neither a party nor a party's officer to travel more than 100 miles," except that the

person may be required to travel more than 100 miles from a point within the state to attend a trial. (Under Rule 45(c)(3)(B)(iii) the court may quash or modify the subpoena if it requires a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.)

It is said that a majority of reported decisions infer from Rule 45(c)(3)(A)(ii) authority to command a party or a party's officer to attend trial from any place in the United States. The theory seems to be that since it does not direct the court to quash a subpoena requiring a party or its officer to travel beyond 100 miles, it authorizes the subpoena without regard to the limits that seem to appear in Rule 45(b)(2).

The proposal is correct in suggesting that this interpretation of Rule 45(c)(3)(A)(ii) is improbable. The Committee knows how to draft better than that.

In part this is another question about the wisdom of amending a rule whenever any significant number of courts seem to be getting it wrong.

But there is a larger issue. Many people still believe in the advantages of live-witness testimony. The proposal helpfully points out that the 100-mile limit (reflected also in Rule 32 on using a party's deposition at trial) traces back to § 30 of the First Judiciary Act. There may be many circumstances in which it is desirable to impose this duty on a party when another party wants to present the party live at trial. (Compare the cases described in the proposal in which Evidence Rule 611 is used to preclude a party from appearing as its own witness if the party has stood on subpoena limits in refusing to appear as a witness for another party.) The surprising use of Rule 45(c)(3)(A)(ii) may serve a useful purpose. Rather than jump into the fray, it may be better to let the issue simmer along for a few years. The question can be taken up whenever it seems to become urgent. One Committee member responded that the question "is getting pretty close to the 'urgency' threshold. We now have a major split at the district level, with the trend being back to the 'minority' view that the Rule 45(b)(2) territorial limit on service does in fact protect party officers despite the language in Rule 43(c)(3)(A)(ii)." A "particularly good" opinion is Johnson v. Big Lots Stores, Inc., 251 F.R.D. 213 (E.D.La.2008).

05-CV-H: This suggestion for defining the methods of serving a subpoena is the first item discussed under heading III.

06-CV-G: Judge Wilson, who confesses that as a member of the Standing Committee he voted for the 1993 and 2000 discovery amendments, urges that they should be repealed in order to restore the pre-1993 discovery rules. The new rules "have made litigation considerably more expensive, as well as more complicated." The Committee maintains a constant watch on discovery practice. The time for truly fundamental reform may have come, but only if there is some sense of what a fundamentally altered discovery system should be. Given all the work that has been devoted to discovery without yet generating any optimism on this score, the proposal seems premature. A return to pre-1993 rules, moreover, might well make matters worse. The grounds for concern may be not so much that the rules amendments have aggravated discovery problems as that they have not provided as much relief as we need. Judge Wilson points to problems that are constantly on the agenda. The topic seems best carried forward in that sense, but without attempting to develop still further amendments until there is a better sense of what might be accomplished. Some inspiration may be provided by the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System.

07-CV-E: Christopher Macchiaroli, Esq., and Danielle Tarin, Esq., submit a copy of their article in 2008 Federal Courts Law Review 3, "Rewriting the Record: A Federal Court Split on the Scope of Permissible Changes to a Deposition Transcript." The target is Rule 30(e)(1)(B), which allows a witness to review a deposition transcript or recording and "if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them." A minority of courts fear misuse and attempt to limit corrections to "transcription errors." In effect, the deponent can say "I said no, not yes," but cannot say "I said no, but I meant yes, and here's why." Other courts take a middle approach that "permits substantive changes that clarify and explain a deponent's answers." Material alteration is not permitted. The majority "plac[e] no limitation on substance, materiality, or number." These courts rely on the language of the rule, noting that the original answers remain in the record and can be used to cross-examine and impeach the deponent as witness. Extensive changes can be met by permission to reopen the deposition, perhaps at the deponent's expense. After this description, the authors frame arguments for and against a narrow approach. They repeatedly glance off an analogy to the "sham affidavit" doctrine that allows a court to refuse to consider a self-serving, self-contradicting affidavit submitted to defeat a summary judgment that would be justified by the affiant's deposition testimony. At the same time, analogizing to the res gestae rule, they posit that spontaneous statements at deposition are more likely to be accurate, and that an attorney may have an undue influence on the changes. On the other hand, they suggest that perhaps the remedies provided by the majority of courts are sufficient.

This appears to be another in the long string of discovery questions that, in part because they are difficult and often context-dependent, divide the courts. The questions are whether the divisions are so persistent and important as to justify an attempt to devise a clearer — or more nuanced but complex — rule, and whether the attempt is likely to succeed.

Professor Marcus has provided the following discussion of the Rule 30(e) question:

RULE 30(e) ISSUES

The agenda materials include submission 07-CV-E, offering thoughts on Rule 30(e)(1)(B). The rule says that the witness, upon request, should receive 30 days to make any "changes in form or substance" desired and list them in a statement to accompany the transcript. The submission is an article from the Review of Litigation. As explored in the article, there seems some division among cases on whether a witness is limited in the revisions that can be made in a deposition. For confirmation on the diversity of judicial attitudes, see 8A Fed. Prac. & Proc. § 2118 nn. 3 & 4 (Supp. 2008). The authors prefer that the rule be revised to preclude changes to depositions that take back concessions that could support summary judgment.

On its face, the rule seems to permit unlimited changes. In operation, this may seem to frustrate some purposes of a deposition, particularly where the party taking the deposition makes a motion for summary judgment. Without suggesting that changing the rule is desirable, one simplistic and immediate thought that comes to mind is:

> **(1)** ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
>
> > **(A)** to review the transcript or recording; and
> >
> > **(B)** if there are changes in form ~~or substance~~, to sign a statement listing the changes and the reasons for them.

It may be that "of substance" includes situations in which the objection is that there was an error in transcription (e.g., "yes" for "no" where the witness asserts "I said 'yes'.") so this simplistic solution does not achieve the desired goal. Perhaps the goal is only to forbid changes that the witness says result from further reflection on the issues raised after the deposition was completed. But if that is so, the drafting task of differentiating between what would be allowed and what would be forbidden could prove difficult.

Assuming the drafting task to be simple does not make it sensible. An outline of some background issues might be useful in addressing these concerns. As suggested below, there seem to be a number of possible ramifications.

Rule 26(e)

Generally, there is no requirement to supplement deposition testimony even if it was wrong or incomplete. (The exception is for expert witness deposition testimony.) There is thus no obligation to correct incorrect deposition testimony, although doing so may well be a good idea. As noted below, the idea of this possible amendment might be likened to forbidding supplementation of a deposition transcript except as to alleged transcription errors.

Rule 37(c)(1)

This rule precludes use of evidence that should have been provided in discovery or disclosure, or in a supplementation thereto, unless it can be shown that the failure to provide the information was substantially justified or harmless. The significance of this rule for the current question seems to be that the proposal is to adopt something like Rule 37(c)(1) treatment for deposition changes that would alter what the witness said in a deposition.

One reaction might be that the proposed change is inconsistent with Rule 37(c)(1) because failure to supplement or correct a deposition transcript would be regarded as substantially justified given the absence of a supplementation requirement for a deposition. But the thrust of the amendment proposal seems to be that a deposition not only need not be supplemented but, unlike other discovery and disclosure, *may* not be. It is likely that much other discovery and disclosure is supplemented (as 26(e) requires), so it would be odd to prohibit doing so with deposition testimony. That would be a considerable change from the current absence even of a duty to supplement.

A duty to prepare witnesses?

Preparing a witness for her deposition is generally a good idea. If a rule change made deposition answers unchangeable, one could say that extensive preparation in effect has become mandatory. So also might questioning by the lawyers for other parties to include in the record of the deposition all the qualification information that might be important with regard to the statements initially made by the witness, or to permit later explanations or emendations. Indeed, there might be additional pressure on the prohibition in Rule 30(c)(2) against suggestive objections. With nonparty witnesses, the implicit mandate to prepare the witness could produce substantial difficulties. But perhaps the objective is only to restrict changes by party witnesses, who would ordinarily (although, perhaps not always) be available for deposition preparation.

If the witness is not receptive to preparation, declining to allow changes later seems particularly dubious. As the Second Circuit noted years ago: "It is the common experience of counsel at the trial bar that a potential witness, upon reflection, will often change, modify or expand upon his original statement and that a second or third interview will be productive or greater accuracy." IBM v. Edelstein, 526 F.2d 37, 41 (2d Cir. 1975). Precisely that sort of evolution of

witness insight could underlie the later desire to modify or even reverse earlier deposition testimony (and explain why the normal method of dealing with such issues is to rely on impeachment at trial, discussed below).

Moreover, even the best preparation would likely not foresee all deposition questions, so it could be that such a change would encourage additional questioning, possibly placing pressure on the time limit for depositions adopted in 2000.

The sham affidavit doctrine

As the authors of the submitted article recognize, their concern resembles the motivations behind the sham affidavit doctrine. This doctrine was developed by courts to respond to efforts to frustrate summary judgment by submitting an affidavit in response to a summary judgment motion to contradict clear party testimony upon which the summary judgment motion is based. As explained by the court in the leading case Perma Res. & Devel. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969):

> If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

It is worth noting that the arguments for the sham affidavit doctrine seem stronger than arguments for curtailing the changes allowed under Rule 30(e). After the summary judgment motion is filed, the opponent's attention is focused precisely on the answers that matter and why they matter. Efforts to change them then look different from efforts to modify answers during the 30-day review period allowed by Rule 30(e), which normally would precede the making of the summary judgment motion. The witness's conclusion then that certain answers selected by the witness seem wrong looks a great deal less problematical. True, as the authors note, the witness would often be following the advice of opposing counsel in making the changes, but this still seems different.

Moreover, even where it might apply, the sham affidavit doctrine is a very circumscribed reaction to a very specific problem, and it could intrude on the right to jury trial. As another court has explained, a judge using this doctrine must be careful:

> To allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point in time and with which words the witness (in this case, the affiant) was stating the truth. Variations in a witness's testimony and any failure of memory throughout the course of discovery create an issue of credibility as to which part of the testimony should be given the greatest weight if credited at all. Issues concerning the credibility of witnesses and weight of the evidence are questions of fact which require resolution by the trier of fact. An affidavit may only be disregarded as a sham "when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact . . . [and that party attempts] thereafter [to] create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony."

Tippens v. Celotex Corp. 805 F.2d 949, 953-54 (11th Cir. 1986), quoting Van T. Junkins & Assoc. v. U.S. Industries, 736 F.2d 656, 657 (11th Cir. 1984).

Devising a rule that would direct similar carefulness in determining whether to allow a change in deposition testimony would be difficult. Among other things, it would raise questions about whether the witness was subject to the influence of a party, for one not subject to the influence of a party might not raise any of the concerns that are advanced to justify a rule change.

Impeachment by prior inconsistent statement

The ordinary use of a deposition answer that a witness contradicts on the stand is as impeachment evidence, and the witness is not ordinarily forbidden to give testimony at trial that is inconsistent with the testimony during the deposition. Making deposition testimony "binding" may sometimes seem at tension with this traditional approach.

An illustration may bring home the point. Assume an intersection collision between Plaintiff and Defendant. Plaintiff claims to have had the green light, as does Defendant. Bystander, who saw the accident, testifies in her deposition: "I'm pretty sure that the light was green for Plaintiff." At trial, Bystander testifies: "On reflection, I'm certain that Defendant had the green light and Plaintiff had the red light."

What should be done? Note that summary judgment could not be granted because Plaintiff and Defendant will offer conflicting versions of the accident. Should Bystander be forbidden to offer testimony that varies from the deposition testimony? Should that only be true if Bystander was questioned at length during the deposition and gave consistent answers? Should it matter whether the questions during Bystander's deposition were clear? Or whether Bystander was tired or on medication that day? Should Bystander be free to testify at variance with her deposition because she is not a party witness?

Perhaps the idea would be to have a rule that only applies to summary judgment motions, but in general those are based on a forecast of what will happen at trial. If it is permissible to give conflicting testimony at trial (subject to impeachment with the deposition statements), it is odd to treat the same issues differently at the summary judgment stage.

Reconsidering the present waiver of the right to review deposition transcript

Another issue that might need to be reexamined is the 1993 change from making review by the witness routine to permitting it only when requested by the witness or a party. Arguably this should not matter since the suggestion is to limit the opportunity to change deposition testimony. But to the extent a change to the rule would operate like Rule 37(c)(1) exclusion, or require something like Rule 26(e) supplementation, there might be reason to consider requiring an opportunity to review the transcript. On the other hand, if changes are not allowed, perhaps the best solution would be to remove the review altogether. Indeed, in an era in which depositions are increasingly likely to be digitally recorded the need to review for errors in transcription may diminish to the vanishing point.

* * * * *

In sum, the possibility of devising a rule change to deal with the problems posed seems to present a number of possible ramifications and complications. It may be that the present sham affidavit doctrine goes as far as is appropriate in binding deposition witnesses to what they say in their depositions.

Supplemental Materials for Agenda Item #7

Additional Rule 45 Issue:

The attached exchange of e-mail messages between Judge Campbell and Professor Marcus identifies another issue arising from Civil Rule 45. This issue may be suitable for consideration on its own in the near future, but also may be seen as one additional consideration in determining whether Rule 45 presents enough questions to justify a general review. The Agenda Review memorandum at Tab 7 illustrates some of the other Rule 45 questions.

To: Mark_Kravitz@ctd.uscourts.gov, coopere@umich.edu, marcusr@uchastings.edu

From: David_Campbell@azd.uscourts.gov

Date: Tue, 21 Oct 2008 12:55:30 -0700

Subject: Issue for future consideration

Dear all:

I've come across an issue that we might want to add to our list of issues for possible future consideration. It concerns the difference between Rule 26(c), which allows a deposition dispute to be resolved either in the court presiding over the case or the court where the deposition is occurring, and Rule 45(c)(2)(B) and (c)(3)(A) & (B), which state that a dispute arising from a subpoena must be heard in the court that issued the subpoena. The circuits apparently are split on whether the provision in Rule 26 allows a court that issues a subpoena under Rule 45 to transfer a dispute over the subpoena to the court presiding over the case. The split appears to be based in part on some confusing commentary in committee notes. The issue is laid out fairly well in part 2 of the opinion in Melder v. State Farm, 2008 WL 1899569 (N.D. Ga., Ap. 25, 2008).

Hope all of you are well.

Dave

To: Mark_Kravitz@ctd.uscourts.gov, coopere@umich.edu, marcusr@uchastings.edu, David_Campbell@azd.uscourts.gov

From: "Richard Marcus" <marcusr@uchastings.edu>
Organization: UC Hastings College of the Law

Date: Tue, 21 Oct 2008 14:13:15 -0700

Subject: Re: Issue for future consideration

Dear All:

Dave's point reinforces the idea that looking carefully at Rule 45, and making sure it fits properly with Rule 26-37, appears to be a worthwhile effort. I'm uncertain how many little glitches there may be, but this tension illustrates the possibility, as does the issue of nationwide subpoena power that has already been called to our attention. And the courts surely do not see eye to eye on this one. Compare Matter of Orthopedic Bone Screw Products Liabil. Litig., 79 F.3d 46 (7th Cir. 1996) (Wisconsin district court properly transferred protective order motions by third-party witnesses to Pennsylvania district court that was presiding over multidistrict litigation) with In re Sealed Case, 141 F.3d 337 (D.C. Cir. 1999) (district court lacked authority under Rule 45 to transfer motion to enforce subpoena to the court in which the underlying action was pending).

Ultimately, sensible determinations about when to defer should probably depend on the valuation of the judge in the district whence the subpoena issues. I suppose there could be a conflict if a Rule 26(c) motion is filed in the forum of the underlying litigation and a Rule 45 motion is filed in the district whence the subpoena issued. But that risk seems to exist already (and to be compounded by holdings that Rule 45 prohibits the district court that issued the subpoena from deferring to the forum for the underlying litigation).

One important consideration is probably whether the nonparties served with the subpoenas are actively resisting them, and whether they strongly prefer to get a local ruling on their objections. In the case cited by Dave, the nonparties had not even appeared in relation to the dispute about enforcing the subpoena. Another issue might be whether the questions that control the subpoena dispute have been presented to, or seem largely to bear upon, what the judge presiding over the underlying case has addressed (or will address) in regulating discovery in that case. In Dave's example case, it appears that the judge handling the underlying case had addressed exactly the sorts of disputes raised by the subpoena, and at least possible that the subpoena was an end run around the authority of that judge.

On the other hand, if the issues raised in resistance to the subpoena were (a) the nonparty's claims of privilege, or (b) the nonparty's claims that discovery imposed undue burden and cost on it, it seems that resolving the dispute in the district issuing the subpoenas would likely be the best idea, and making the nonparties traipse off to some judge far away would not make sense. At the same time, the judge presiding over the underlying action might well be relieved not to have to deal with these localized questions.

Of course, there must be lots of other considerations to take into account. My point for the present is to try to show why any rigid directive that all disputes be handled by one judge or the other is likely to be counterproductive in some instances. It seems unlikely to me that the 1991 amendments to Rule 45 were designed to adopt any such rigid directives, but quite possible that they crept in nonetheless. The question then is whether more than 16 years of experience with amended Rule 45 (and a little experience with our 2006 E-Discovery amendments to that rule) show there are reasons to make changes. One lesson from the 1991 experience could be that making changes itself raises risks of results we don't want to produce occurring anyway, if I'm right about the discrepancy between what the Committee probably was trying to do in 1991 and what we've learned developed since then.

So it looks like we have even more to discuss with regard to Rule 45.

Rick

To: Mark_Kravitz@ctd.uscourts.gov
Cc: "Edward H. Cooper" <coopere@umich.edu>, marcusr@uchastings.edu, Mark_Kravitz@ctd.uscourts.gov

From: David_Campbell@azd.uscourts.gov

Date: Tue, 21 Oct 2008 16:31:39 -0700

Subject: Re: Issue for future consideration

Sure, we can plan to discuss it in whatever time it warrants. I thought it worthy of consideration because of the circuit split. I am also confronted with it in a current case. A defamation lawsuit pending in L.A. concerns anonymous blogs about the plaintiff. The ISP that hosts the blogs is located in Phoenix. The Plaintiff has served an Arizona-issued subpoena on the ISP to learn the identity of the anonymous bloggers, and the ISP has objected. So the Plaintiff filed a motion to compel under Rule 45, and the motion was assigned to me. I have previously held, as have other district courts, that obtaining the identities of anonymous bloggers raises first amendment concerns, and that a plaintiff therefore can obtain them only by making the kind of showing that would be needed to overcome a motion for summary judgment. Because that inquiry strikes close to the merits of the case, could affect the eventual ruling on summary judgment, and will be case-dispositive if I decide plaintiff has not made the showing, it seems to me that it should be decided by the district judge presiding over this case in L.A. But the ISP has not consented to jurisdiciton in L.A., Rule 45 says the motion is to be heard in the court that issued the subpoena, and so I've concluded I cannot send the issue to the judge in L.A. Two circuits say I can transfer it, but I think I disagree given the current wording of Rule 45. I expect we may see more of these issues with the growth of the Internet.

Dave

TAB 8

Rule 68: A Progress Report

Introduction

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 is the latest in a recent string that sketches the considerations for and against reopening the debate.

Suggestions for revising Rule 68 emerge from the "mailbox" at rather regular intervals. Usually the suggestions aim at expanding the use of Rule 68 offers of judgment. One strain suggests that Rule 68 sanctions should be increased. The common belief is that Rule 68 is now used — when it is used at all — only in cases involving claims made under a statute that allows a successful plaintiff to recover attorney fees as part of "costs." And it turns out that for the most part, Rule 68 is not much used even in those cases. For other cases, the amount of money typically involved in cost awards seems too small to generate many Rule 68 offers. A second common strain is that plaintiffs should be allowed to make Rule 68 offers, either because that seems only fair or because of a belief that offer and counter-offer will yield more realistic offers and a better opportunity to settle. The actual settlement may well be spurred by the Rule 68 offers, but be reached on terms that lie between the offers and are outside the formal Rule 68 structure.

The Problem of Specific Relief

An official judicial voice has been added to the mix, albeit in a much narrower vein. In *Reiter v. MTA New York City Transit Authority*, 2d Cir.2006, 457 F.3d 224, 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 books for the October 2006 and November 2007 meetings. This narrow question is outlined before turning back to the broader questions.

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.

Apart from the general questions posed by specific relief, 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.

The Broader Questions

The Committee's most recent Rule 68 work in the early 1990s was stimulated by Judge Schwarzer's proposal to encourage more offers of judgment. The core of the proposal was to adopt attorney fee sanctions generally. A party who fails to beat a rejected offer by judgment must pay post-offer fees incurred by the adversary. But payment in full would be over compensation. Suppose, for example, a defendant makes an unaccepted offer of $100,000 and then loses a $80,000 judgment after incurring post-offer fees of $30,000. Because the $80,000 judgment saved the defendant $20,000 as compared to the rejected $100,000 offer, the $20,000 is deducted from the $30,000 post-offer fees. The defendant then is in the same position as if the offer had been accepted. Moving beyond the core, however, the proposal became complicated even in its original form, with caps and floors. Continuing work generated ever-greater complications.

The project was abandoned for all practical purposes in 1994; the relevant portions of the April and October Minutes are attached. One problem arose from the growing complexity of attempts to implement the limited "benefit-of-the-judgment" approach. In addition at least some participants came to harbor growing doubts about the value of Rule 68. Again, some of the doubts involved questions going to matters of implementation, not the basic enterprise. One issue is the interpretation of the Rule 68 reference to "costs." In *Marek v. Chesny*, 1985, 473 U.S. 1, the Court ruled 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." This "plain meaning" interpretation seems questionable on its face — why might the drafters have thought it proper to make so serious a consequence turn on the legislative drafting choice whether to allow a fee award as "part of costs" or instead "in addition to costs"? And why might Congress want to allow a Rule 68 offer to stand as a severe impediment to enforcing the statutory provisions that favor some litigants by providing a right to attorney fees? Any reconsideration of Rule 68 must examine this question. And the question will be made even more difficult if Rule 68 itself is to provide for fee awards. Using fee awards as sanctions 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.

Another Supreme Court decision that also might need to be considered is *Delta Air Lines, Inc. v. August*, 1981, 450 U.S. 346. The Court held that a plaintiff who rejects a Rule 68 offer is not subject to any Rule 68 sanction when the defendant wins the judgment. Rule 68 provides that the offeree pays post-offer costs "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer." If judgment is for the offeror-defendant, the offeree-plaintiff has not obtained a judgment. At least in the simple case, this interpretation makes little difference because a prevailing defendant ordinarily collects costs under Rule 54; the only consequence is that Rule 68 does not cut off the court's Rule 54 discretion to deny costs to a prevailing defendant. This

interpretation also may serve as a substitute for a "good faith" requirement. A defendant has nothing to lose by making a nominal offer of judgment, and some may worry that a patently unacceptable offer should not trigger any consequence when the defendant — by winning on the merits — does better than the offer. (The good-faith problem might seem most troubling in statutory fee-shifting cases where the problem is not judgment for the defendant but a low offer followed by a still-lower judgment for the plaintiff. The plaintiff is a prevailing party, entitled to a statutory fee award, but loses the award under *Marek v. Chesny*.) If more powerful sanctions are added to Rule 68, however, it may be necessary to revisit this question.

It also will be necessary to consider the question whether Rule 68 should be expanded to allow plaintiffs to make offers. It seems only fair to allow each party access to the same procedure. But since a prevailing plaintiff ordinarily is entitled to costs, a defendant would have an incentive to avoid Rule 68 sanctions only if the sanctions are in addition to costs. Attorney fees are an obvious possibility. Multiple cost awards are an obvious alternative, and likely to be less fearsome — double or triple statutory costs, apart from attorney fees in fee-shifting cases, might have some bite. But the spirit of bilateral sanctions returns to the question whether a defendant who wins a no-liability judgment after making a Rule 68 offer should be provided a parallel incentive.

There are still deeper questions. Earlier notes have reflected the work done by Professors Thomas A. Eaton and Harold S. Lewis, Jr.. They undertook 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.

The fruits of the Eaton-Lewis work are reflected in two articles: *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 2007, 241 F.R.D. 332, and *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 2008 Manuscript. They propose a number of intertwined revisions that should be among the alternatives considered if Rule 68 is restored to the agenda for further work. The details do not seem necessary for present purposes. But it may help to reflect on three points gleaned from their interviews with scores of attorneys who practice in fee-shifting cases where present Rule 68 is most likely to have an impact. First, they believe that earlier settlements are more likely to be encouraged by court-annexed ADR programs than by rule-enhanced offers of settlement. Second, they note that "defense lawyers asserted that merely relieving their clients from post-offer costs and fees, or awarding them their own post-offer costs, is usually insufficient to motivate a defense offer." If that is right, it suggests that a revised Rule 68 is likely to stimulate more early settlements only by providing significant awards that are mirrored by significant costs for offerees. Third, they note that "[w]hile most lawyers felt reasonably confident about predicting the approximate range of a plaintiff's merits recovery after a few months of discovery, all recognized that there remained significant imponderables." That is to say that the

offeree must make the higher-stakes gamble in the face of genuine and understandable uncertainty. This combined set of observations raises serious questions about the wisdom of pursuing some small incremental increase in early settlements by means of augmented Rule 68 sanctions.

The full range of possible approaches to Rule 68 revision cannot be easily described. The possible variations and levels of complexity will only increase as detailed work is done. As simple illustrations, should the rule address offers addressed to multiple parties — a defendant who wants global peace or all-out war, for example, might make an offer conditioned on acceptance by all plaintiffs and encounter acceptance by some only. What about successive offers between the same pair of parties? Should the uncertainties of predicting actual judgments be met by building in some acceptable margin of error — state rules often adopt a safety zone of 20% or 25%, so that a plaintiff who rejects a $100,000 offer escapes sanctions if the judgment is more than $80,000 or $75,000. Leaving those issues aside, at least four general approaches can be identified:

First, do nothing. The problems that must be resolved in creating a rule that will have any substantial effect are daunting. If it is true that ADR practices that have emerged since Rule 68 was adopted are more effective than Rule 68 is likely to be, why bother? And Enabling Act limits must be considered, not only if fee sanctions are used but also if lesser sanctions are used, such as an award of expert witness fees. Rule 68 is not much used now, not even in fee-shifting cases. It still creates some uncertainty at the margins — as the Second Circuit found with offers for specific relief — but there are no signs of manifest distress. Let it be.

Second, face up to a few problems without undertaking a thorough revision. The interpretation that cuts off a fee award to a plaintiff who prevails but fails to beat a Rule 68 offer, when and only when the statute makes fees a part of "costs," could be reconsidered. Something might be done about specific relief — the 1994 draft is set out below as an illustration. The offer could be recharacterized as an offer to settle, not an offer of judgment, to overcome the reluctance many defendants feel about suffering entry of a judgment. More time might be allowed to consider the offer. Something might be said about the possibility of retracting an offer before it is accepted — the opportunity to retract may become more important if more time is allowed to accept, and if indeed something is done that actually stimulates early offers before the case has been well developed by (often expensive) discovery. Attempts to use Rule 68 offers in class actions might be addressed — one persisting question is whether a pre-certification offer of complete relief to the named representatives can moot their claims, forcing a perhaps endless quest for successor representatives. And so on. As even this brief list suggests, it may prove difficult to draw a line once the appetite for revising improvements is whetted.

Third, a thorough revision might be attempted, tackling all of the problems head-on in an enthusiastic effort to encourage still more early settlements. Much of the focus would be on enabling plaintiffs to make offers, and on increasing sanctions for all categories of cases so as to enhance the incentives both for making and for accepting offers. If past experience is any guide, this approach will, to put it gently, engender great interest and equal opposition.

Fourth, Rule 68 might be abrogated as an antiquated device that, no matter how revised, is likely to generate more unfairness than can be justified. Risk-averse litigants are faced with the risk of adverse consequences in the face of uncertain trial outcomes. The most severe consequences fall on a class of litigants Congress has chosen for special favor — civil rights and employment-discrimination plaintiffs who stand to lose the benefit of attorney-fee awards for the post-offer period even though they win on the merits. ADR alternatives and judicial suasion offer incentive enough for settlement, and for early settlement. On this view, the time may have come to take up the motion to repeal that was deferred indefinitely in 1994.

EXCERPTS FROM APRIL 28-29, 1994 MINUTES

Rule 68

Discussion of Rule 68 began with presentation by John Shapard of the preliminary results of the Federal Judicial Center survey of settlement experience. The survey was divided into two parts. The first part drew from 4 matched sets of 200 cases each, 100 of which settled and 100 of which went to trial. The effort was in part an attempt to learn more about the factors that foster or thwart settlement, and in part to learn the reactions of practicing attorneys to possible changes in Rule 68. The questions to be tested were whether there is reason to cling to the hope that strengthened consequences might make Rule 68 an effective tool to increase the number of cases to settle, to advance the time at which cases settle, and to reduce misuse of pretrial procedures lest the misuser be forced to pay attorney fees incurred by the adversary. The concerns about strengthened consequences also were tested in an effort to determine whether the rule might force unfair settlements on financially weak parties or might cause trial of some cases that now settle. The second part of the survey used a different questionnaire for 200 civil rights cases, in which present Rule 68 has real teeth because of its effect on recovery of statutory attorney fees.

The questionnaire used in the general survey took two approaches. One, and likely the more useful, was to ask counsel about what happened and what might have happened in their actual cases. The second was to ask counsel for general opinions. It is an important caution that only first-round responses are available, with a 30-35% response rate. As an illustration of a strengthened Rule 68, the questionnaire posited a sanction of one-half of post-offer attorney fees. At this stage of response, there is evidence that approximately 25% of the attorneys responding for cases that went to trial believed that a strengthened Rule 68 might have led to settlement, and approximately 25% of the attorneys responding for cases that settled believed that a strengthened Rule 68 might have led to earlier settlement.

In specific cases, there was a wide variation of plaintiff and defendant settlement demands. In tried cases in which counsel for both sides responded — a total of 22 cases — there were three that apparently should have settled because of overlap between the demands of plaintiff and defendant. The problem may have been failure of communication-negotiation, or it may have been divergence between the settlement views of counsel and clients.

The answers for the civil rights cases were comparable to other cases on many questions. But there was polarization on some questions. Defendants want Rule 68 strengthened, and plaintiffs would be happy to abolish it. These answers reflect the fact that defendants and plaintiffs both understand the way Rule 68 works today in litigation under attorney fee-shifting statutes.

The information about expenses incurred in responding to pretrial requests is one important result of the survey.

Mr. Shapard responded to a question by stating that if he were writing the rule, he would try to give it teeth for both sides, without upsetting the fee-shifting statutes. He would be encouraged by the survey responses to proceed on a moderate basis to allow offers by both plaintiffs and defendants, with greater consequences such as shifting 50% of post-offer attorney fees. Although it would be more effective to avoid any cap on fee-shifting, it is a political necessity to adopt a cap that protects a plaintiff against any actual out-of-pocket liability for an adversary's attorney fees.

Another question asked about the element of gamesmanship that might be introduced by increasing Rule 68 consequences, leading to strategic moves designed to control or exploit this new element of risk rather than to produce settlement. Mr. Shapard recognized the risk, but observed that we can create a new set of game rules. Although there are cases that the parties do not wish to

compromise, most cases settle because of the economics of the situation. A changed game will only lead to getting better offers on the table.

Mr. Shapard also suggested that this survey will provide about 90% of what might be learned by empirical research. There is a growing body of theoretical research as well. Some states have rules that might be considered in the effort to gain additional empirical evidence of the effects of enhanced consequences.

It was asked what might be done to generate positive incentives for plaintiffs in fee-shifting cases, since they get fees if they win without regard to Rule 68. Mr. Shapard replied that this was uncertain, although expert witness fees might be used as a consequence if they are not reached by the fee-shifting statute. Another possibility would be to allow an increment above the statutory fee.

It was observed that some lawyers would like to abolish Rule 68. Mr. Shapard suggested that this would be of little consequence in comparison to present practice, apart from statutory fee-shifting cases, since Rule 68 is little used. In civil rights fee-shifting cases, on the other hand, the survey shows that Rule 68 was used or had an effect in about 20% of the cases.

Mr. Shapard also noted that it may be possible to correlate the answers on the reasons for not settling with other answers about the nonsettling cases to learn more about the possible consequences of strengthening Rule 68. There still are cases that go to trial, and they are not all contract litigation between large enterprises.

Discussion turned to the relationships between Rule 68 and attorney-fee arrangements. The "cap" in the current draft would avoid the problem of liability for defense attorney fees in an action brought by a plaintiff under a contingent-fee arrangement. Without the cap, it would be necessary to determine whether the plaintiff or the attorney should be responsible for this out-of-pocket cost. Plaintiff liability would have a dramatic effect on the character of contingent-fee representation. The effect on fee-shifting statutes also was noted. This effect extends beyond "civil rights" litigation to reach any fee-shifting statute characterized in terms of "costs." The view was expressed that using Rule 68 to cut off the right to post-offer statutory fees violates the Rules Enabling Act, notwithstanding the contrary ruling in Marek v. Chesny, and that the violation cannot be cured by the semantic device of referring to the result as a "sanction." There is no preexisting procedural duty to settle that supports denial of a fee award. We should not continue the violation of the Enabling Act in an amended Rule 68. Similar doubts were expressed about Enabling Act authority to adopt attorney-fee shifting as a sanction in more general terms.

More general discussion followed. One view was that there is little reason to suppose that it is desirable to foster earlier and more frequent settlements by means of Rule 68. Litigants with vast resources have too many advantages in our system, and their advantages would be entrenched and exacerbated by strengthening Rule 68. A supporting view was that the Judicial Center survey does not change the case against expanding the rule. On the other hand, it might be an undesirable symbol to abrogate the rule.

One possible problem with the survey was suggested: many of those who did not respond may have been worried about their freedom to answer the questions. Even with pledges of anonymity, client permission should be sought, and there is still some concern about loss of confidentiality. Another concern is that the first question about alternative sanction systems did not provide for indicating second choices.

Experience with the California practice was again recalled. California includes "costs" in the offer-of-judgment sanctions, and costs commonly include expert witness fees. The rule seems to exert a real influence on settlement. It also is helpful in effecting settlement pending appeal because the cost award is a useful bargaining item. One conclusion was that the Committee should

find out more about the actual operation of the California practice as a more modest means of encouraging acceptance of offers.

Mr. Sherk was asked to describe experience with Arizona Rule 68. Starting with a rule like Federal Rule 68, the Arizona rule was first amended to make it bilateral. Then, noting that an award of costs does not provide a meaningful benefit to a plaintiff who has prevailed to the extent of doing better than its offer of judgment, stiffer sanctions were adopted. The rule has become more complicated, and is difficult to administer.

Professor Rowe described his ongoing research of the effects of different attorney fee sanctions by means of a computer simulation exercise sent to practicing attorneys. One of the hypotheses is that significant sanctions will smoke out more realistic offers, which will ease the path to settlement. Another concern to be tested is the effect of "low-ball" offers on risk-averse and poorly financed parties. One preliminary result of the research is that in a significant minority of cases there also can be a "high-ball" effect in which significant sanctions encourage defense attorneys to accept high plaintiff demands. The explanation may be that a defending lawyer hates to have to tell the client that the client must pay the plaintiff's attorney fees. Another effect is that substantial sanctions give poor plaintiffs the means to bring claims that are strong on the merits for relatively small amounts.

The observation that present Rule 68 can operate to distort relations between attorneys and clients in statutory fee-shifting cases led to the question whether a system that allows for offers by plaintiffs as well as by defendants might lead to arrangements in which clients insist that lawyers bear the cost of Rule 68 sanctions.

Note was made of a quite different sanction possibility. Founded on the premise that many contingent-fee cases do not involve any significant risk that the plaintiff will take nothing, this suggestion would limit plaintiffs' attorneys to hourly rates for post-offer work that leads to recovery of less than a Rule 68 offer.

The conclusions reached after this discussion were, first, that the current draft proposal should not now be presented to the Standing Committee. Second, Rule 68 should remain under consideration, including study of the effects on fee-shifting statutes, alternative sanctions such as awards of expert witness fees or restrictions on contingent fees, and abrogation of Rule 68. The Federal Judicial Center study will be completed and considered further. The Committee expressed its great appreciation for the work and help of the Judicial Center.

EXCERPTS FROM OCTOBER 20-21, 1994 MINUTES

Rule 68

Rule 68 has been before the Committee for some time. At the April, 1994 meeting, it was concluded that further action should await completion of the Federal Judicial Center study of Rule 68. John Shapard, who is in charge of the study, put it aside over the summer for the purpose of completing the survey of practices surrounding attorney participation in voir dire examination of prospective jurors. See the discussion of Rule 47(a) above.

An informal survey of California practice was described. California "section 998" uses costs as an offer-of-judgment sanction, but costs commonly include expert witness fees in addition to the more routine items of costs taxed in federal courts. Generally this sanction is seen as desirable, although respondents generally would like more significant sanctions. Most thought the state practice was more satisfactory than Rule 68. There was no strong feeling against the state practice. One lawyer thought the state practice restricts his freedom in negotiating for plaintiffs. This state

practice seems preferable to the complicated "capped benefit-of-the-judgment" approach embodied in the current Rule 68 draft.

Another comment was that Rule 68 becomes an element of gamesmanship in fee-shifting cases. It is like a chess game — an extra shield and tool in civil-rights litigation. It is working close to a casino mentality. But Rule 68 has meaning only in cases where attorney fees are thus at stake. It would be better to abandon it.

Professor Rowe described his ongoing empirical work with Rule 68, investigating the consequences of adding attorney-fee sanctions. The work does not answer all possible questions. An offer-of-judgment rule may have the effect of encouraging strong small claims that otherwise would not support the costs of suit; this hypothesis has not yet been subjected to effective testing. There does seem to be an effect on willingness to recommend acceptance of settlement offers, and perhaps to smoke out earlier offers. Results are mixed on the question whether such a rule may moderate demands or, once an offer is made, encourage the offeror to "dig in" and resist further settlement efforts in hopes of winning sanctions based on the offer. And there is a possible "high-ball" effect that encourages defendants to settle for more, just as there may be a "low-ball" effect that encourages plaintiffs to settle for less.

John Frank reminded the Committee of the reactions that met the efforts in 1983 and 1984 to increase Rule 68 sanctions. At the time, he had feared that efforts to pursue those proposals further might meet such protest as to bring down the Enabling Act itself. He also noted that there are other means of encouraging settlement, and imposing sanctions, that involve less gamesmanship and more neutral control. "Michigan mediation," which was recognized as a form of court-annexed arbitration with fee-shifting consequences for a rejecting party who fails to do almost as well as the mediation award, was described. The view was expressed that this and other alternate dispute resolution techniques have made Rule 68 antique in comparison.

Some members of the Committee suggested that the best approach would be to rescind Rule 68. It might work well between litigants of equal sophistication and resources, but it is not fair in other cases, even if it is made two-way. A motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view, but also support for an attempt to provide more effective sanctions in a form less complicated than the present draft.

Alfred Cortese noted that Rule 68 has been "studied to death." An ABA committee looked at it but could not reach any consensus. Most lawyers are adamantly opposed to fee-shifting sanctions.

After further discussion, it was concluded that the time has not come for final decisions on Rule 68. It has significant effect in actions brought under attorney fee-shifting statutes that characterize fees as costs. Repeal would have a correspondingly significant effect on such litigation. Even if the present rule seems hurtful, there should be a better idea of the consequences of repeal. It was agreed that the motion to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices.

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.

Comments on 1994 Specific Relief Proposal

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.

TAB 9

Item 9 will be an oral report

TAB 10

NOTICE PLEADING: BEYOND TWOMBLY — OR WHAT NOW, WHAT NEXT?

The shape of notice pleading has been clouded by the uncertainties flowing from the opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S.Ct. 1955 (2007). Pleading practice must command an important place on the Committee agenda. Last January, the Standing Committee invited a distinguished panel to address the first wave of responses. There is great interest in the many questions that seem open. But several reasons appear for holding the topic open without rushing to draft an immediate response.

A salient reason for deferring action is that the Supreme Court has granted certiorari to review one of the leading decisions attempting to construe the Twombly decision, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir.2007), certiorari granted sub nom. Ashcroft v. Iqbal, 128 S.Ct. 2931. The opinion, whatever it says, will be informed by 18 months to two years of experience. It may weigh heavily in determining whether there is any urgency about considering rules amendments. The possibilities range from a new and clear sense of direction to new pronouncements that will require still more years of lower-court reactions to determine what, if anything, can be accomplished by revised rules. (The FJC has suspended its exploration of post-Twombly practice, anticipating that the decision in the Iqbal case may result in new patterns of practice that will take some time to settle into place.)

Another reason for postponing consideration is the interdependence of pleading with discovery. The original decision to shift most fact communication from pleading to discovery was coupled with the belief that after discovery, summary judgment and other pretrial devices could do a better job than former pleading practice in sorting out the cases that do not deserve to go to trial. The original Rules Committee could not have foreseen the ways in which discovery has evolved. The Twombly opinion reflects grave doubts about the ability to confine within reasonable limits the discovery launched by vague notice pleading. The court continues to express these doubts in different settings. In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761, 772 (2008), the Court refused to extend the private cause of action implied by § 10(b) of the Securities Exchange Act. One of the reasons was that it is appropriate to examine the practical consequences of expansion. "In Blue Chip, the Court noted that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." Great strides are being made in the joint discovery project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. Pressures may be building to undertake a joint project that simultaneously considers a new package that expands pleading requirements and — somehow — avoids the worst excesses of discovery. The ever-changing face of discovery suggests the virtues of delay. It is not impossible, for example, that the burdens arising from discovering massive volumes of electronically stored discovery information will suddenly yield to spectacular advances in the means for searching and screening the information.

Any serious consideration of notice pleading will confront additional questions. Rule 11(b)(3) now allows pleading of "factual contentions" that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Would a change in pleading rules aimed at reducing the role of discovery require reconsideration? Rule 27's provisions for discovery to perpetuate testimony ordinarily are not used to enable discovery to assist in determining whether there is a claim. Expansion of Rule 27 has been considered briefly in recent years, and quickly put aside. If pleading evolves to require greater fact detail, should this matter be reopened?

The aftermath of the Twombly decision illustrates another familiar question. Restrained readings speculate that it is primarily an "antitrust pleading" decision, or a "conspiracy pleading" decision, or something dealing primarily with claims that are easy to allege and difficult to prove. Speculation in this vein is supported by looking to the decision in *Erickson v. Pardus*, 127 S.Ct. 2197 (2007), where the Court reversed dismissal of a pro se prisoner complaint, observing that

"[s]pecific 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.'" As the Committee has reflected on notice pleading in recent years, one set of alternatives frequently noted is the prospect that special pleading rules should be developed for specific types of claims. The particularity that Rule 9(b) requires for pleading the circumstances constituting fraud or mistake might be required for other types of claims. A project working toward a system that combines continued reliance on general notice pleading for some types of claims with heightened pleading requirements for other types of claims would be quite different from a project focused on generalizing heightened pleading requirements for all claims. Proceeding simultaneously in both directions would be exhausting; picking one approach to see whether it can be made to work might be risky. Again, developing experience in the lower courts may provide invaluable guidance.

These uncertainties may suggest caution as well about a smaller-scale project that might flow from the Twombly decision. The Court made honorable mention of the negligence complaint that then was Form 9, later revised to become Form 11 as part of the Style Project. There was some uneasiness about carrying forward several of the form complaints, but it was decided that the Style Project was not the occasion to replace or simply abandon them. So long as they persist, the forms will impede any rush toward heightened pleading. Under Rule 84 they "suffice under these rules and illustrate the simplicity and brevity that these rules require." It might not be wise to withdraw all of the form complaints before taking up notice pleading more broadly. Any attempted explanation about the implications and lack of implications would likely become short-circuit rulemaking of an undesirable sort. Still, there may some room for an interim project considering the forms. Those that may be candidates include Forms 13 (FELA), 14 (Merchant Marine Act), 18 (patent infringement), and 19 (copyright infringement). (As a curious note, the Form 21 complaint to set aside a fraudulent conveyance alleges that the defendant conveyed property "for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt." There is no expansion of circumstances constituting fraud, presumably because the elements of a fraudulent conveyance claim do not include "fraud" in the sense intended by Rule 9(b). A confident assessment of that diagnosis would require detailed knowledge of fraudulent conveyance law, perhaps state as well as federal.)

A final practical note seems in order. The public comments on the Rule 26 and Rule 56 proposals published this August may well command a major portion of the agenda for the spring Committee meeting. It may be as well to avoid mortgaging a portion of the agenda for discussion of even preliminary notice pleading proposals.

TAB 11

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 03-02

At the Appellate Rules Committee's April 2008 meeting, members discussed the proposal to amend Appellate Rule 7 to address the inclusion of attorney fees among the costs for which a Rule 7 bond can be required. Among other information, the members discussed the Federal Judicial Center's initial exploratory study of appeal bonds. Members expressed varying views about the best way to proceed with the study of this topic (and, indeed, about whether to proceed with a proposed amendment at all). But there was general consensus that the use of appeal bonds in class litigation seems to pose issues distinct from those raised by the use of such bonds in other settings. Thus, members concluded that before asking the FJC to invest further resources in a larger study, the Committee should seek the views of the Civil Rules Committee concerning the role of appeal bonds in class litigation. Members also expressed interest in seeking the views of knowledgeable practitioners concerning this question.

As a preliminary means of pursuing these questions, I conveyed the following questions to Judge Kravitz and Professor Cooper:

- What role do sizeable appeal bonds play in class litigation? Do such bonds constitute an undue deterrent to appeals by objectors, or are they a useful tool for courts tasked with managing class litigation? (Or does the answer to this question depend on the specifics?) In this context is the inclusion of attorney fees in the bond the only issue, or might sizeable bonds also result from the inclusion of such anticipated costs as "administrative costs" relating to the delay in implementing a proposed class settlement?

- If appeal bonds play a significant role in class litigation, and if their use is problematic, does it make sense for the Appellate Rules Committee to consider a rulemaking response to those issues in isolation, or should such a response be coordinated with your Committee's consideration of other issues relating to the management of class suits?

- We would also be grateful for your suggestions concerning knowledgeable practitioners whom we might consult for their views concerning these issues (obviously, we would want to seek a range of views from plaintiffs' and defendants' viewpoints, and from both those who have served as class counsel and those who have served as counsel for objectors).

The Civil Rules Committee's fall meeting, which will occur shortly after the Appellate Rules Committee's meeting, may provide an opportunity to obtain the Committee's views on such questions. In the meantime, Professor Cooper shared some very helpful preliminary thoughts.

Professor Cooper's observations underscore the challenges of moving forward with a provision to address class-action appeals. As a general matter, he notes that to the extent that a commentator takes the view that appeal bonds may be used to respond to perceived problems with the behavior of certain class action objectors, one might question whether the best way to address such behavior is through *appellate* procedure (and specifically through an appeal bond requirement).[1] Moreover, he points out that procedural reforms directed at class-action objectors present challenges: "As to class actions, objectors present many problems. Beginning with the fact that there are, after all, good objectors. And good objections. Back in the earlier phases of the Rule 23 revisions there were provisions that sought both to encourage the good objectors (including an award of fees even if their objections failed) and to discourage bad objectors. Discouraging extortionate appeals was one of the real concerns. At the time we gave up on the idea. That is not to say we should not take it up again, only that it is difficult. So a provision in Appellate Rule 7 looking at class actions only with respect to objector-appellants would be difficult in its own right."

In addition to these big-picture concerns, a project attempting to address class-action appeals would confront challenging technical issues. Professor Cooper notes that the conceptual challenges of addressing the inclusion of attorney fees in appeal bonds extend beyond situations where a *statute* authorizes the award of attorney fees; for example, appeal-bond issues might arise "[i]f class counsel is entitled to a fee out of the common fund, and it seems reasonable to augment the fee out of the common fund that has been preserved for the class by attorney services rendered for the class as appellee." In addition, Professor Cooper notes that class-action appeals include interlocutory appeals by permission under Rule 23(f), and he suggests that consideration of such interlocutory appeals might entail assessment of the present uses (and perhaps misuses) of Rule 23(f). Professor Cooper further questions whether (if one is reassessing the contours of Appellate Rule 7) it might be worthwhile to reexamine why only the *appellant* may be required to file a Rule 7 bond: "As for statutory fee appeals, what if the appellant is the one who will be entitled to fees if successful on appeal? Why not require the appellee to post a bond--because we presume the judgment is correct? Should it depend on whether the statute is a one-way shift, a two-way shift, or a [two-way shift under which] defendant can recover, but only on showing worse behavior than the plaintiff need show to recover[]?"

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[1] Professor Cooper notes that a focus on appeal bonds might be explained by the likelihood that "any part [of an action] that remains certified for class treatment is far more likely to be resolved by settlement than trial, so appeals will be taken by objectors or no one. But trial, with a winner and a loser, is possible: can we ignore it in the rule?"

Professor Cooper agrees with the Appellate Rules Committee's intuition that if the Committee were to move in the direction of considering an amendment dealing specifically with appeals in class action litigation, it would be desirable for the Civil Rules Committee to be involved in the discussions of such a proposal. He notes, however, that the Civil Rules Committee's consideration of issues relating to the treatment of attorney fees under Appellate Rule 7 carries the possibility of additional complications for the Civil Rules Committee. As the Appellate Rules Committee has noted, the reasoning of *Marek v. Chesny*, 473 U.S. 1 (1985), has played a key role in the lower courts' discussions of the Appellate Rule 7 issue. In *Marek*, the Supreme Court held that Civil Rule 68's reference to "costs"[2] includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute "defines 'costs' to include attorney's fees." *Marek*, 473 U.S. at 9. The Court explained that because neither Rule 68 nor its note defined "costs," and because the drafters of the original Rules were aware of the existence of fee-shifting statutes, "the most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Id.* As Professor Cooper notes, commentators have questioned both the plausibility of the *Marek* Court's inference and the policy implications of *Marek*'s holding. To the extent that the Committees contemplate revising Appellate Rule 7 to address the treatment of attorney fees as part of Rule 7 "costs," and to the extent that such a revision to Appellate Rule 7 entails the consideration of possible amendments to the Civil Rules, the question may arise whether (and how) to address *Marek*'s treatment of attorney fees as "costs" under Civil Rule 68. And the latter issue would undoubtedly prove a thorny one. Admittedly, a change to Appellate Rule 7 which did not entail parallel changes to any Civil Rule might not require the Civil Rules Committee to open the question of Civil Rule 68; but this set of potential complications is worth weighing as the Committees discuss whether, and how, to proceed with possible changes to Appellate Rule 7.

If the Appellate Rules Committee is inclined to continue with research concerning appeal bonds and class action litigation, it would be very helpful to obtain the perspective of litigators with experience in various roles in class litigation. (Daniel Girard's memo, which the Committee considered in connection with its spring 2008 meeting, illustrates how helpful such perspectives can be.) Among those who have assisted the Civil Rules Committee with questions on class action litigation are Allen Black of Fine, Kaplan & Black; Sheila Birnbaum of Skadden, Arps; Robert Heim of Dechert; Jocelyn Larkin of the Impact Fund; and the Public Citizen Litigation Group's co-founder Alan Morrison.[3] I expect that Committee members may have additional suggestions concerning whom to consult; this would be a useful topic to discuss at the November meeting.

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[2] If a Rule 68 offer of settlement is not accepted, and "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d).

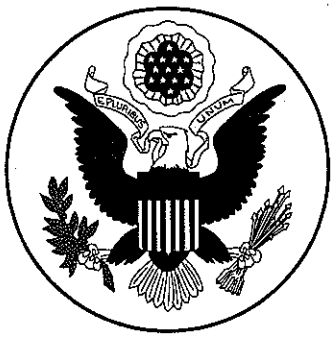
[3] Though Alan Morrison is no longer with Public Citizen, he and/or some of the current litigators at Public Citizen could comment from the perspective of class-action objectors.

TAB 12

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE MARK R. KRAVITZ

JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT



FOR THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON
THE "SUNSHINE IN LITIGATION ACT OF 2008," H.R. 5884

JULY 31, 2008

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700.

STATEMENT OF JUDGE MARK R. KRAVITZ
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I am Judge Mark R. Kravitz of the United States District Court for Connecticut and chair of the Judicial Conference's Advisory Committee on Civil Rules. I am submitting this statement on behalf of the Judicial Conference of the United States, the policymaking arm of the federal judiciary.

The Judicial Conference opposes the "Sunshine in Litigation Act of 2008" (H.R. 5884), which was introduced on April 23, 2008, on the ground that it effectively amends the Federal Rules of Civil Procedure outside the rulemaking process, contrary to the Rules Enabling Act (28 U.S.C. §§ 2071-2077). Under the Rules Enabling Act, proposed amendments to federal court rules are subjected to extensive scrutiny by the public, bar, and bench through the advisory committee process, carefully considered by the Judicial Conference, and then presented after approval by the Supreme Court to Congress. It is an exacting, transparent, and deliberative process designed to provide exacting and exhaustive scrutiny to every proposed amendment of the rules, by many knowledgeable individuals and entities, so that lurking ambiguities can be unearthed, inconsistencies removed, problems identified, and improvements made. It is also a process that relies heavily upon empirical research, rather than anecdotal information, to identify problems and to ensure that any solution is workable, effective, and does not create unintended consequences. Direct amendment of the federal rules through legislation, even when the rulemaking process has been completed, circumvents the careful safeguards that Congress itself established.

After years of careful and thorough study through the Rules Enabling Act process, the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules did not recommend that the Judicial Conference approve a change to Rule 26(c) similar to that proposed in the Sunshine in Litigation Act and its predecessors. Because the Rules

Committees made no such recommendation, the Judicial Conference has not been asked nor has it taken a formal position on the specifics of the Act's provisions. The Rules Committees did not recommend such a change to Rule 26(c) for three principal reasons. First, the bill is unnecessary. Second, it would impose an intolerable burden on the courts. Third, it would have significant adverse consequences on civil litigation, including making litigation more expensive and making it more difficult to protect important privacy interests.

I am no stranger to these issues. In my former life as a private practitioner I represented numerous media companies in their efforts to gain access to court proceedings and to information held by state and federal governments. I practiced law in Connecticut for 27 years. During those years, I represented both plaintiffs and defendants in litigation in the federal courts and utilized protective orders. I also spent a good deal of my time representing media companies, including ABC and the New York Times, in their efforts to obtain access to courts and to government documents. And I am proud to say that during that time I received the Bice Clemow Award for my "support of open and accountable government" and the Dean Avery Award "for advancing the cause of freedom of information and speech in Connecticut." I say this so you will understand that I do not have a personal history of supporting secrecy in Government. I also have a deep appreciation of the Rules Enabling Act process having served on the Judicial Conference's Standing Committee on Rules of Practice and Procedure before becoming Chair of the Advisory Committee on Civil Rules about a year ago. As a judge I have worked with litigants to craft responsible protective orders that safeguard the legitimate privacy interests of the parties while at the same time protecting the public's constitutionally-grounded interest in open judicial proceedings.

Discovery Protective Orders

H.R. 5884 is intended to prevent parties from using the federal judicial process to conceal matters that harm the public health or safety by imposing requirements for issuing discovery

protective orders under Rule 26(c) of the Federal Rules of Civil Procedure. The bill would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c), to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 5884, have been introduced regularly since 1991. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to inform itself about the problems identified by these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committees also considered specific alternative proposals to amend Rule 26(c), intended to address the problems identified in H.R. 5884's predecessor bills, including an amendment to Rule 26(c) that expressly provided for modification or dissolution of a protective order on motion by a party or nonparty. The Rules Committees published the proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Rules Committees for further study. That study included the work described above.

The Empirical Data Identifies Scope of Protective Order Activity

In the early 1990's, the Rules Committees began studying pending bills, like H.R. 5884, requiring courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant concerns about the potential for revealing, in the absence of a protective order, confidential information that could endanger privacy interests and generate increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Rules Committees concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committees asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep information about public safety or health hazards from the public. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders are requested in only about 6% of civil cases. Most of the requests are made by motion, which courts carefully review and deny or modify a substantial proportion; less than one-quarter of the requests are made by party stipulations and the courts usually accept them.

In most of the 6% of civil cases in which discovery protective orders were entered, the empirical study showed that the orders did not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. A careful inspection of the data reveals that the problematic protective orders targeted by H.R. 5884 represent only a small fraction of civil cases, which would nonetheless all be subjected to the bill's requirements. Only half of the 398 cases studied by the FJC involved a protective order restricting disclosure of discovery materials.

The other half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. Of the cases in which a protective order was entered restricting access to discovery materials, a little more than 50% were civil rights and contract cases and about 9% were personal injury cases. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards. A copy of the study is attached to this statement.

Information Shows No Need for the Legislation

The Rules Committees studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 5884. In these cases, the Rules Committees found that there was information available to the public sufficient to protect public health or safety. The pertinent information was found in court documents available to the public, e.g., pleadings and motions, as well as in reported stories in the media. In particular, the complaints filed in these civil cases typically contained extensive information describing the alleged party's actions sufficient to inform the public of any health or safety issue.

The Rules Committees also examined the case law to determine whether the court rulings in cases in which parties file motions for protective orders in discovery justified legislation. The case law showed that the courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also showed that courts often reexamine protective orders if intervenors or third parties raise concerns about them. That conforms with my own personal experience as a lawyer in representing media companies. The FJC study corroborated the findings of the case law study and showed that judges denied or modified a substantial proportion of motions for protective orders.

The bill's limited practical effect further undermines its justification. The potential benefit of the proposed legislation would be minimized by the general rule that what is produced in

discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Furthermore, even when a protective order is entered, it usually does not result in the sealing of all, or even many, documents or information submitted to the court. Case law shows that courts are rightly protective of the public's right to gain access to information and documents submitted to the courts. Thus, my court of appeals, the Second Circuit has held that "[d]ocuments used by parties moving for, or opposing summary judgment should not remain under seal *absent the most compelling reasons*." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006)(quoting *Joy v. North,* 692 F.2d 880, 893 (2d Cir. 1982)); *see Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (stating that judicial records enjoy a "presumption of openness," a presumption that is rebuttable only "upon demonstration that suppression is essential to preserve higher values and is narrowly tailored to serve that interest" (internal quotations omitted)). The Court of Appeals has instructed District Courts that "a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or

compelling need." *Video Software Dealers Assoc. v. Orion Pictures, Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994) (citation omitted).

The Legislation Would Impose Intolerable Burdens on Federal Courts

The scope of discovery has dramatically changed since legislation like H.R. 5884 was first introduced in 1991. Most discoverable information is now stored in computers and the growth in electronically stored information has exploded. Relatively "small" cases often involve huge volumes of information. The discovery requests in cases filed in federal court typically involve gigabytes of electronically stored information or about 50,000 pages per gigabyte. Cases requiring intensive discovery can involve many gigabytes, and some cases are now producing terrabytes of discoverable information, or about 50 million pages.

Requiring courts to review discovery information to make public health and safety determinations in every request for a protective order, no matter how irrelevant to public health or safety, will burden judges and further delay pretrial discovery. Indeed, the requirement to review all this information would make it infeasible for most federal judges to even consider undertaking the review. It is important to recognize that most protective orders are requested *before* any documents are exchanged among the parties or submitted to the court, and that therefore, it would be difficult, if not impossible, for the court to make the review the legislation requires. Inevitably, a request for a protective order would be routinely denied, including requests that are entirely justified.

The Legislation Would Have Significant Adverse Consequences

Since bills like H.R. 5884 were first introduced in 1991, obtaining information contained in court documents has become much easier. Court records no longer enjoy the practical obscurity they once had when the information was available only on a visit to the courthouse. The federal courts now have electronic court filing systems, which permit public remote electronic access to court

filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Parties often rely on the ability to obtain protective orders in voluntarily producing information to each other without the need for extensive judicial supervision. They do this for many valid reasons, including saving costs that would otherwise be incurred in carefully screening every document produced in discovery. If obtaining a protective order required item-by-item judicial consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

In many cases, protective orders are essential to effective discovery management. The burdensome requirements of H.R 5884 are especially objectionable because they would be imposed in cases having nothing to do with public health or safety, in which a protective order may be most needed and justified. As noted, the empirical data showed that about one-half of the cases in which discovery protective orders of the type addressed in H.R. 5884 are sought involve contract claims

and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery. H.R 5884 would make it more difficult to protect confidential and personal information in court records to the detriment of parties filing civil rights and employment discrimination cases.

Conclusion

The Rules Committees consistently have concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 5884, are not warranted and would adversely affect the administration of justice. The Committees' substantive concerns about the proposed legislation result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted and that the proposed legislation would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.

Based on lengthy and thorough examination of the issues, the Rules Committees concluded that: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens

on the court system; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

If the Committee is aware of empirical information that suggests that protective orders have become a problem of some kind, the Rules Committee would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response. To date the Rules Committee has not been directed to any such empirical information. In the absence of demonstrated abuses, however, there seems no reason to burden litigants and courts with the requirements of H.R. 5884.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 5884 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted. In 2002, the Rules Committees asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committees asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 5884 contains a similar provision. In April 2004, the FJC completed its comprehensive study surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%). A copy of the study is attached to this statement.

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Rules Committees were nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available information about potential hazards contained in other records that were not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product-liability suit complaints, for example, specifically identified the product at issue,

described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings." A copy of the follow-up study is attached to this statement.

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 5884, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources — including the complaint — to inform the public of potential hazards in cases involving a sealed settlement agreement, the Rules Committees concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements. Once again, if the Committee is aware of empirical information that suggests that sealed settlements have become a larger problem, the Rules Committee would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response.

I thank you for the opportunity to appear before you today.

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

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ROBERT L. HINKLE
EVIDENCE RULES

October 15, 2008

Honorable Linda T. Sánchez
Chair
Subcommittee on Commercial and Administrative Law
United States House of Representatives
Washington, DC 20515

Dear Representative Sánchez:

I write in response to your September 30, 2008, letter to answer the two follow-up questions on H.R. 5884. I appreciate the opportunity to continue our dialogue on this important issue. Please find enclosed my responses to these additional questions. I thank you for your consideration and look forward to continuing to work together to ensure that our civil justice system is just and fair. Please do not hesitate to contact me if further information would be useful.

Sincerely,

Mark R. Kravitz
United States District Judge
Chair, Civil Rules Advisory Committee

Enclosure

Response to Post-Hearing Written Questions
from Representative Linda T. Sánchez Regarding H.R. 5884

Mark R. Kravitz

Question 1: You contend in your written statement (at 7) that the Sunshine in Litigation Act would impose "intolerable burdens" on courts when they are asked to issue protective orders. How would the Act burden courts any more than do the existing requirements under which courts must scrutinize requests for protective orders?

Under current law, when parties seek protective orders for discovery, the motions are generally made early in a case, before discovery begins. Parties seek protective orders to be able to exchange documents and information in discovery among themselves without frequent and expensive litigation over protecting such items as trade secrets, proprietary information, or sensitive personal information. Typically, motions for protective orders do not require the judge, who at that point has little information about the case, to examine all documents and information that may be produced in discovery to try to determine in advance whether any of it is relevant to protecting public health or safety. Instead, the parties generally request protective orders that seek confidentiality for categories of documents or information. The lawyers for each side can present arguments and the judge can evaluate whether particular categories of documents should be covered by a protective order and what the terms should be. If entered by the judge, protective orders provide the parties and the court with a procedural framework that allows the parties to produce documents and information much more quickly than would be the case if item-by-item judicial examination was required.

Protective orders typically provide that after documents are produced in discovery, the receiving party may challenge whether particular documents or information should be kept confidential. Such challenges are often made when the judge knows more about the case and they typically involve a much smaller subset of the documents produced in discovery. In considering such requests, the judge also has the benefit of input from the lawyers after they have received the documents and know what they contain. The judge can order that documents designated as "confidential" during discovery no longer be subject to such protection. *See, e.g.*, *In re Zyprexa Prods. Liab. Litig.*, — F.R.D. —, Nos. 04-MD-1596, 05-CV-4155, 05-CV-2948, 06-CV-0021, 06-CV-6322, 2008 WL 4097408, at *158–59 (E.D.N.Y. Sept. 5, 2008). Current law also allows the courts to tailor protective orders to be sure that they are no broader than necessary. Finally, when documents are filed in court, the common law or constitutional interest of the public in open proceedings will apply.

By contrast, H.R. 5884 requires the judge to make specific fact findings in any case in which a protective order is sought in discovery. To make those fact findings, the judge would have to review all the documents and information, item-by-item. In many cases, the parties will be asking for and producing huge volumes of information and documents in discovery, only a very small percentage of which will ultimately be used by the parties in the case. The review required by H.R. 5884 will often involve huge amounts of information. Because the review occurs early in the case, when the judge knows relatively little, it will often be very difficult for the judge to tell if specific information or documents are relevant to public health or safety. The parties and lawyers will be unable to help because they do not have each other's documents at this stage. The review must take place and the findings of fact must be made before any protective order can issue, and the parties are usually unwilling to produce their documents before then. The result is a much larger burden on the courts than is imposed under current law, and greater delay and cost in getting needed information to the parties and their lawyers.

Question 2: You note in your written testimony (at 5) that the Rules Committee of the Judicial Conference "studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 5884." It found, "in particular, that the complaints in these civil cases typically contained extensive information describing the alleged actions sufficient to inform the public of any health or safety issue." But how can the public and regulatory agencies realistically identify health and safety risks from the many untested allegations in the 200,000-plus complaints filed in the federal court system each year? A complaint allegation is one thing; a smoking-gun document uncovered during discovery is another.

The protective-order issue arises in a small fraction of cases. As noted in my written statement, the available empirical data shows that protective orders are requested in only about 6% of the 200,000 plus civil cases filed in the federal courts each year. Nearly 75% of these requests are by motion, which courts carefully review and deny or modify as required. In addition, half of the requested protective orders involve orders governing the return or destruction of discovery materials or imposing a discovery stay pending some event, and only the other half deals with restricting disclosure of information. Accordingly, there is currently substantial information that is publicly available about most cases filed in federal court.

As to that small fraction of cases in which protective orders are entered, the allegations in the complaints, though not tested, contain enough information and details to provide notice of what claims are asserted and why those claims are a plausible basis for

relief. In product defect cases, for example, complaints typically at a minimum identify the allegedly defective product or alleged wrongdoer, identify the accident or event at issue, and describe the harm. Complaints are readily accessible to the public, the press, and regulatory agencies. Remote electronic access to court filings, now available in virtually all federal courts, makes it easy, efficient, and inexpensive to find complaints with allegations that raise public health and safety issues. Filed complaints are where the public, the press, and regulatory agencies would be expected to look for case information on public health and safety issues. Based on the allegations in the complaint, the public, the press, or regulatory agencies can decide whether to monitor a case, investigate further, or seek information through the court handling the case.

Unlike complaints, materials produced in discovery are not filed with the court and cannot be remotely or easily accessed. The public does not have the right to materials produced in discovery. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). As a result, even in the absence of a protective order, the public has no right to know of, or obtain access to, documents produced in discovery, including the rare "smoking gun" document. The public does have a right to learn of and have access to documents produced in discovery if they are filed with the court or introduced into evidence in a hearing or at trial.

Under current law, if a protective order is in place, the public, the press, or regulatory agencies can use the allegations in a complaint to decide whether to ask the court to lift or modify the protective order to allow the parties to disseminate information or documents obtained in discovery. H.R. 5884 is not necessary to achieve this result. Moreover, as a practical matter, "smoking guns" will be difficult, if not impossible, for the judge to recognize in the mountain of documents that must be reviewed, all without the assistance of the requesting party's counsel or expert.

TAB 13

Calendar for March–May 2009 (United States)

March

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

April

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

May

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

Holidays and Observances:

Mar 9 Prophet's Birthday (Islamic)
Apr 9 First day of Passover (Jewish)
Apr 10 Good Friday (Christian)
Apr 12 Easter Sunday (Christian)
Apr 13 Easter Monday (Christian)
Apr 15 Tax Day
Apr 16 Last day of Passover (Jewish)
May 1 Law Day
May 1 National Day of Prayer
May 1 Loyalty Day
May 10 Mother's Day
May 15 Peace Officers Memorial Day
May 15 National Defense Transportation Day
May 22 National Maritime Day
May 25 Memorial Day

Calendar generated on www.timeanddate.com/calendar