

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

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

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

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

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

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

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

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

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

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

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

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

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

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

89 *September Minutes*

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

92 *Rule 56*

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

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

103 **WISDOM OF REVISION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

257 Committee Note statements about the completion of expert-witness discovery were resisted  
258 as a potential source of confusion. Rule 26(a)(2)(B) establishes a default time for initial trial-expert  
259 witness disclosures and reports, absent a time set by the court, at 90 days before the trial date or the  
260 date the case is to be ready for trial. The deadline is extended to 30 days after the disclosures made  
261 by another party if the evidence is intended solely to contradict or rebut expert evidence identified  
262 by the other party. An expert witness who is required to disclose a report can be deposed only after  
263 the report is provided. Working through these provisions may become confused if there is no trial  
264 date or apparent date the case is to be ready for trial.

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

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

#### 273 LOCAL RULES

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

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

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

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

#### 297 RULE 56(A)(2): CROSSMOTIONS

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

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

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

321 The Committee agreed to delete the crossmotion provision.

322 **OTHER RULE 56(a) QUESTIONS**

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

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



343 have many pro se prisoner filings and that government motions for summary judgment are common  
344 in such cases. The prisoner needs time for a response; service will work better.

345 **RULE 56(b): AFFIDAVITS OR DECLARATIONS**

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

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

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

368 Deletion of the second sentence was approved.

369 **RULE 56(C): STATEMENT OF FACTS, RESPONSE, AND REPLY**

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

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

383 of law. A reply may dispute any additional fact stated in the response, using the same form as the  
384 response.

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

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

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

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

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

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

428 It was agreed that lawyers at the miniconference who deal in complex cases had encountered  
429 inappropriate uses of procedures like those embodied in subdivision (c). Statements of undisputed  
430 facts have run beyond a hundred pages, and responses have met and even outstripped the statements.  
431 Subdivision (c) addresses this problem primarily by recognizing the authority to establish a different  
432 procedure by order in the cases that are too complex — that present too many potentially disputed  
433 or undisputed facts — to bear the general procedure. It also attempts to address the problem by  
434 referring to “specific material facts,” with the hope that these words will inspire movants to narrow  
435 their focus. For most cases in the federal courts, however, the subdivision (c) procedure should  
436 work well. Many summary-judgment motions, for example, are made in employment cases, civil  
437 rights cases, and like cases that present a reasonably manageable universe of potential fact disputes.  
438 This procedure will enable the judge to determine more easily and rapidly whether there are disputed  
439 facts.

440 The next comment was that much of the opposition to subdivision (c) reflects dislike of Rule  
441 56 in its entirety. Experience with the Northern District of Georgia local rule similar to subdivision  
442 (c) shows that it works very well. The judge can winnow the statement of undisputed facts down  
443 to a reasonable number and can readily turn to the cited record support to determine which of them  
444 are genuinely in dispute.

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

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

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

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

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

472 should include language that had been enclosed in brackets: “reply by stating in the form required  
473 for a response \* \* \*.”

474 Indiana practice was described. For 25 years it was much like present Civil Rule 56.  
475 Motions were made in ways that did not enable trial judges to figure out, in the limited time  
476 available, what might be in the record to show a genuine dispute. Grants of summary judgment were  
477 often reversed because on appeal the loser did the work that should have been done in the trial court,  
478 pointing to the record materials that established a genuine issue. The Indiana rule was amended to  
479 require greater specificity, although not at the level exacted by subdivision (c). The result has been  
480 a decline in the rate of reversals. The amended rule has been useful. In later discussion, the Indiana  
481 rule was explained further. It does require specific designation by page or similarly precise  
482 reference to the facts that are relied on. It does not “look as tidy” as subdivision (c); it does not  
483 require a separate statement. “But it avoids the hidden truffle” problem.

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

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

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

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

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

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

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

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

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

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

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

557 A judge suggested that the reality of the subdivision (c)(1) and (2) draft can be tested against  
558 a typical employment case. Summary-judgment motions are made in all of these cases. “I spend  
559 more time on Rule 56 than in trial.” The defendant says: “I did not fire the plaintiff based on race.”  
560 The plaintiff says: “You did.” The plaintiff then supports the claim by comparing the treatment of

561 other named employees. “Practitioners will be prolix. They are afraid to leave things out.” Most  
562 of the motions are “no-evidence” motions, pointing to the lack of evidence to support a claim. They  
563 are not prolix. The response is prolix.

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

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

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

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

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

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

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

605 the motion. Separating the motion from the memorandum or brief will help to focus the response  
606 on the statement of facts in the motion.

607 This suggestion led to the observation that it is possible to separate several elements. One  
608 is the requirement of specific citations to the record to support fact positions. Another is the  
609 requirement that facts be separated out into individual numbered paragraphs. Yet another is the  
610 requirement that the response address the motion's statement of facts by correspondingly numbered  
611 paragraphs. Fifty-six districts have local rules requiring a separate statement of facts with the  
612 motion. Only 20 have local rules that require that the response track the motion paragraphs. Even  
613 in districts that do not have either requirement good lawyers point to record support for their fact  
614 positions. Should subdivision (c) be cut back to require only specific record citations? But the  
615 citation requirement is in proposed subdivision (c)(4); it can be dealt with separately after deciding  
616 what to do about the (1), (2), and (3) provisions for motion, response, and reply.

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

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

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

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

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

650 It was asked whether subdivision (c) will supersede inconsistent local rules. Both 28 U.S.C.  
651 § 2071 and Civil Rule 83 require that local rules be consistent with the Civil Rules. The Advisory  
652 Committee should be sensitive to local attachments to local rules, but it should opt for national  
653 uniformity when it thinks that is right. The draft Committee Note language addresses this problem  
654 by language included in the second paragraph for purposes of illustration, urging local rules  
655 committees to consider the consistency of their rules with the new national rule. It was urged that  
656 the authority to depart by order in the case suffices; the Committee's determination that the  
657 requirements of subdivision (c) will enhance practice and promote uniformity should not be  
658 undermined by allowing a local-rule opt-out. Experience with the original opportunity to opt out  
659 of initial disclosure requirements by local rule demonstrates how difficult it may be to restore  
660 uniformity after local rules become entrenched. To be sure, some judges may adopt a routine of  
661 ordering different procedures in all cases; that may be as well, since a litigant should want to know  
662 what the judge finds useful and to provide it.

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

665 **RULE 56(C)(4): FACT CITATIONS**

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

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

680 The first question renewed earlier concerns about a motion made before discovery is  
681 completed. In some types of litigation, at least, such motions are common. Should (c)(4) reflect  
682 the opportunity to respond by a Rule 56(f) showing that the nonmovant should not yet be required  
683 to respond in any of the ways listed in (c)(4)? The draft note suggests that a nonmovant seeking  
684 additional time ordinarily should ask for an extension of the time to respond, but it is not clear that  
685 the Note should address this issue at all. Another suggestion was that the nonmovant should be able  
686 both to point to the need for additional discovery and to provide such response as it can on the basis  
687 of information available without further discovery. (c)(4) could be expanded to include a specific  
688 cross-reference to subdivision (f) — by whatever letter it may come to be designated — but it was  
689 suggested that this added complication is not needed. Subdivision (f) takes care of the problem.  
690 And a specific cross-reference might imply that the court cannot grant the motion. For that matter,  
691 a cross-reference might fit better with the (a)(2) time limit for responding to the motion. For  
692 example, it could say that the response must be filed by the stated time "unless the court grants a  
693 motion under Rule 56(f)." This suggestion was resisted because it might generate an unintended  
694 sense that the time to respond always should be extended when a party seeks time for additional  
695 discovery. It will not do to extend the time to respond whenever a nonmovant requests more time



696 for discovery. A judge agreed that the time to respond should not be qualified by a cross-reference  
697 to subdivision (f); it is better to raise the question in the briefs on the motion. Another judge  
698 observed that different cases will call for different approaches. A nonmovant may assert that it is  
699 not yet possible to make any response. The assertion instead may be that the nonmovant believes  
700 it is possible to defeat the motion with the information currently available, but also believes that  
701 further discovery will provide better support.

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

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

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

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

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

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

735 The reference to “qualification” of a fact was questioned: what does the response “qualify”?  
736 Is this an invitation to quibble about subtle word distinctions when it is not possible to deny the fact?  
737 Lawyers will find a way not to accept a part of a statement they do not agree to — we do not need  
738 to invite them to engage in additional wordchopping. This word was defended as offering a useful  
739 alternative to a blanket admission or denial. One party’s statement of fact may be partly true;  
740 another party should be able to recognize the true part while disputing other parts. If response by

741 qualification is not permitted, the party who states the facts is put at increased risk of its own inept  
742 statement — other parties will deny because the statement is only partly true as expressed. Present  
743 Rule 8 and both present and Style Rules 36 provide for qualification as well as denial. A motion to  
744 delete “qualification” failed, 6 yes and 7 no.

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

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

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

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

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

760 **SUBDIVISION (C)(6): SUPPLEMENTAL SUPPORTING MATERIALS**

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

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

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

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

777 Subdivision (c)(8) was introduced by Judge Baylson. This subdivision addresses the  
778 consequences of a failure to respond to a motion or of a response that fails to comply with Rule  
779 56(c). The draft includes in brackets language that would allow the court to grant summary  
780 judgment in these circumstances only if examination of the motion and supporting materials shows  
781 that the movant is entitled to summary judgment. Some circuits have announced this rule. The  
782 Subcommittee voted to omit these words, believing that adherence to the requirements of

783 subdivision (c) will be enhanced by the ability to grant summary judgment by default if there is no  
784 response or even if there is a response that fails to comply with the requirements of subdivision (c).  
785 Omitting these words would change the law in some circuits.

786 The Subcommittee also considered a possible middle ground between granting the motion  
787 by default and requiring the court to determine whether the motion should be granted on the merits.  
788 Many districts have local rules that deem admitted a fact stated in a movant's statement of  
789 undisputed facts when the response fails to satisfy the local rule's requirements. If the response  
790 properly addresses some of the facts, only the facts not properly addressed are deemed admitted.  
791 The court then decides the motion by accepting the facts deemed admitted without further inquiry  
792 but examining the record as to any facts properly denied and applying the law to the set of facts  
793 deemed admitted or established beyond genuine dispute.

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

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

801 Support was expressed for the "deemed admitted" approach on the ground that the court  
802 should not be obliged to examine the materials offered to support a fact when the nonmovant has  
803 not bothered to assist the court.

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

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

813 The distinction between default and "deemed admitted" approaches was noted again. The  
814 deemed admission of facts does not establish a right to summary judgment if under the law the facts  
815 do not support the movant's position.

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

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

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

831 Further support was found in the suggestion that since several circuits require examination  
832 of the materials cited to support summary judgment even when there is no response, any change  
833 might seem to conflict with the avowed intent to make no change in the summary-judgment  
834 standard. A reply observed that whatever choice is made on this question, it will be desirable to  
835 express it in rule text. "We owe it to judges to indicate their authority."

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

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

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

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

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

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

870 silence as to a complete failure to respond might be read as an implication that the court can grant  
871 the motion by default. It would be better to decide the matter in rule text.

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

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

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

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

896 A motion was made to revise subdivision (c)(8) to direct the court to enter suitable orders  
897 following a failure to respond or an improper response. The orders could include granting summary  
898 judgment if consideration of the motion and materials cited to support the motion show the movant  
899 has carried the summary-judgment burden. There might be a graduated list. It may prove desirable  
900 to detach this provision from subdivision (c), making it a new subdivision (d). The motion passed,  
901 7 yes and 6 no.

#### 902 **SUBDIVISION (f): ADDITIONAL TIME FOR DISCOVERY**

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

909 This new element was questioned. The reference to "facts" seems too precise. The party  
910 requesting more time can describe the elements of claim or defense that will benefit from additional  
911 discovery, but cannot describe facts that it has not yet found. Some cases, of course, may involve  
912 a clear historic fact that can be described. But others involve such abstract constructs as  
913 "manipulative intent." Great masses of detailed fact may be needed to support an inference of

914 manipulative intent. Without discovery it may not be possible to describe in detail the kinds of  
915 testimonial fact that may support the required fact inferences. “This ratchets up the heat.” The  
916 present rule does refer to facts, but only in the context of explaining why they are not available.

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

921 A motion to make one change passed, 8 yes and 4 no: “describes the facts it intends to  
922 support prove.” Further changes may be submitted for Committee consideration after the meeting,  
923 if suitable illumination can be provided by further research into the ways in which courts apply  
924 present Rule 56(f).

### 925 **TIME-COMPUTATION PROJECT**

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

931 Computation Template. The core time-computation revisions are reflected in the template prepared  
932 by the Standing Committee’s Time-Computation Subcommittee. They graciously used Civil Rule  
933 6(a) as the model, providing a specific illustration that is aimed for adoption in the Appellate,  
934 Bankruptcy, and Criminal Rules as well.

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

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

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

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

951 A neat solution has been found for a drafting problem that once seemed difficult. Some time  
952 periods are “backward looking” in the sense that they command action measured by a number of  
953 days before an event. A rule might direct, for example, that a motion be served 14 days before a  
954 stated event. The general rule is that when the last day to act falls on a Saturday, Sunday, or legal  
955 holiday, computation of the period is made by continuing to count in the same direction. So if the  
956 14th day before the event falls on a legal holiday, say a Wednesday, the filing will be due on

957 Tuesday. That rule works for holidays. But it creates a problem when the 14th day is a day on  
958 which the clerk's office is inaccessible — it may not be until Wednesday that a party learns that it  
959 had to file on Tuesday one day earlier. This problem was resolved in subdivision (a)(3) by directing  
960 that if the clerk's office is inaccessible on the last day, the time to file is "extended." Inaccessibility  
961 on Wednesday means that the filing may be made on Thursday if the office is accessible on  
962 Thursday, and so on.

963 One other question remains. Rule 6(a)(6)(B) defines legal holiday to include state holidays.  
964 Other sets of rules include holidays in the District of Columbia and in any commonwealth, territory,  
965 or possession of the United States. Parallelism could be achieved by adopting a definition in Rule  
966 6(a). But it also is possible to expand the definition of "state" more generally by amending Rule 81.  
967 A later decision approved an amendment of Rule 81 that, if adopted, will pretermitt any need to  
968 amend Rule 6(a).

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

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

985 The Committee was reminded that it had approved time provisions in Rule 56(a). If Rule  
986 56 and the Time-Computation packages are both approved for publication at the same time, a way  
987 will be found to ensure that there is no confusion about the independent role of Rule 56(a) as part  
988 of the Time-Computation package.

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

991 Statutory Time Provisions. The question of computing statutory time periods has proved vexing.  
992 Rule 6(a) now applies the rule method of computing time to statutory time periods. It is useful to  
993 have a single method for computing all time periods. The Time-Computation Subcommittee and  
994 the Advisory Committees have agreed that the better method would eliminate the present rule that  
995 excludes intermediate Saturdays, Sundays, and legal holidays in computing periods of less than 11  
996 days. The effect of that change is to reduce the effective length of these shorter periods. A 10-day  
997 period, for example, now runs for a minimum of 14 days. Removing the exclusion of Saturdays,  
998 Sundays, and legal holidays reduces the period to 10 days. That effect can be offset in the rules by  
999 amendments that extend former 10-day periods to 14 days when that seems appropriate. It would  
1000 be very difficult, however, to attempt to identify all relevant statutory periods and then determine  
1001 which of them might be addressed by superseding rules provisions, even if supersession is a wise

1002 approach. Professor Struve has identified an astonishing number of statutes that set time periods less  
1003 than 11 days, and there may be others not yet identified.

1004 The Standing Committee has concluded that these statutory time-computation problems  
1005 should be addressed by identifying and recommending that Congress amend periods that seem too  
1006 short under the new computation method.

1007 A good illustration is provided by Civil Rule 72 and 28 U.S.C. § 636(b). Section 636(b) sets  
1008 a 10-day period to serve and file written objections to a magistrate judge's proposed findings and  
1009 recommendations "as provided by rules of court." Section 636(d) also provides that the practice and  
1010 procedure for the trial of cases before magistrate judges "shall conform to rules promulgated by the  
1011 Supreme Court pursuant to section 2072 of this title." Rule 72 has adopted the 10-day period.  
1012 Under present Rule 6(a), both the statutory 10-day period and the Rule 72 10-day period are  
1013 calculated by excluding intermediate Saturdays, Sundays, and legal holidays. The proposed  
1014 amendment of Rule 6(a) would be matched by adopting a 14-day period in Rule 72. The result is  
1015 to carry forward the same basic result that follows from the present rule; the only difference is the  
1016 reduction that occurs when legal holidays extend the present 10-day period beyond 14 days. It is  
1017 important to accomplish this result, which supersedes the statute somewhat less than the present  
1018 rules do. But it also will be important to amend § 636 so that lawyers who look only at the statute  
1019 are not misled. If possible, it will be desirable to propose statutory amendments to take effect on  
1020 the same day as the amended rules take effect — December 1, 2009, if the proposals proceed  
1021 through the ordinary course.

1022 The agenda materials include Professor Struve's spreadsheet of brief statutory time periods.  
1023 They also include memoranda identifying a few time periods that deserve consideration for  
1024 amendment, but only a few. There is no need to decide on these recommendations by the time the  
1025 rules proposals are published for comment. Many of the statutory time periods address temporary  
1026 restraining orders. 10-day periods are common, but some are shorter. It was noted that in  
1027 considering the no-notice TRO provisions in Rule 65, the Committee has recommended amendment  
1028 of the 10-day period to 14 days. But that recommendation does not imply a recommendation that  
1029 the statutory provisions be extended. Rule 65(e), indeed, addresses several of the statutes by  
1030 providing that the Civil Rules do not modify any federal statute relating to temporary restraining  
1031 orders or preliminary injunctions in actions affecting employer and employee.

1032 The Standing Committee has not yet settled on the approach to be adopted in recommending  
1033 specific statutory time amendments. The several advisory committees will coordinate their  
1034 recommendations through the Standing Committee. It may prove desirable to identify a few statutes  
1035 for comment in the memorandum that transmits the Time-Computation Project amendments for  
1036 publication.

1037 **RULE 81(e) - STYLE RULE 81(d)(2): DEFINITION OF "STATE"**

1038 The definition of state holidays for purposes of Rule 6(a) raised the question whether the  
1039 general definition of states in Rule 81(e), Style Rule 81(d)(2), should be expanded.

1040 Style Rule 81(d)(2) provides:

1041 **(2) District of Columbia.** The term "state" includes, where appropriate, the District  
1042 of Columbia. When these rules provide for state law to apply, in the District  
1043 Court for the District of Columbia:

1044 **(A)** the law applied in the District governs; and



1045                   **(B)** the term “federal statute” includes any Act of Congress that applies  
1046                   locally in the District.

1047                   Several reasons can be advanced to amend this rule to include at least territories and  
1048                   commonwealths in the definition. “Possessions” also might be included.

1049                   A modest reason to amend is to avoid including different definitions of “state” in Rule 6(a)  
1050                   for identifying state holidays and in Rule 81 for all other purposes. Negative implications might be  
1051                   drawn.

1052                   More positively, the reasons for referring to states in the Civil Rules seem to apply to other  
1053                   places where federal “district courts” sit. State law is adopted for service in Rules 4 and 4.1; for  
1054                   some matters of capacity in Rule 17; for serving subpoenas in Rule 45; for stay of execution in Rule  
1055                   62(f); for prejudgment remedies in Rule 64(a); for execution in Rule 69; and for jury trial in  
1056                   condemnation actions exercising the power of eminent domain under state law in Rule 71A(k).  
1057                   Adoption of state law establishes uniformity with state practice, often in matters that involve  
1058                   significant state interests. And adoption of state law spares federal courts the need to develop their  
1059                   own rules to address problems that often require complex rules. Similar advantages follow for a  
1060                   federal court sitting in a territory or commonwealth.

1061                   Criminal Rule 1(b)(9) defines “state” to “include[] the District of Columbia, and any  
1062                   commonwealth, territory, or possession of the United States.” Parallelism may suggest that Civil  
1063                   Rule 81 include “possession,” subject to further research to determine whether there are any  
1064                   difficulties not now understood. The Criminal Rules have encountered some difficulties with  
1065                   warrants for searches in American Samoa; that experience may help in deciding whether Rule 81  
1066                   should adhere to the Criminal Rule model. “Possession” also may play a role in the Criminal Rules  
1067                   because of military bases and “status of forces” agreements.

1068                   Finally, Rule 81 has a built-in safeguard: the definition applies only “where appropriate.”  
1069                   Any unforeseen complications that might arise from exotic local law can be met by finding it not  
1070                   appropriate to apply the definition in that particular setting.

1071                   The Committee agreed that Style Rule 81(d) should be revised to include a “commonwealth,  
1072                   territory, or possession of the United States,” subject to further research to determine whether  
1073                   “possession” should be included in the definition.

1074                   The means of accomplishing the amendment presented some difficulty. Style Rule  
1075                   81(d)(2)(A), as quoted above, states that when the rules call for state law to apply, “in the District  
1076                   Court for the District of Columbia the law applied in the District governs.” This statement seems  
1077                   to be redundant once the District is defined as a state for rules purposes. The redundancy can be  
1078                   cured by deleting the phrase. But that leaves another problem. Present Rule 81(e) includes this  
1079                   sentence:

1080                   When the term “statute of the United States” is used, it includes, so far as concerns  
1081                   proceedings in the United States District Court for the District of Columbia, any Act  
1082                   of Congress locally applicable to and in force in the District of Columbia.

1083                   Style Rule 81(d)(2)(B) incorporates this provision awkwardly. The second sentence says: “When  
1084                   these rules provide for state law to apply, in the District Court for the District of Columbia: \* \* \*  
1085                   (B) the term ‘federal statute’ includes any Act of Congress that applies locally to the District.” The  
1086                   difficulty is that this literally narrows the definition of federal statute to circumstances in which the  
1087                   rules provide for state law to apply. That is not the scope of present Rule 81(e).

1088 There has not been occasion to consider whether the definition of “federal statute” should  
1089 be expanded to include any Act of Congress that applies locally in a commonwealth, territory, or  
1090 possession.

1091 The upshot of these considerations was a recommendation to publish for comment a new  
1092 Rule 81(d)(2) and (3), subject to any further review that may be possible before the June Standing  
1093 Committee meeting:

1094 (2) *State Defined.* The term “state” includes, where appropriate, the District of  
1095 Columbia and any commonwealth, territory[, or possession] of the United  
1096 States.

1097 (3) *District of Columbia.* The term “federal statute” includes any Act of Congress  
1098 that applies locally to the District of Columbia.

1099 In over- and underlining on Style Rule 81(d), the result is:

1100 **(d) Law Applicable.**

1101 (1) *State Law.* When these rules refer to state law, the term “law” includes the  
1102 state’s statutes and the state’s judicial decisions.

1103 (2) ~~*District of Columbia State Defined.*~~ The term “state” includes, where  
1104 appropriate, the District of Columbia and any commonwealth, territory[, or  
1105 possession] of the United States. ~~When these rules provide for state law to~~  
1106 ~~apply, in the District Court for the District of Columbia:~~

1107 ~~—————(A) the law applied in the District governs; and~~

1108 (3) *District of Columbia.* ~~(B)~~ The term “federal statute” includes any Act of  
1109 Congress that applies locally to the District of Columbia.

1110 **RULE 6(b): EXTENDING STATUTORY TIME PERIODS**

1111 Present Rule 6(b) allows a court to enlarge a time period, or to permit an act to be done after  
1112 time has expired on a showing of excusable neglect. The rule applies “[w]hen by these rules or by  
1113 a notice given thereunder or by order of court an act is required or allowed to be done at or within  
1114 a specified time.” Style Rule 6(b), written in terms borrowed from the Criminal Rules, allows a  
1115 court to extend time “When an act may or must be done within a specified time.” On its face, Style  
1116 Rule 6(b) seems to allow extension of a time specified by statute. That may be a good thing, even  
1117 though it may entail a change of meaning. Of course some statutes set time periods that should not  
1118 be extended by court order. A quick survey of cases that consider present Rule 6(b) shows that  
1119 courts have not attempted to extend statutes of limitations or “jurisdictional” time limits such as  
1120 those set for removing an action from state court to federal court.

1121 Judge Rosenthal expressed the appreciation and thanks of the Committee to Professor Struve  
1122 and Judge Kravitz for the great work done to advance the Time-Computation Project.

1123 **RULE 62.1: “INDICATIVE RULINGS”**

1124 In May 2006 the Committee recommended publication of a new Rule 62.1 in August 2007,  
1125 deferring the publication date to allow an interval between the new rules aimed to take effect on  
1126 December 1, 2007 and the next set of new rules. The Rule would address district court responses  
1127 to a motion seeking relief that the district court cannot grant because of a pending appeal. The

1128 recommendation was discussed at the June 2006 Standing Committee meeting, the September 2006  
1129 Committee meeting, and the January 2007 Standing Committee meeting. The Appellate Rules  
1130 Committee, having initially referred the matter to the Civil Rules Committee, determined that it  
1131 should consider adoption of a new Appellate Rule to complement the Civil Rule. A draft Appellate  
1132 Rule 12.1 is set for consideration one week after this meeting.

1133 Rule 62.1 is built on the procedure that most circuits follow when a party moves under Rule  
1134 60 to vacate a judgment that is pending on appeal. The district court can defer consideration, deny  
1135 the motion, or “indicate” that it would be inclined to grant the motion if the case is remanded for that  
1136 purpose. Rule 62.1 extends this procedure to any motion for relief that cannot be granted because  
1137 of an appeal that has been docketed and is pending.

1138 The question whether remand should be available only if the district court indicates that it  
1139 will grant the motion upon remand remains unsettled. After the Standing Committee discussion in  
1140 January the Civil Rules proposal is to publish as “state that it [might or] would grant the motion,”  
1141 and to invite comment on the choice. The argument that remand should be available only if the  
1142 district court states that it will grant the motion rests on an anticipation that the court of appeals may  
1143 prefer to remand only on assurance that disruption of the appeal will be repaid by the opportunity  
1144 to avoid decision of issues that will be altered or mooted when the case is remanded and the  
1145 judgment is vacated. In addition, a survey of the circuit clerks yielded responses by three; two of  
1146 them preferred to be notified of the motion only if the district court states that the motion will be  
1147 granted if the case is remanded.

1148 The argument that remand should be possible if the district court states that it “might” grant  
1149 relief on remand rests on efficient use of both trial-court and appellate-court resources. A motion  
1150 may present complex questions that can be resolved only by investing much time and effort.  
1151 Requiring the district court to decide the motion before it knows whether the decision will be  
1152 mooted by the ruling on appeal exacts a high price. The process of deciding the motion, moreover,  
1153 may be derailed if the appeal is decided in mid district-court passage. The court of appeals is in a  
1154 much better position to decide whether, in light of the progress of the appeal, it is better to proceed  
1155 to decide the appeal, potentially mooting or changing the issues raised by the motion, or instead to  
1156 remand to avoid the risk that the decision on appeal will be superseded by decision of the motion  
1157 on remand. Notifying the court of appeals that the district court might grant the motion leaves  
1158 determination of the best next step in court of appeals control.

1159 Professor Struve noted that the issue whether to provide for remand on an indication that the  
1160 district court might grant the motion will be considered by the Appellate Rules Committee.  
1161 Integration of the two rules, if an Appellate Rule 12.1 goes forward, will depend on as-yet  
1162 unforeseeable determinations.

1163 The “might” grant alternative was supported by two judges. One observed that it would be  
1164 counter-productive to recognize remand only if the district court is prepared to decide the motion  
1165 on the merits before remand becomes possible. Both the district court and the appellate court would  
1166 benefit from the “might” alternative. Another suggested that so long as the district court has a  
1167 choice to defer consideration of the motion, some busy judges will simply defer consideration rather  
1168 than divert from other cases the time needed to decide the motion on the merits. Professor Struve  
1169 added that the alternative to defer consideration will be useful in the circuits that seem to say that  
1170 the judge cannot defer consideration.

1171 A practitioner noted that a statement that the district court “would” grant relief upon remand  
1172 will carry great weight in the court of appeals. A less forceful statement that the court “might” grant

1173 relief is less likely to lead to remand, but the statement and any accompanying information will  
1174 enable the court of appeals to decide on the better course.

1175 A separate question was raised by the observation that outside Rule 60(b) there may be many  
1176 circumstances in which the district court is uncertain whether a pending appeal ousts its authority  
1177 to act on a motion. Should the rule apply whenever the court “may” lack jurisdiction to grant the  
1178 motion? The response was that this approach could extend the rule too far. The district court may  
1179 decide to make an indicative ruling if it is unsure of its authority to grant a motion without remand,  
1180 but that risk exists now. To limit the court to an indicative ruling whenever there is a possibility that  
1181 a pending appeal may oust its authority to grant the motion would disrupt orderly proceedings when  
1182 the court concludes on balance that it does have authority to grant.

1183 The problem that neither the parties nor the court may know whether the court has  
1184 jurisdiction to grant a particular motion while an appeal is pending ties to the question of when  
1185 notice should be given to the court of appeals. Two alternatives are presented: notice should be  
1186 given when the motion is filed, or notice should be given if the district court indicates that it might  
1187 or would grant the motion on remand.

1188 The discussion noted advantages in directing that a party notify the court of appeals when  
1189 the motion is filed. The court of appeals may wish to postpone further consideration of the appeal  
1190 when there is a prospect that the appeal may be undone by action on the motion, whether the remand  
1191 is made before the appeal is decided or after. A practitioner observed that it is better to notify the  
1192 court of appeals when the motion is filed — the court may be justifiably disconcerted to find that  
1193 it has wasted time deciding issues that prove unnecessary to the ultimate judgment.

1194 The argument against notice when the motion is filed rests on concerns expressed by the  
1195 circuit clerks surveyed for the Appellate Rules Committee. They point out that many Rule 60(b)  
1196 motions are filed by pro se litigants, who are not always sources of fully reliable information. They  
1197 prefer not to be afflicted with notice of motions that often will be denied without further incident.  
1198 They also believe that practice in this area is better left to regulation by local circuit rules that can  
1199 reflect different local cultures. A different question asked whether filing notice when the motion  
1200 is filed in the district court would impair the calendaring process — lawyers like more time.

1201 A further observation was that a rule directing that notice must be given to the court of  
1202 appeals when the district court states that it might or would grant the motion does not prevent a  
1203 lawyer from giving notice when the motion is filed.

1204 A further difficulty with requiring notice when the motion is filed is that the movant is faced  
1205 with determining whether the district court has jurisdiction to grant the motion. A practitioner  
1206 observed that “it doesn’t come up that way.” The motion will seek relief. In cases of doubt the  
1207 lawyer may notify the court that the lawyer believes the court has jurisdiction to grant the motion,  
1208 but that in the alternative the court may wish to make an indicative ruling. The resolution is to file  
1209 notice with the court of appeals when you become aware there is a question whether the district  
1210 court has jurisdiction to grant relief.

1211 A participant suggested that the rule might direct notice when a Rule 60(b) motion is filed.  
1212 But the Committee was reminded of the lengthy deliberations that led to the decision to generalize  
1213 this procedure to apply to any motion that cannot be granted because of a pending appeal. It was  
1214 suggested that perhaps the first paragraph of the Committee Note should be revised to make this  
1215 point even more explicit.

1216 Proposed Rule 62.1(c) has been revised to integrate with the draft Appellate Rule 12.1. If  
1217 Rule 12.1 is adopted, Rule 62.1 need not address the appellate court's determination whether to  
1218 remand for all purposes or to remand only for decision of the motion, retaining jurisdiction of the  
1219 appeal. The most important need is to encourage careful appellate attention to the distinction  
1220 between a full remand and a special or limited remand. There is a danger that a party dissatisfied  
1221 with the outcome in the district court may not recognize that a full remand may require a new notice  
1222 of appeal. It is better to address this concern in an Appellate Rule than to attempt to regulate  
1223 appellate court behavior by a Civil Rule.

1224 Two final questions are presented by the reference to a motion "that the court lacks authority  
1225 to grant because of an appeal that has been docketed and is pending." The more obvious question  
1226 is whether this provision should identify docketing of the appeal as the point of transferring  
1227 authority from district court to court of appeals. Rule 60(a) draws the line at this point. Some courts  
1228 of appeals have recognized it as the appropriate line in facing Rule 60(b) motions. It has real  
1229 advantages. It is clear. It recognizes that at all times there should be a court that clearly has  
1230 authority to act. And it may be difficult to ask a court of appeals to address a question in the  
1231 interlude between filing a notice of appeal in the district court and the docketing that first informs  
1232 the court of appeals that the case has come to it. The period between filing the notice of appeal and  
1233 docketing in the court of appeals is likely to be quite brief as electronic filing takes hold; the bright  
1234 line can be established at very little cost. The Committee agreed that this is the proper line.

1235 The other question is raised by a style suggestion to delete two words: "lacks authority to  
1236 grant because of an appeal that has been docketed and is pending." This seemingly innocuous  
1237 saving on the word count may generate confusion about the effect of a pending appeal. It seems to  
1238 imply that any docketed and pending appeal defeats district-court authority to act on any motion.  
1239 But that is not at all the case. Many appeals leave the district court free to act on many motions.  
1240 One well-established example is the district court's authority to dismiss an action while an  
1241 interlocutory injunction appeal is pending. It is important to retain the restrictive words.

1242 The Committee renewed the recommendation to publish Rule 62.1 for comment, subject to  
1243 any revisions needed to integrate with any Appellate Rule that may be recommended for publication,  
1244 or to compensate for a decision not to recommend an Appellate Rule.

1245 **RULE 26: EXPERT-WITNESS DISCOVERY**

1246 Judge Campbell introduced the report of the Discovery Subcommittee. No action is  
1247 recommended at this meeting. The Subcommittee has devoted substantial time and two  
1248 miniconferences to studying four issues with respect to disclosure and discovery of expert trial  
1249 witnesses.

1250 Two sets of issues go to the categories of expert trial witnesses that must disclose reports  
1251 under Rule 26(a)(2)(B). The report requirement is limited to an expert witness "retained or specially  
1252 employed to provide expert testimony in the case or whose duties as an employee of the party  
1253 regularly involve giving expert testimony." This rule apparently means that a report need not be  
1254 provided by an employee whose duties do not regularly involve giving expert testimony, but some  
1255 courts have found ways to require reports from such employees. The Committee Note is clear that  
1256 treating physicians frequently fall outside the ranks of those specially employed to provide expert  
1257 testimony, so they too fall outside the report requirement. But courts have found difficulty in  
1258 drawing a line beyond which a treating physician has become retained or specially employed.

1259 The treating physician question is whether a report should be required when the testimony  
1260 will offer an opinion that goes beyond diagnosis or treatment. The opposing party may claim  
1261 surprise by such testimony.

1262 Professor Marcus provided additional background. Between 1970 and 1993, discovery of  
1263 all expert trial witnesses began with interrogatories seeking the substance of the opinions to be  
1264 given. In some courts depositions were routinely allowed to supplement the interrogatory responses,  
1265 but other courts were more conservative. The 1993 amendments established the disclosure  
1266 requirement, but stripped out experts not retained or specially employed — including treating  
1267 physicians — and employees who do not regularly give expert testimony. Such witnesses must be  
1268 disclosed under Rule 26(a)(2)(A), although there may be problems with compliance.

1269 Lawyers at the January miniconference wanted attorney disclosure for the witnesses  
1270 exempted from the 26(a)(2)(B) report requirement. The disclosure would closely resemble the  
1271 answers that were provided to expert-discovery interrogatories under the pre-1993 system. The  
1272 attorney would write the disclosure, and provide it at the same time as disclosing the witness's  
1273 identity under Rule 26(a)(2)(A). The draft in the agenda materials “cribs from the pre-1993  
1274 version.” A more elaborate attorney disclosure could be required, approaching closer to the report  
1275 required from a witness covered by 26(a)(2)(B). But the more limited disclosure seems to fill the  
1276 gap that some find in the present rules. The disclosure will help opposing attorneys in determining  
1277 whether to depose the witness. It will prevent surprise. It addresses the concerns that have been  
1278 expressed about employee witnesses who do not regularly give expert testimony.

1279 Judge Campbell noted that the lawyers at the January miniconference were adamant in the  
1280 view that treating physicians will stop testifying if required to give 26(a)(2)(B) reports. They also  
1281 thought there would be few problems if they were provided attorney disclosure of the testimony  
1282 expected from an employee witness who does not regularly give expert testimony.

1283 The ambiguities that arise from treating physician testimony were noted. The physician  
1284 ordinarily should be disclosed under 26(a)(2)(A) as an Evidence Rule 702 witness. The physician  
1285 may be asked questions of causation or the length of treatment. The opposing party objects that  
1286 these topics go beyond the role of treating physician. Objections even may be made when a  
1287 physician is asked what was observed in treating a party. Opposing lawyers want to know what the  
1288 physician will address. Attorney disclosure will provide that.

1289 Treating physicians also may create another problem. The physician may have been deposed  
1290 before the 26(a)(2)(A) disclosure. The other side may then wish to depose the physician a second  
1291 time to explore new topics, requiring a stipulation of the parties or court order under Rule  
1292 30(a)(2)(B). There is no ready solution to this problem.

1293 The attorney disclosure proposal was commended by a Committee member whose office  
1294 defends a large number of medical malpractice cases. The disclosure will provide the information  
1295 other parties need without putting a heavy burden on the physician.

1296 An observer noted the decisions that have seemed to misinterpret present Rule 26(a)(2)(B)  
1297 by requiring reports from employees whose duties as employees do not regularly involve giving  
1298 expert testimony and asked whether the Committee Note to an amended rule would say that the new  
1299 attorney disclosure provision supersedes those decisions. It may be that clear new rule text will  
1300 suffice without need for comment in the Note.

1301 The Committee consensus was that the Subcommittee seems to be moving in the right  
1302 direction with the attorney disclosure proposal.

1303 Judge Campbell resumed the Subcommittee Report, noting that the other two expert-witness  
1304 topics being studied by the Subcommittee involve discovery of communications between an attorney  
1305 and a trial-expert witness and discovery of draft expert witness reports. Last August the ABA  
1306 adopted a resolution that these materials should not be discoverable absent “exceptional  
1307 circumstances.” Discovery is opposed on several grounds. Among them is the view that the  
1308 discovery is expensive but seldom yields anything of value. Perhaps more important is the concern  
1309 that exposure to discovery induces costly behavior that impairs the quality of expert testimony.

1310 Seven of the nine lawyers who attended the January miniconference favored the ABA  
1311 proposal. They represented many different types of practice. Two, plaintiffs’ lawyers from the east  
1312 coast and the west coast, disagreed. They advanced the view that an expert appears as a witness  
1313 sworn to tell the truth, not an advocate, and that discovery should be available to show how far the  
1314 testimony may have been shaped to meet the needs of the case as viewed by the attorney. They did  
1315 not seem to offer concrete examples of discovery that made a difference. But their view is important  
1316 and must be weighed carefully in developing any proposed amendments.

1317 New Jersey recently adopted a rule that seems to restrict discovery of draft reports and  
1318 attorney-expert communications. There has been enough experience with the rule that it seemed a  
1319 likely source of at least anecdotal information about operation in practice. The April 18  
1320 miniconference in New York convened 11 New Jersey lawyers from a wide variety of backgrounds  
1321 to test their experience. They provided an impressive — nearly unique — show of agreement. They  
1322 did not merely favor the rule. They were genuinely enthusiastic about it. They report that lawyers  
1323 and experts can really collaborate when freed from the shadows of discovery. The expert-witness  
1324 reports are better, the testimony is better, the experts who are willing to be witnesses at all are better.  
1325 Depositions are shorter. They do not miss the opportunity for discovery of attorney-witness  
1326 communications or draft reports; they have not given up anything useful in return for the benefits.

1327 Some of the New Jersey lawyers were involved in the process that adopted the rule. They  
1328 reported that there was no opposition even at the time of adoption. And the lack of opposition did  
1329 not reflect a lack of awareness — the rule was well publicized along the way to adoption.

1330 Professor Marcus continued the Subcommittee report. The 1993 disclosure requirements  
1331 created a better way to deal with what might be a lawyer speaking through an expert. But there  
1332 seem to have been some downside consequences.

1333 One of the most interesting and important points made in the miniconference was that the  
1334 New Jersey rule means more than it says. It seems to distinguish between communications before  
1335 the report is served and communications after; the lawyers say that this distinction is not observed  
1336 — full protection carries over. The bar has converged on this practice because all agree on its great  
1337 benefits.

1338 The agenda materials include alternative models to limit discovery of draft expert-witness  
1339 reports. One concern is that a bar on discovery might intrude on effective deposition questioning.  
1340 The New Jersey lawyers say that is not a problem. “They seem to have achieved an understanding  
1341 that is better than the rule text.”

1342 A Committee member observed that there are no opinions interpreting the New Jersey rule.  
1343 The miniconference lawyers said that the absence of opinions reflects the fact that the rule works.  
1344 And they asked “why should experts be the only witnesses who cannot interact with lawyers about  
1345 what will happen at trial,” free from discovery.

1346 Another Committee member observed that there is some value in showing how hard a lawyer  
1347 had to push the expert to get a favorable opinion. The current rule could work, but lawyers do not  
1348 understand how to make that happen.

1349 Still another Committee member said that the Subcommittee made a point of trying to find  
1350 the downside of the bright-line rule described by the New Jersey lawyers. They said there was none.  
1351 The rule allows full access to all facts and data considered by the expert. Facts and data considered  
1352 are discoverable, and can be examined at trial, whatever the source — if the attorney asserted a fact  
1353 to be assumed in framing an opinion, that is discoverable. The New Jersey lawyers say that is what  
1354 they need. And the New Jersey lawyers also said that they are uncomfortable with the federal  
1355 practice when they appear in federal court; they often stipulate to adopt the state practice.

1356 A practitioner offered a caution. If something like the New Jersey rule is adopted, courts will  
1357 have to be ever more alert to the danger that experts will be advocates. But in a recent case with 18  
1358 experts all parties agreed to a stipulation that adopted rules very much like the New Jersey practice.  
1359 They did so for self-serving reasons. Each wanted to be able to help its experts “improve the ways  
1360 of presenting their entirely objective reports.” A rule like this will help a lot. But the experts who  
1361 will say anything for a fee will be a problem; jurors have to understand what we’re doing.

1362 Massachusetts practice was described as quite similar to New Jersey practice. The plaintiffs’  
1363 bar has developed ways to undercut bad experts by using their own experts.

1364 A participant in the miniconference noted that New Jersey experience may not transfer  
1365 automatically to other settings — the New Jersey lawyers think they have a collegial bar. But they  
1366 did assert that they contest their cases vigorously, including discovery disputes. It is only these  
1367 issues of expert discovery that find them united.

1368 A judge suggested that the New Jersey practice could save a lot of court time. He has never  
1369 found draft reports useful in assessing a trial expert’s testimony.

1370 Texas practice was described briefly. The rule emerged from lawyers’ concerns that expert  
1371 discovery not become a sideshow. In allowing for discovery of documents and things “provided to,  
1372 or reviewed by or for the expert in anticipation of testifying,” the rule excludes discovery of the  
1373 expert’s own draft reports. Communications between lawyer and expert witness are not  
1374 discoverable; if they were, at least in theory discovery could take the form of deposing the attorney.  
1375 “Anything oral is off limits in discovery.”

1376 The Subcommittee report concluded with the statement that proposals for rules amendments  
1377 will be made, probably for the fall Advisory Committee meeting.

1378 **RULE 68**

1379 The agenda materials include a brief memorandum reporting on survey research on Rule 68  
1380 offers of judgment being done by Professors Thomas A. Eaton and Harold S. Lewis, Jr.. Rule 68  
1381 escaped revision in each of two lengthy Advisory Committee undertakings in the 1980s and 1990s.  
1382 But suggestions for revision regularly appear on the agenda, fueled by a desire to find ways to  
1383 encourage earlier settlements reached before unnecessary litigation costs are incurred. Completion  
1384 of the articles reporting on this research and making recommendations supported by it may provide  
1385 an occasion to return once again to Rule 68.

1386 **CLASS ACTION FAIRNESS ACT: FJC STUDY**



1387 Thomas Willging reported on the most recent phase of the Federal Judicial Center study of  
1388 the impact of the Class Action Fairness Act on federal court dockets. He began by observing that  
1389 Emery Lee, “an expert in statistical analysis as well as a wonderful lawyer,” had done much of the  
1390 analysis in the report. The whole research team, indeed, is excellent.

1391 Last September’s report projected that the Act would lead to an annual increase of about 370  
1392 additional class actions filed in, or removed to, federal courts. The study now has analyzed 16  
1393 months of data. For the most recent 12 months there have been 364 additional filings. “That’s  
1394 pretty close.”

1395 The types of cases in the increase have been pretty much the types that the Act was expected  
1396 to influence. Most were diversity cases.

1397 Figure 2a in the report illustrates contract cases — mostly insurance cases. The filing trend  
1398 was downward before CAFA. There has been an increase since, all of it in diversity cases. Of an  
1399 average 16 new cases a month, 11 were original filings. The relationship between original filings  
1400 and removal also is contrary to the pre-CAFA trend.

1401 Figure 2b shows there have been few tort personal injury or property damage cases, either  
1402 before CAFA or after. Property damage cases increased slightly, all of them original filings.

1403 Figure 2c shows that “other fraud” cases increased at a rate of about 8 a month, 5 original  
1404 filings and 3 removals.

1405 Diversity cases are charted in figure 3. It shows that the numbers were falling before CAFA  
1406 and then went up dramatically in the first 6 months after CAFA. They rose again in the next 6-  
1407 month period, and now have leveled off. Figure 4 separates original diversity filings from removals.  
1408 Original filings skyrocketed in the first year of CAFA, and then leveled off. Removals went up in  
1409 the first 6 months, and then fell. The proportions between original filings and removals have  
1410 reversed as compared to pre-CAFA experience — original filings now outnumber removals.

1411 Figure 5 shows filings in district courts grouped by circuits. There are dramatic increases  
1412 across the circuits. At least 7 circuits have doubled or more than doubled class-action activity  
1413 comparing the 12 months before CAFA to the 12 months after. Filings in the 2d, 3d, 5th, and 11th  
1414 Circuits more than doubled; it is difficult to know what is going on. And it is difficult to know how  
1415 many of these cases could have been filed in districts in more than one circuit — whether “universal  
1416 venue” is drawing lawyers to prefer filings in some circuits over others.

1417 Figure 6 shows filings in the 10 districts that have the greatest class-action activity. Filings  
1418 have doubled in 9 of the 10. “There is an indication that lawyers are choosing federal courts for  
1419 diversity actions.”

1420 The next step will be to look at 306 pre-CAFA cases to document litigation activities: are  
1421 there state claims or federal claims, and how many of each; motion practice; remand motions;  
1422 certification; trial.

1423 A participant observed that the most dramatic changes seem to be in California. The  
1424 California Judicial Council is studying state-court class-action practice, and will generate  
1425 information parallel to the FJC work. Mr. Willging replied that the FJC has talked extensively with  
1426 the people conducting the California study. The FJC also has talked with RAND researchers, who  
1427 are looking for a state to study. The FJC is willing to coordinate the federal study with any state  
1428 study. But most states do not collect data. It would be terrific to encourage states to develop better  
1429 data.

1430 A recent RAND study reported on class actions against insurance companies. It found that  
1431 only 10% of them were filed originally in federal court, while another 20% were removed to federal  
1432 court.

1433 Brief note was made of the goals of CAFA that aim beyond the allocation of class actions  
1434 between state courts and federal courts. It will be interesting to see whether there is a decline in  
1435 “coupon settlements.”

1436 **FJC STUDY: RULES 56 AND 12(e)**

1437 Joe Cecil reported briefly on the FJC study of Rules 56 and 12(e) that had been discussed  
1438 with the Subcommittee report on Rule 56. He noted that there is a rather high rate of granting  
1439 summary judgment in whole or in part. Part of the explanation is that Rule 56 is often used in cases  
1440 with many defendants, trimming back the number of parties without disposing of the claims.

1441 Rule 12(e) has been used with greater frequency in some types of cases than in others.  
1442 Greater frequency is found in civil rights cases and civil RICO actions. The RICO actions may be  
1443 special because the Manual for Complex Litigation includes a model order that directs complex case  
1444 statements. That approach may prove useful for other types of cases.

1445 **NEXT MEETING**

1446 It was decided that the next meeting should be set for November 8 and 9 at a place to be  
determined.

Respectfully submitted,

Edward H. Cooper, Reporter