MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 20-21, 2009

The Civil Rules Advisory Committee met in Chicago at the Northwestern Law School on April 20 and 21, 2009. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Hon. Michael F. Hertz; Peter D. Keisler, Esq.; Judge John G. Koeltl; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Chilton Davis Varner, Esq.; and Judge Vaughn R. Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, and Judge Diane P. Wood represented the Standing Committee, along with Professor Daniel R. Coquillette, Standing Committee Reporter. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers liaison); Ken Lazarus, Esq. (American Medical Association); Professor James Pfander; Lorna Schofield, Esq. (ABA Litigation Section); and John Vale, Esq. (American Association for Justice).

Judge Kravitz opened the meeting by expressing thanks to Anton Valukas for helping to make the arrangements for this meeting and to Northwestern Law School, particularly Dean David Van Zandt, for providing the facilities and hospitality for the meeting. He noted that the Law School has made wonderful progress under Dean Van Zandt's leadership. He also noted that Professors Redish and Pfander are among the eminent proceduralists here, and quoted from an article by Professor Redish about the Rules Enabling Act. Dean Van Zandt welcomed the Committee, invited Committee members to explore the school, and noted that the litigation program is one of the sources of special pride at the Law School.

Judge Kravitz welcomed Acting Assistant Attorney General Michael Hertz, noting that confirmation hearings for Tony West were to be held on this first day of the meeting.

Judge Kravitz also noted that this is the last official meeting for Judge Hagy, who is completing his second term as a member. Judge Hagy has been an enthusiastic participant and contributor whose thoughtful advice has made a difference at many points, most recently in his work with the Rule 56 Subcommittee. Judge Rosenthal added that from his first meeting with the Committee, Judge Hagy has provided helpful comments that are a fine blend of practical experience with conceptual understanding. Judge Hagy responded that it has been an honor to work with the Committee.

Judge Kravitz recalled that the January Standing Committee meeting had been described at this Committee's February meeting in San Francisco. In March he and Judge Rosenthal addressed the district-judge members of the Judicial Conference; the judges seemed relieved that the "point-counterpoint" part of the current Rule 56 proposal is likely to be withdrawn from the recommendation for adoption.

Judge Kravitz also noted that the Sunshine in Litigation Act has been introduced again in Congress. The ABA has written a strong 3-page letter opposing enactment, urging that judges in fact are acting appropriately in entering and supervising discovery protective orders. The Supreme Court has adopted the Time Computation Rules, along with the other Civil Rules amendments recommended by the Judicial Conference, and has sent them to Congress. Judge Rosenthal said that legislation has been introduced to make the statutory changes recommended to complement the

Time Computation rules changes. The legislation seems to be making good progress. Congressional staff are fully supportive.

Minutes

The Committee approved the draft Minutes for the November 2008 and February 2009 meetings, subject to correction of typographical and similar errors.

Rule 56

Judge Kravitz introduced Rule 56 by suggesting that this meeting may be the last session on the current Rule 56 project. It has been a long and thorough inquiry. The issues have been clearly focused with the help of extensive comments and testimony.

Judge Baylson began discussion by noting that the Rule 56 Subcommittee met twice by conference call after the February Committee meeting. The Subcommittee reached recommendations on some of the open issues and presented other issues for discussion without recommendations.

Subdivision (a): "Fact": The recommendation to delete the "point-counterpoint" aspect of published Rule 56 led to transferring part of proposed (c)(2)(A)(i) to subdivision (a) — "A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought * * *." Subcommittee discussion raised the question whether "fact" should be included in the list: "each claim, fact, or defense * * *." "Fact" is easily encompassed as "part" of a claim or defense, and the Committee Note can comment on that. But some Subcommittee members thought it desirable to call attention in rule text to the value of summary judgment on even a single fact. A judge observed that it is not unusual to encounter a motion for summary judgment on a single fact when the parties are unable to agree to it; the local rules in the Central District of California provide for this. At the same time, several courts have ruled that while present Rule 56(d) recognizes authority to establish a single fact in ruling on a motion for summary judgment, it does not authorize a motion to establish a single fact. It may suffice to say in the Note that a part of a claim or defense may be as simple as a single fact.

Further discussion observed that "fact" is used to signify different things. It can refer to a historic fact. It also can refer to legal constructs — "negligence" and "intent" are often referred to as questions of fact. So the question may be more elaborate — the question whether a defendant is a statutory "employer," for example, may turn on determining who is an "employee" for purposes of determining whether there are fewer than 15 employees.

An alternative was suggested — the Committee Note could refer to determination of an "element" of a claim or defense, rather than a "fact." But again it may be asked what is an element? Is it an element that the driver was negligent? That the defendant was the driver? That the vehicle was driving 50 miles per hour in a 25-mile-per-hour zone, or only that it was driving faster than 25 miles per hour? Referring to an "element" may lead to conceptual wrangling that does nothing to advance useful summary-judgment practice.

A different alternative was suggested — allow a motion on an "issue."

Arguments were advanced to delete "fact" both from rule text and from the Committee Note. Present Rule 56(d), revised as proposed Rule 56(g), authorizes disposition of a single fact when the court does not grant all the relief requested by the motion. But Rule 56 should not invite motions to establish a single fact. If it does that, lawyers may feel compelled to make motions they would not now make. It is better to avoid motions on "Claim 1 and the following 36 facts * * *." And if

"fact" is not in rule text, it may be better to leave it out of the Note for fear of encroaching on the practice that a Note should not become an operational part of the rule.

A motion to insert "fact" in the rule text and Committee Note was defeated, 1 yes and all others no.

Subdivision (a): "Shall": In February the Committee concluded that "shall" should be restored, despite the general style convention prohibiting any use of this word. Multiple comments on the published proposal, which carried forward with "should" from the Style Project, show unacceptable risks that either of the recognized alternatives, "must" or "should," will cause a gradual shift of the summary-judgment standard. Brief discussion reconfirmed by unanimous vote the recommendation to restore "shall".

Subdivision (a): "Identifying each claim, defense, or the part of each claim or defense — on which summary judgment is sought": An observer asked whether it was necessary to transfer this provision into subdivision (a). It was drafted as part of the point-counterpoint procedure, to help focus the motion. If point-counterpoint procedure is abandoned, as now proposed, it may invite more partial motions. Perhaps the rule should fall back on the form as published: "A party may move for summary judgment on all or part of a claim or defense." A motion was made to take this step.

Referring to part of a claim or defense was defended on the ground that in practice there are many motions for partial summary judgment. It is better to provide clear authority in the rule text. To be sure, Rule 7(b)(1)(B) requires that any motion must "state with particularity the grounds for seeking the order." Added language in Rule 56 could be seen as redundant. But the emphasis is different, and the reminder may be useful. If not here, where else would the incentive to brevity appear?

Again it was suggested that the rule text could be shortened and supplemented by the Committee Note, and again it was responded that anything that is important should be in the rule text.

A judge observed that with some motions it is difficult to know what the movant is requesting. "It will be useful to have something to point to in the Rule" when directing that the motion be presented more clearly. Another judge agreed that such motions do appear. The direction to correct the motion is to make it more specific.

An alternative was proposed: "identifying the basis on which summary judgment is sought." This alternative was resisted on the ground that "basis" is unclear, and can easily invite the movant to make its arguments as part of the motion.

Another alternative was proposed: rearrange the same words, to read "A party may move for summary judgment on all or part of a claim or defense, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought."

The fear was again expressed that the focus on part of a claim or defense will invite more motions on subparts of parts. A judge responded that summary judgments are sought so frequently that it does not seem likely that a revised rule will lead to still more motions. Another judge offered employment discrimination cases as an example. The employer, as defendant, "usually moves on everything. Does it have to identify each piece"? Yet another judge observed that it is more likely to be a plaintiff who moves for summary judgment on only part of a claim. Two other judges agreed that a defendant is likely to move both for summary judgment on the entire action and also on separate parts. The employer in a discrimination case, for example, is likely to argue that the

plaintiff has failed to make a prima facie case, that the employer has articulated nondiscriminatory grounds for the challenged action, and that the plaintiff has not shown pretext.

The subcommittee proposal was again supported on the ground that it avoids the motion that "throws it all up against the wall." The proposal requires the movant to identify clearly the basis for the motion.

A motion to delete the reference to part of the claim or defense failed, 3 yes and 9 no. The text will remain as proposed, minus "fact."

Subdivision (a): "Shows": The Subcommittee proposes that "show" be restored to the rule text. The proposal focuses on the movant: the court shall grant summary judgment "if the movant shows" there is no genuine dispute. Present Rule 56 directs that summary judgment be rendered if the summary-judgment materials "show" that there is no genuine issue. "Show" has been in Rule 56 from the beginning. It helps to make clear that the movant has a summary-judgment burden. The Celotex opinion requires even a movant who does not have the burden of production at trial to "show" — that is, to point out — that there is no genuine issue.

It was pointed out that the emphasis in current Rule 56 is on what "the pleadings, the discovery and disclosure materials on file, and any affidavits show." That may seem at odds with the decisions ruling, as proposed subdivision (c)(3) provides, that the court need consider only materials called to its attention. It helps to focus on the showing made by the movant.

The question whether anything would be lost by deleting "the movant shows" was answered by urging that this part of the Celotex opinion has acquired such meaning that it should be carried forward in rule text.

It was agreed to retain "the movant shows." It is useful as a reminder of the movant's burden.

Subdivision (a): Committee Note: Discussion turned to the draft Committee Note. Professor Coquillette sounded a familiar theme with a reminder of the constraints imposed by the rule that a Committee Note cannot be changed unless the rule is amended. It is important to avoid observations that may become obsolete before there is any justification for changing the rule. One particular manifestation of this constraint arises whenever specific cases are cited. Using cases as illustrations is risky enough, but at times may be a permissible way of explaining a point. Using cases as authority is riskier still. They may be modified or overruled. So the Note to subdivision (a) refers to the three 1986 Supreme Court decisions as the source of contemporary summary-judgment standards. That is accurate so long as "contemporary" is properly understood — it refers to the time of the Committee Note. But if the Supreme Court expresses different approaches in later decisions, there may be some confusion. The Note also quotes from two Supreme Court decisions in explaining the change from "should" to "shall." The very uncertainty of the debates about discretion to deny summary judgment when there is no apparent genuine dispute of material fact suggests that these opinions are likely to change.

The value of quoting the decisions on discretion to deny summary judgment was explained by pointing to the Committee Note on the Style Project decision to substitute "should" for "shall." The Note cited the Kennedy case that is cited here in the quotation from Anderson v. Liberty Lobby. It is important to provide a full explanation of the recommendation to restore "shall." Further support was expressed for this view, at the same time as further doubts were expressed about citing the 1986 cases as the source of contemporary summary-judgment standards. But there also was

support for retaining the citations as the most important touchstone of current practice. "The most important audience is today."

A motion to delete citations of the three 1986 decisions as the source of contemporary standards passed, 7 yes and 5 no. The quotations bearing on discretion will be retained.

On a finer point, it was thought awkward to refer to the Supreme Court decisions that seem to touch on discretion — or perhaps to deny discretion — as "ambiguous and conflicting." One alternative might be "apparently ambiguous." Further discussion led to deletion of "ambiguous and conflicting." The Note will explain that restoration of "shall" is suitable "in light of the case law on whether the district court has discretion * * *."

A final suggestion was to delete the part of the first sentence of the Committee Note stating that Rule 56 is revised "to make the procedures more consistent with those already used in many courts." The suggestion was resisted on the ground that the current text of Rule 56 "little resembles practice." The proposal does improve the procedures, but it is even more about making them consistent with common and better practices.

Subdivision (b): Time to Respond and Reply: As published, subdivision (b) set times to move, to respond, and to reply. These times were an integral part of the point-counterpoint procedure in proposed subdivision (c), which specified the separate steps of motion, response, and reply. As the Time Project moved toward completion the Committee decided to take a chance on eventual adoption of the point-counterpoint procedure by incorporating parallel time provisions in Rule 56. If Congress does not act, on December 1, 2009, Rule 56 will include the times for response and reply. The question is whether it is better to delete these times if, as proposed, the point-counterpoint procedure is deleted from the national rule.

Deletion of national rule provisions on response and reply may alleviate the possibility of confusion arising from setting times for steps that are not themselves specified in the rule. Although subdivision (b) allows change by local rule, there still may be some interference with various methods of presenting the motion. A court may, for example, direct simultaneous presentation of motion and response in a form that facilitates identification of the fact contentions and corresponding record materials. The rules do not generally reach this level of detail — times are set for some motions, though not others, and times for response and briefing are left for other devices. Deletion also will avoid the difficult question whether provision should be made for surreplies.

Deletion of these provisions, however, may be strategically unwise. There are constant complaints that the rules are changed too often. Acting one year later to retract amendments the bar has barely had time to master will add support for these complaints. The recommendation to restore "shall" in subdivision (a), shortly after the Style Project adopted "should," will add to a possible sense the Committee is vacillating.

Several reasons were offered to show that retaining the times for response and reply will do little harm. The proposal allows local rules to set different times. There are lots of local rules; if the national-rule periods are incompatible with local summary-judgment practice, we can count on local rules committees to set appropriate alternative periods. Case-specific orders also will be used when needed. The times proposed in subdivision (b), moreover, are consistent with common local-rule periods. And reactions to the rule as published did not reflect any significant anguish about setting times for response and reply — most of the concerns that were expressed went to the time for making the motion.

Discussion continued with the Subcommittee's suggestion that the Committee Note can explain the reasons for the Time Project change and for retracting it. At the same time, there may be little harm done by setting a 21-day period to respond. The time to "reply" may generate more confusion, particularly in districts that do not follow a point-counterpoint procedure. In those districts, this might seem to be a time for reply briefs.

The problem of surreplies was brought back. Many of the plaintiff-side lawyers who commented argued forcefully that they should have a right of surreply. They note that at trial the plaintiff has the right to open and close. When a defendant moves for summary judgment, it is unfair to reverse the order so that the defendant gets to open and then to close by a reply that admits of no surreply. Some of the comments reflected concern that defendants at times deliberately make vague motions that elicit a clear response, only to follow up with a reply that for the first time presents new facts and arguments that the plaintiff cannot respond to. Early drafts of the present proposal included a time to surreply. The provision was deleted, however, out of concern that it would invite undesirable proliferation of papers in cases that do not need so many steps.

One possible approach would be to provide that the time for steps after the motion must be set by the court. But that would impose a specific scheduling order obligation for every case. Times for motions are set in many courts by local rule; it would be undesirable to require case-specific orders. One judge responded that his court has a local rule that sets times, but that he always requires the parties to appear before a summary-judgment motion is made, and sets times for the steps "irrespective of the local rule."

Support was offered for deleting the times for response and reply. In part, it was urged that if there is a reply, the Committee must determine whether there should be a general provision for surreplies. Further discussion led to an apparent consensus that it is better to delete the proposed times for response and reply.

Weighing the values of adopting the better rule against the perception that the Committee has fallen down in this particular recommendation is important. The balance seems clear to the Committee. Part of the gain in simplicity is avoiding the need to confront the surreply question. A rule that mandates a surreply opportunity is likely to elicit strong protests. The simple version avoids that. And the perception of vacillating may not be much of a problem. The proposal completely rewrites Rule 56. This change is one among many, tracing back to different times in the life history of Rule 56. The Time Project, moreover, required coordination of all five advisory committees. It could not be held back to match the uncertain but inevitably slower progress of the Rule 56 proposal. It made sense to make the best prediction possible as part of the Time Project, but to leave the way open to draft the best possible Rule 56. It took 40 years to consider serious revision of Rule 56. It may be many years before it is again taken up. Memory of the short-lived provisions added by the Time Project will fade away quickly. It is better to draft for the long run.

The Committee was reminded that the Department of Justice is concerned about losing the specific part of published (b)(2) that set the time for response at "21 days after the motion is served or that party's responsive pleading is due, whichever is later." The United States commonly has 60 days to answer. Absent a specific provision deferring the time to respond to a summary-judgment motion, the summary-judgment response may be due well ahead of the answer. The Committee Note might help, and most judges understand the problem, but the explicit rule text is desirable.

A motion to retain the response and reply time provisions in Rule 56(b) as publish failed, 1 yes and 10 no. The tag line will be shortened: "Time to File a Motion~~, Response, and Reply~~."

Subdivision (b): Committee Note: The draft Committee Note on subdivision (b) includes in brackets two sentences designed to explain the brief appearance and subsequent removal of provisions governing the time for response and reply. The first suggestion was that there should be some explanation of "the Time Project" if these sentences are retained. But it was suggested that the sentences be deleted. All agreed. The explanation for the change can be set out in the Report to the Standing Committee.

Subdivision (c)(1): The decision at the February meeting to omit the point-counterpoint provisions in Rule 56(c)(1) and (2) as published leads to reorganizing the paragraphs in subdivision (c). The reorganization begins by bringing the "pinpoint citation" requirements published as (c)(4) up to become (c)(1). There was a broad consensus to carry this provision forward.

The Subcommittee divided on a suggestion that greater clarity would be achieved by adding a few words: "An assertion in supporting or opposing a motion * * * must be supported by * * *." Others thought these words add little, unless it is to generate some confusion whether the support or opposition is to be made part of the motion or part of a brief. Some districts now require that citations to the record be made as part of a statement of undisputed facts. Other districts require that citations be in the brief. The requirement might be made part of the motion itself. "We do not want to preempt local practice."

This question relates, if only as a matter of drafting, to a second suggestion that the language should be made active. The passive voice is permitted when it works better, but the active voice can emphasize that parties' responsibilities.

A motion to substitute an alternative suggested in the agenda materials passed without opposition: "A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by: * * *."

An observer suggested that it would be helpful to add a requirement of admissibility to the citation requirement, something like; "citation to particular parts of the materials in the record that would be admissible in evidence." This is better than the negative in proposed (c)(2), allowing an opposing party to challenge the admissibility of supporting or disputing evidence. A judge responded that it is better to wait for objections, just as at trial. The parties may have good reasons for not raising potential objections. Another judge added that some readers might be misled into confusion about the role of affidavits, declarations, and depositions in summary-judgment practice.

Subdivision (c)(2): Admissibility Challenges: All agreed that there is no controversy about the revised form of (c)(2), recognizing an assertion that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

Subdivision (c)(3): Materials not Cited: The provision published as subdivision (c)(4)(B) has become (c)(3). It provides that the court need consider only materials called to its attention under Rule 56(c)(1). It further provides that the court may consider other materials in the record. The published version required that the court give notice under Rule 56(f) before granting a motion on the basis of record materials not cited by the parties, but did not require notice before denying a motion on this basis. The American Bar Association recommended that notice be required before granting a motion on this basis as well as before denying a motion. Discussion of this recommendation led the Subcommittee to conclude that notice should not be required either for a denial or for a grant. It was recognized that a court may err by relying on uncited materials while failing to find still other materials that dispel the seeming effect of the materials it has found. But there are common situations in which the court should not feel required to give notice. A party may

file an entire deposition transcript, for example, while citing to only part of it. The court should be free to read the entire transcript and to evaluate the parts cited in light of the whole.

It was noted that proposed Rule 56(f) requires notice and a reasonable time to respond before granting a motion on grounds not raised by the parties. Notice is not required only if the court relies on uncited materials in the record to act on a ground that has been raised by the parties.

The Committee agreed to drop any notice requirement from subdivision (c)(3).

Subdivision (c)(4): Positions for Purposes of Motion Only: As published, proposed subdivision (c)(4) provided that "A party may accept or dispute a fact either generally or for purposes of the motion only." Thoughtful comments suggested that there should be a "default" provision that governs when a party fails to state whether its position is general or is limited to purposes of the motion. The Subcommittee initially concluded that the rule should provide that the position is taken for purposes of the motion only "unless the party expressly states that it is made generally." But doubts were expressed. One question was whether it would often happen that a party would unilaterally agree to take a position for all purposes in the action. The first question put for discussion was whether paragraph (4) should be omitted entirely.

The first comment was that there should be some provision recognizing the right to take a position for purposes of the motion only. Litigants fear that "it will come back to bite me." The rule provision provides reassurance that a limitation on an acceptance is effective. "It's a comfort provision." The reassurance also is valuable to protect against a ruling that taking a position for purposes of the motion only authorizes the court to enter a subdivision (g) order that the fact is established in the action.

The rejoinder was that elimination of the point-counterpoint provision removes the need for an express limited-position provision. The original concern was that a party faced with a long statement of undisputed facts may believe that many of the facts are not material, and find it better to accept them for purposes of the motion than to face the time-consuming and expensive task of offering a full pinpoint-citation response. The provision, moreover, will encourage parties to take positions in motion practice that are fundamentally different from the positions that will be taken at trial. A limited acceptance often will be followed by hot dispute at trial.

Elimination of this provision was further supported by noting that it is not necessary to enable a party to both deny an asserted fact and to argue that it is not material. The problem of overlong statements of facts in point-counterpoint practice has been described by many plaintiff-side lawyers in employment cases. The same lawyers said that they would not accept a fact for purposes of the motion only, that they cannot seem to accept a fact that they may want to dispute. Another judge seconded this observation — a party can always respond "I deny, but even if true the fact makes no difference." The rule is cleaner without this provision.

Without a provision in rule text, it remains fair to recognize the limited position practice in the Committee Note to subdivision (g). The Note can say that accepting a fact for purposes of the motion only does not authorize the court, after refusing to grant all the relief requested by the motion, to order that the fact is established in the case.

A motion to delete proposed subdivision (c)(4) passed, 10 yes and 1 no. A later motion to reconsider failed for lack of any support.

Subdivision (c)(5): Affidavits or Declarations: This provision is drawn from present Rule 56(e)(1). It has drawn no substantial criticism. It will be renumbered as subdivision (c)(4) to reflect deletion of what had become (c)(4).

Subdivision (c) Committee Note: The Subcommittee brought up for discussion a tentative new paragraph in the Committee Note. This paragraph observes that the pinpoint citations required by subdivision (c)(1) can be provided by various methods. It may be asked whether any purpose is served by reminding litigants and courts of this freedom. It was generally agreed that the reminder serves a purpose. The alternatives may not be apparent to those who are familiar with only one practice. They should, however, be framed as examples: "Different courts and judges have adopted different procedures. Examples include providing citations in the motion, in a separate statement of facts, in the body of a brief or memorandum, or in a separate statement of facts included in a brief or memorandum." The proviso that the court must give clear notice of its expectations was deleted — it is no more than a nagging reminder of the requirements of Rule 83(b).

The next paragraph of the Note recognizes that a court may require preparation of an appendix of the materials cited on the motion, and may require citation to the appendix rather than other parts of the record. This paragraph will be integrated with the paragraph that gives other examples of the methods of citation. The ordering of these two paragraphs will be considered further.

The paragraph of the Note reflecting the limited-position provision of proposed subdivision (c)(4) will be deleted, reflecting the decision to delete (c)(4).

Subdivision (d): "When Facts are Unavailable": Proposed subdivision (d) carries forward present Rule 56(f) with little change. It has drawn few comments and no changes are recommended.

Some of the comments urged that the rule should permit an alternative response: "summary judgment should be denied on the present record, but if the court concludes that summary judgment should be granted I should be allowed time for additional investigation and discovery." This provision would respond to the dilemma faced by a party who believes that it can defeat the motion without further investigation or discovery, but who also believes that it can find facts that clearly defeat the motion if need be. The difficulty, however, is that this alternative response essentially asks the court both to decide the motion and then — if the decision is to grant the motion — to undo its own decision by allowing more time, a further response, and then reconsideration. As one comment put it, "No one wants seriatim Rule 56 motions." The alternative-response suggestion was rejected.

Subdivision (d): Committee Note: The Note includes a bit of practice advice — a party seeking time to obtain affidavits or declarations or to take discovery may seek an order deferring the time to respond to the summary-judgment motion. This brief sentence presents the common question whether a Committee Note should include practice advice. The advice was defended on the ground that it serves as a gentle reminder to the court that a party often should be spared the burden of preparing a response while the time to respond winds down and it remains uncertain whether additional time will be granted. But it was questioned by asking whether it is possible to ask for additional time for investigation or discovery without also at least implicitly asking for additional time to respond. This question was answered by judges who agreed that a good lawyer will recognize the need to ask for more time to respond, but too many lawyers seem to assume that there is an automatic extension. The advice is right, and will be helpful. It will remain in the Note.

Subdivision (e): Failing to Properly Support or Properly Respond: Subdivision (e) began as part of the point-counterpoint proposal. It recognized that one of the proper responses to a failure to

comply with the requirements of pinpoint response or pinpoint reply can be that the court deems a fact admitted. It generated little comment, and has been carried forward in part to ensure that local rules providing for "deemed admission" — rendered as "consider the fact undisputed for purposes of the motion" — are not invalid.

Deletion of the point-counterpoint provision has had the effect of somewhat broadening the reach of subdivision (e). It now applies when a party "fails to support an assertion of fact or fails to properly address another party's assertion of fact." Failure to support an assertion can occur in a motion as well as in later stages. The failure in a motion will not support an order granting summary judgment, nor will it support an order considering the fact undisputed as asserted by the motion. But it will support an order affording an opportunity to correct the deficiency or another appropriate order.

The "consider undisputed" provision is permissive; it says only that the court "may" consider a fact undisputed for want of a proper response.

The initial rule text will be rearranged to read: "If a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c)(1) the court may: * * *."

The tag line will be revised to reflect the rule text: "Failing to Properly Support or Respond."

Rule 56(e) Committee Note: The first paragraph of the proposed Committee Note includes a statement that summary judgment cannot be granted by default. It was observed that the balance of the Note makes the meaning clear, but agreed that it would help to begin: "As explained below, summary judgment cannot be granted by default." Other minor changes also were made.

Rule 56(f): Judgment Independent of Motion: Rule 56(f) reflects decisional law recognizing the court's authority to grant summary judgment without a motion or outside a motion. It drew few comments.

Subdivision (f)(2) recognizes that a court may deny a motion on grounds not raised by a party. That seems fine. But why require that the court give notice and a reasonable time to respond? Why not limit this paragraph to granting the motion?

The first response was that it is useful to give notice because the parties often understand the record better than the court does. Materials that seem to the court to require denial of the motion may not mean what they seem to mean.

But it was asked what effect this provision has on denying a motion for procedural reasons. Suppose the motion is filed after the deadline set by a scheduling order. The court should be able to deny the motion without having to give notice. Or the motion may fail to comply with Rule 56(c). Or the motion may be ridiculously overlong — the court should be able to deny it with directions to submit a new and proper motion. And to whatever extent there is discretion to deny a motion despite the apparent lack of any genuinely disputed fact, why should notice be required? How, in short, should case-management problems be reflected here?

It was suggested that the rule might be limited to denying a motion "on the merits." But it was asked whether it is denial on the merits when the court concludes that information supporting the motion would not be admissible in evidence?

One possibility is to leave the rule text as it is, addressing case-management authority in the Committee Note. The Note might say that subdivision (f)(2) does not limit authority to enforce Rule 56 procedures and court orders.

Another possibility would be to delete subdivision (f). It can be seen as advisory in the sense that courts do the things it describes and will continue to do them whether or not the rule describes them. But it is helpful to give notice of these practices — lawyers may not be aware of them, and may frame motions and responses differently when they are aware.

It was suggested that "deny" be omitted from (f)(2). The court should not be required to give notice before denying, whether denial rests on procedural failure or on failure to carry the summary-judgment burden.

Examples were given to illustrate the importance of notice before granting a motion on grounds not stated. One judge granted a motion on limitations grounds, only to be informed of facts that defeated the limitations defense. A parallel might arise when the judge suspects there may be grounds for equitable tolling and denies a motion despite an apparently good limitations defense.

Another perspective was offered. There are many pro se cases in which the court should be able to deny a clearly inappropriate motion for summary judgment without having to give notice.

It was suggested that if "deny" is deleted, the Committee Note might include a reminder that the court is of course free to give notice before denying the motion.

An observer urged that lawyers want the rule to be balanced as between grant and denial. They fear that denial is the easy way out for the judge. Deletion of "deny" may seem to tip the scale in favor of denial. Another observer suggested that "deny" should be kept "for transparency." A committee member responded that "this is not a problem of balance." The case is not over — the case continues after denial. "Deny" should be deleted.

Another alternative was suggested: the rule text might distinguish the grounds of denial, omitting any notice requirement if denial rests on failure to satisfy the requirements of Rule 56, a local rule, or a court order. On the other hand, the movant may benefit from notice no matter what the reason for denial. The motion is the chance to avoid trial, or to shift the terms of settlement. It is important. A committee member responded that "this is where a motion to reconsider makes sense." Another noted that "we cannot legislate against arbitrary action." Two others suggested that the main concern is with granting a motion on grounds not raised by the parties — the grant is more serious. Notice protects against the risks of acting on a ground that a nonmovant can show is wrong.

A motion to delete "deny" from subdivision (f)(2) passed, 7 yes and 5 no.

Subdivision (f) Note: The Note will be amended to delete the reference to "deny" in subdivision (f)(2).

The earlier suggestion that the Note might include a reminder that if it wishes to do so the court can give notice before denying a motion on grounds not raised by the parties was renewed. The suggestion was rejected as providing gratuitous advice. Courts are well aware of the authority to give notice before acting.

Subdivision (g): Order Fact as Established: The tag line will be changed to better reflect the rule text: "Failing to Grant all Relief." It was noted that not granting all relief includes complete denial.

It was observed that the final line of subdivision (g) "is clunky." It might be revised by making two sentences. " * * * stating any material fact * * * that is not genuinely in dispute. ~~and~~

~~treating the fact~~ A fact so stated must be treated as established in the case." A motion to make this change failed, 3 yes and 9 no.

Subdivision (g) Note: The decision to delete subdivision (c)(4) requires revision of the draft Committee Note to remove references to (c)(4). Judge Baylson proposed substitution of these sentences: "The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes."

Judge Baylson explained that the Note would ensure that it is safe to accept a fact for purposes of the motion only. It will work in the point-counterpoint setting as well as in others.

Discussion returned to deleted subdivision (c)(4). The intent of this Note is to make clear that a subdivision (g) order cannot be based on acceptance of a fact only for purposes of the motion. Why, then, not retain (c)(4)? A response was that as drafted, (c)(4) has not said whether acceptance for purposes of the motion only includes acceptance for purposes of a subdivision (g) order.

It was noted that subdivision (c)(1)(A) specifically notes the possibility of stipulations made for purposes of the motion only, and includes "admissions." It might be possible to find two meanings in "admissions" — not only a Rule 36 admission, but less formal admissions that could be limited to purposes of the motion. But it was thought better to read "admissions" in (c)(1)(A) as referring only to Rule 36 admissions. Parties do stipulate facts for purposes of the motion, particularly when the real dispute goes to the law rather than the facts.

The question whether the reassurance provided by the Note is useful was renewed. Would a lawyer ever turn around after denial of the motion and argue that an adversary's acceptance for purposes of the motion was an admission that supports a subdivision (g) order that the fact is established in the case? Would a court accept the argument?

The motion to add the language quoted above passed, 10 yes and 2 no.

Consideration will be given to adding a sentence in the Note stating that denial of a motion is included in "does not grant all the relief requested."

Subdivision (h): Sanctions: Discussion began with an observation that many sanctions rules include "or other appropriate sanction." Adding those words to subdivision (h) "could increase options." This suggestion was elaborated by noting that it is useful to provide a reminder that other sanctions may be considered in lieu of contempt.

The first response was that subdivision (h) is present subdivision (g), changed only to reduce from "must" to "may," and to require notice and a reasonable time to respond. The next response was that Rule 11 is available to support sanctions for inappropriate Rule 56 practice.

Adding a reference to other sanctions won further support. Contempt is an extraordinary sanction. The FJC study of present Rule 56(g) shows that contempt is almost never invoked. This observation was turned back by a suggestion that adding a reference to alternative sanctions will support arguments that the change shows an intent to further diminish resort to contempt sanctions.

A motion to add "or subject to other appropriate sanctions" at the end of subdivision (h) passed, 11 yes and 1 no.

It was suggested that authorizing other sanctions makes it possible to delete the reference to expenses and attorney fees. No action was taken on this suggestion.

Subdivision (h) Committee Note: The Note will be expanded to reflect that three changes have been made from present Rule 56(g) and to refer to the new "other appropriate sanctions" language.

Rule 56: Republication Not Needed: Judge Kravitz raised the question whether the changes made since publication warrant republication of the revised proposal for further comment. The revised proposal looks quite different. It has been stripped down. But the request for comments squarely invited comments on all of the issues that have proved important. The most significant changes involve deletion of the point-counterpoint provisions and restoration of "shall" to displace "should" grant in the Style Project version of what is to become Rule 56(a). Those questions were developed at length in the request for comments.

Judge Baylson thought that republication is not necessary. All the concepts in the Rule as revised were in the published rule.

This theme was developed further. The request for comments was more detailed than past requests, including requests on complex and controversial proposals. This elaboration responded to many questions raised by the Standing Committee. It worked well. The testimony and comments were clearly focused, and addressed all of the central issues. This model is one that will be emulated in future requests for comment on important and complex proposals.

A committee member suggested that it is "hard to imagine anything new." Comments in response to republication could only rehash the same themes that have been thoroughly developed in the original comment period.

It was noted that the only issue that might be thought to warrant republication is withdrawal of the mandate for point-counterpoint procedure. But courts that want to use this procedure remain free to adopt it, as many have. What is lost is standardization, pursuit of nationwide uniformity. But this goal was abandoned in large measure because many people, and particularly many courts, want to shape presentation of Rule 56 motions in many different ways. And uniformity did not seem to be as important as the Committee had thought it would be. Republication is not required on this score.

Discussion of republication concluded with the observations that the Committees had given sufficient notice of all the features that will go forward in the revised proposal, and that the comments and testimony have provided sufficient guidance on what should be done. It would be different if the Committee were recommending provisions that were not published. The path here, however, has been away from a more prescriptive rule and toward a less prescriptive rule. That is OK.

The Committee agreed unanimously that republication is not needed.

Rule 56: Recommendation to Adopt: The Committee voted unanimously to recommend that the Standing Committee approve the revised Rule 56 proposal for adoption by the Judicial Conference and the Supreme Court.

Judge Kravitz concluded the discussion of Rule 56 by praising the work as deliberative in the highest traditions of the rulemaking process. The Committee listened to the comments and testimony. The comments and testimony have had a significant impact on the proposal that is going forward. Additional help was provided by Andrea Kuperman's research and by the Federal Judicial Center's research. Judge Baylson provided outstanding leadership of the Rule 56 Subcommittee.

Judge Baylson noted that appreciation is due Judge Rosenthal for her support and guidance from the beginning of the project.

Rule 26: Expert Witnesses

Judge Campbell launched the discussion of the expert-witness discovery proposals by observing that a number of issues were raised by the public comments and testimony, even though the total volume of comments and testimony was less than for Rule 56.

At the February meeting after the San Francisco hearing the Committee decided that the Rule 26 proposals should carry forward, subject to any improvements that may be found in light of the comments and testimony. The Subcommittee has not reconsidered that decision. Among the issues that remain to be explored, four are most prominent.

First is whether work-product protection should be extended to communications between an attorney and an employee expert trial witness who is not required to give a disclosure report under Rule 26(a)(2)(B). The Subcommittee decided not to extend the protection, but the question drew many comments and deserves the Committee's attention. Practical problems in litigation prompted the proposal to protect communications with an expert who is required to provide a Rule 26(a)(2)(B) disclosure report because the expert is specially retained or employed to give testimony in the case or is one whose duties as a party's employee regularly involve giving expert testimony. Lawyers and experts avoid creating discoverable drafts and communications. Lawyers retain second sets of "consulting" experts who are nearly immune from discovery. Other practical problems follow. The proposal has been crafted with an eye on the New Jersey experience, which has been a real help. The Committee had not talked about in-house experts, and was not informed about possible inefficiencies arising from discovery of communications with them. And there are non-employee experts that are not required to provide (a)(2)(B) reports. The Committee did not want to protect communications by one party's lawyer with treating physicians, accident investigators, and the like. An employee expert, moreover, may also be an important fact witness. Drawing suitable lines to achieve an appropriate level of protection for communications with employee experts could prove difficult. Finally, it seems likely that much of the interest in shielding communications with employee experts arises from concern with the limits placed on attorney-client privilege by states that employ a "control group" test to identify who is a client. It is not desirable to create even an appearance of attempting to expand a privilege rule by way of a civil rule.

Second is how to express the intention to protect communications between a lawyer and the expert trial witness's staff. The Subcommittee agreed that it suffices to provide a reminder in the Committee Note.

Third is the problem arising from the published proposal that extends work-product protection to drafts of any report or disclosure required by Rule 26(a)(2) "regardless of the form of the draft." The Committee Note explained that this language included oral, written, electronic, and other forms. But referring to oral drafts may create a problem — a party might seek to defeat discovery of the attorney-expert communications that are not protected by proposed Rule 26(b)(4)(C) by arguing that the communications are oral drafts of the expert's report. The Subcommittee proposed revising the rule text so that it protects only "written or electronic drafts."

Fourth is the next-to-last paragraph of the proposed Committee Note. This paragraph recognizes that the proposed rule focuses only on discovery, but expresses an expectation "that the same limitations will ordinarily be honored at trial." This paragraph drew protests that the Committee Note was being used to accomplish changes in the Rules of Evidence, and perhaps even to test the lines that require special procedures to adopt a rule that creates, abolishes, or modifies an

evidentiary privilege. The Subcommittee recommends that this paragraph be deleted. It is hoped, as many comments have suggested, that protection in discovery will have the desired practical effect of ending the cumbersome practices that now effectively defeat any effective discovery of draft reports and attorney-expert communications.

Professor Marcus noted that the proposals drew broad support from many professional organizations, representing lawyers on all sides of practice. What remains for debate is more a matter of detailed implementation than broad concept.

Subdivision (a)(2)(C): Disclosure of "Non-Report" Expert: Some comments expressed a fear that the proposed disclosure summarizing the facts and opinions that a "non-report" expert is expected to testify to will override otherwise applicable attorney-client privilege and work product. That concern seems rooted in the effects of adding the (a)(2)(B) report in 1993, but the situation is quite different. The 1993 Committee Note seemed to expressly provide that privilege and other protections do not apply to information considered by an expert required to provide an (a)(2)(B) report. There is nothing like that in the present Committee Note. For that matter, the purpose of adding proposed (b)(4)(B) and (C), and changing to "facts or data" in (a)(2)(B)(ii), is to supersede the effects of the 1993 Note. There is no basis for the fear of waiver. This explanation was accepted without further discussion.

Subdivision (a)(2)(C): Committee Note: The Note to (a)(2)(C) has been changed in a couple of respects. It emphasizes that the disclosure is to include a summary of the facts supporting the expert's opinions. This emphasis responds to fears that things left out of the disclosure might be excluded at trial. A lawyer preparing the disclosure may find that an expert such as a treating physician or accident investigator will not cooperate fully in preparing the disclosure. It seems useful to emphasize that only a summary is required. And separate new language is added to emphasize that the disclosure obligation does not include facts unrelated to the expert opinion.

Subdivision (b)(4)(B): Draft Reports or Disclosures — Form: Rule 26(b)(4)(B) invokes work-product protection for drafts of expert reports required by Rule 26(b)(2)(B) and expert disclosures required by Rule 26(b)(2)(C). The Subcommittee recommends that the description of protected drafts be changed from "drafts * * * regardless of the form of the draft" to "written or electronic drafts." The drafting problem arises because drafts often are electronic, while Rule 26(b)(3) itself extends protection only to "documents and tangible things." And the Committee Note referred also to "oral" drafts. (A similar question arises under proposed subdivision (b)(4)(C), which refers to communications "regardless of the form of the communication.")

Several comments asked what is an "oral draft." Is every interaction with the expert an oral draft of the eventual report? Can the rule text, along with the Note, be read to destroy the provisions in proposed (b)(4)(C) that except three categories of communications from work-product protection? The Subcommittee thought it better to draw back to "written or electronic drafts." The reference to "oral" drafts will be stricken from the Note.

An observer began by praising the proposed expert-discovery amendments as "very careful work." It is good to protect drafts regardless of form. Many lawyer organizations and other organizations have supported the proposal. The proposal to draw back to protecting only written or electronic drafts will generate arguments about oral drafts. Three of the observers each independently had this same reaction. It is a mistake to narrow the protection; "regardless of form" had it right. "Oral report is a concept that had life"; interrogatories inquiring about oral reports had to be answered in New Jersey until the 2002 New Jersey rule amendments. Protecting oral draft reports will not impinge on the discovery of attorney-expert communications allowed by (b)(4)(C).

A committee member asked why is an oral report not a communication with an attorney, subject to the provisions that allow discovery of communications on three subjects? The response was that creative lawyers will argue that an oral draft report is fully discoverable because it is excluded from the protection of proposed (b)(4)(B); the protections for communications do not apply. "Using words of limitation on the drafts that are protected will imply there is no protection for others." The committee member rejoined that a report not in writing is a communication, and thus protected by (b)(4)(C). Another member agreed that "communications" is broader than draft reports, but asked why draft reports are not all protected as communications? A response was that draft reports are a species of communication that should be protected by work-product principles even when they address the topics that are excepted from work-product protection when addressed by other forms of attorney-expert communication. And beyond that, there can be draft reports that do not involve communication with the attorney. But anything oral will be a communication. The draft report and communications categories overlap, but each also has independent meaning.

It was suggested that "written" is imprecise — does it mean anything that is "hard copy"? The Subcommittee was worried about written reports, including the modern electronic equivalent of writing.

A committee member recalled the "documents and tangible things" scope of Rule 26(b)(3) and noted that proposed (b)(4)(B) seems to refer to something to be physically provided in discovery. How do you turn over something that is not physical? A response was that inquiry at deposition can achieve the same result. But it was protested that the deposition inquiry is objectionable because it seeks a communication with the lawyer. And it was responded that there can be oral discussions between expert and others who are not the lawyer — common examples are the client, or the expert's staff. These communications might well address the form of the report the expert will eventually reduce to written or electronic form.

An observer offered an example. Suppose the dispute involves valuation. The expert initially thought $1,000,000 was an appropriate value, but then raised it to $2,000,000. Discovery can appropriately inquire into the process that led to the $2,000,000 valuation, including questions whether different figures were considered and what process was followed in reaching the eventual figure. There is no need to allow questions about what the expert witness said in developing the report.

A committee member responded that this argument proves too much. The distinction between work papers and draft reports will be blurred. The danger is too great — it invites endless debates over the line between a protected draft of a report and working papers.

It was suggested that the rule might simply protect "drafts" without any further elaboration. But concern was expressed that this might not protect electronic drafts because they are not documents or tangible things.

It was asked whether sufficient guidance could be provided by saying in the Note that proposed (b)(4)(B) does not restrict the exceptions in (b)(4)(C) — attorney-expert communications about compensation, identifying facts or data the expert considered, or identifying assumptions the expert relied upon, are not protected as draft reports. The response was that this advice is not so much needed if the rule text is limited to written or electronic drafts. But it was noted that the Note says that (b)(4)(C) protects an oral communication. "I think it's worth $100,000,000" is protected.

A motion to restore "regardless of form" failed, 3 yes to 9 no.

Discussion returned to the suggestion that the rule text refer only to "drafts." The "documents and tangible things" limit of Rule 26(b)(3) was recalled again, observing that work product in other forms is protected by the continuing "common-law" effects of Hickman v. Taylor, not Rule 26(b)(3). Could the problem be solved by referring to "documentary or electronic drafts?

An observer suggested that if the rule text is limited to "drafts," "no lawyer will argue that electronically stored information is not protected." That can be said in the Note.

A motion to delete "written or electronic" passed, 9 yes and 4 no.

Continued concern was expressed about drawing the line between unprotected work papers and protected drafts. Lawyers will not ask for oral drafts. Perhaps the rule could refer to drafts "in some recorded form"?

The problem of redefining rule text in a Committee Note was brought into the discussion. It is not a useful thing. It is important to make the rule text as clear as it can be. But the words to use are not yet apparent. If lawyers fear that electronic drafts are not protected, rule language should make sure the protection is provided. The need for some form of guidance was underscored by suggesting that lawyers will seek to exploit any opportunity to go back to the regime that allows discovery of draft reports, no matter how unproductive it has been.

It was suggested that "document" carries forward into many rules the Rule 34(a) reference to electronically stored information. The 2006 Committee Note observes that "References to 'documents' appear in discovery rules that are not amended * * *. These references should be interpreted to include electronically stored information as circumstances warrant." This suggestion drew attention to language proposed for the Committee Note: protection applies to a draft "without regard to whether it would be considered a 'document or tangible thing' within Rule 26(b)(3)(A)." It was suggested that this Note seems to expand the meaning of (b)(3)(A), making it necessary to expand the text of (b)(4)(B).

It was suggested that the problem might be solved by viewing Rule 34 as a somewhat circular provision that defines "document" to include electronically stored information. Then Rule 26(b)(3) would itself apply to electronically stored information; this is an interpretation that "circumstances warrant" within the intent of the 2006 Committee Note.

This suggestion was elaborated in different directions. The statement in proposed (b)(4)(B) that Rule 26(b)(3)(A) and (B) protect drafts can be read to settle the matter, no matter what Rule 26(b)(3) might mean independently. (b)(4)(B) extends (b)(3), just as surely as if it were written in pre-Style form: "Rule 26(b)(3) is hereby extended to protect drafts," and so on. The Committee Note can explain that this is the meaning of the rule text. Alternatively, there are compelling reasons to read Rule 34(a) to include electronically stored information in the definition of "documents." Documents or electronically stored information are defined to include many things that may exist either in hard form or in electrons; the examples conclude with "stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." One illustration of the importance of this approach is provided by Rule 34(b)(2)(E)(i), which directs that a party produce documents "as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." It will not do to reorder electronically stored information before producing it so as to make it more difficult to use.

This discussion was summarized by a flat statement that electronically stored information is protected as "documents or tangible things" within the meaning of Rule 26(b)(3).

But it was protested that the rule texts do not say that documents and tangible things include electronically stored information. The Committee should not rely on a Committee Note to an amended Rule 26(b)(4) to accomplish an amendment of Rule 26(b)(3). Nor does it seem appropriate to propose that Rule 26(b)(3) be amended to include electronically stored information on a schedule that could take effect at the same time as the proposed (b)(4) amendments only if public comment is bypassed.

It also was observed that whatever is made of "oral drafts," it is essential to protect oral communications between attorney and expert witness in proposed (b)(4)(C).

The question was attacked from a different angle by asking whether electronically stored information is a tangible thing. Then protecting "drafts" will provide the desired protection.

The question was renewed again: if the rule text refers only to "drafts," should the discussion of electronically stored information be withdrawn from the Committee Note? One answer was that the Note can say that (b)(4)(B) applies to any draft, whether in written or electronic form. We are determining by this rule what is protected. The Note can say simply that protection "applies to any draft report or disclosure, in written or electronic form."

A different suggestion was that the Note might say "regardless of the form in which the draft is recorded."

The need for explicit Rule text was again expressed. There is a long history of fighting over discovery of expert reports. We need to foreclose entirely any argument that electronically stored drafts are not protected. Referring to "recorded" in rule text would help. An observer suggested, though, that it would be better to leave this in the Note, referring only to "drafts" in the rule text. But a committee member who voted to reduce the text to "drafts" protested that he had assumed the Note would cover this. At the same time, it would be better to address this in the rule text. Another member agreed. "Rule text is better to make it as clear as possible. Rewriting Rule 26(b)(3) in this Committee Note is not a good idea."

A motion to amplify the rule text reference to drafts passed by unanimous approval. Subject to further consideration, the rule text will read: "protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded." The Note can be revised by the Subcommittee.

Subdivisions (b)(4)(B), (C): Combined?: Professor Kimble's style comments included a suggestion that words could be saved by combining subparagraphs (B) and (C). The Subcommittee and Committee had already struggled long and hard in attempts to combine them and concluded that it works better to set them out separately. It is difficult to draft an integrated provision in a way that clearly limits to communications, and not drafts, the exceptions for discovery of exchanges about compensation, facts or data provided by the attorney and considered by the expert, and assumptions provided by the attorney and relied upon by the expert. The two subparagraphs use different formulas to address the forms of draft reports and communications that are protected. All agreed that it is better to keep the two subparagraphs separate.

Subdivision (b)(4)(C): Communications with "non-Report" Experts: The proposed protection for attorney-expert communications is limited to expert trial witnesses who are required to provide disclosure reports under Rule 26(a)(2)(B). The testimony and comments provided many suggestions that the protection should extend to some or all of the expert trial witnesses who are not required to give these reports. Some comments wanted to extend the protection to all. Other comments sought to protect only communications with experts who also are a party's employees. Drafting is easy if

we want to include all experts that must be identified by a Rule 26(a)(2)(A) disclosure. It will present more difficult line-drawing problems if we stop short of that. What of communications between employee and in-house counsel? With former employees? Contract "employees"? The Subcommittee decided not to expand protection along any of these lines.

An observer noted that this question is very important to corporate defense counsel. They strongly favor extending protection to communications with corporate employees. That will reinforce protection for their work product. And all of the problems that have been expressed with respect to experts retained or specially employed apply here. The problems were not as obvious during the initial stages of this project because they are encountered by in-house counsel more often than outside counsel, but they are just as severe. There is no reason to make this distinction. The ABA Litigation Section supports extending the protection to communications with corporate employees.

This observer continued that the arguments against extending the protection do not hold up. The protection need not include retired employees or independent contractors. The hybrid fact witness is interesting, but these problems are solved all the time — the facts the employee knows are not protected simply because they have been communicated to counsel. The lawyer will not designate as an expert witness an employee whose facts he wants to protect. The Note can say that communications with an employee's assistants are not protected. Nor need the drafting be tricky. The protected communications can be those with an expert retained or employed by a party. The timing of disclosure will not be a problem.

A committee member suggested that addressing communications with corporate employees will stir concerns that the rule is intruding on the realm of attorney-client privilege, and intruding for the purpose of expanding protection in states that limit privilege to communications with a "control group."

This comment led to the observation that the Subcommittee did think there was a danger that extending protection this far would seem to be creating or extending a privilege. It also was noted that a party anxious to protect attorney-expert communications might think about retaining the employee expert on terms that come within the report requirements of (a)(2)(B) — at the cost of disclosing a report, the result would be protection under (b)(4)(C) as proposed. Going further down the road to protect communications with employee experts might engender greater resistance to the proposed rule.

Turning away from employee experts, it was observed that a plaintiff can talk to the treating physician. The defendant cannot. It is possible to argue that communications between the plaintiff's attorney and a treating physician should be protected. That is a tough issue, with good arguments on both sides.

Returning to employee experts, a member noted that "this has been a balanced proposal from the outset. Adding protection for communications with employee experts benefits one particular constituency." The addition could make the package vulnerable.

An observer suggested that the Committee specifically invited comment whether communications with all witnesses expected to testify as experts should be protected. Extending the protection would not depart from what was published. Lots of changes are being made; this one could fit in readily. Juries view corporate employees with suspicion, as aligned with their employers. Treating physicians are regarded as neutral.

Another observer noted that the ABA recommended splitting the difference. The purpose is to focus on the quality of the testimony, not the process of developing it. New Jersey, however, does not provide a model — it has not addressed the employee expert.

A third observer suggested there are obvious opportunities for mischief if communications with employee experts are protected. Suppose a product case. An employee engineer participated in all design decisions. How can we separate the sense impressions leading up to the final design from the expert opinion at trial, and distinguish attorney-expert communications about one from communications about the other? This is a big issue that requires more consideration that it can be given now.

Discussion concluded with the observation that the Committee had devoted long consideration to the question of employee experts. That is why the question was flagged in the request for comments. The Subcommittee has reconsidered the question carefully, and rejected it for fear of unintended consequences. No member responded to an invitation for a motion to extend work-product protection to communications with employee experts.

Subdivision (b)(4)(C) Note: The proposed Note includes new language stating that communications between a party's attorney and assistants to the expert witness are protected. "Assistants" seemed a better word than "agents." No case law has been found on this topic. One witness at the San Antonio hearing did address efforts to discover a lawyer's communications with an expert's assistants. This language was approved without further discussion.

Other new language addresses the concern expressed by some comments that protecting attorney-expert communications will impede implementation of the Daubert decision. This language has been explored with Professor Capra, Reporter for the Evidence Rules Committee. It was agreed that it is better to avoid elaborating on the topic. Simple is better. Thus there is a single sentence stating that these discovery changes do not affect the gatekeeping functions called for by Daubert. This change also was approved without further discussion.

The published Note included a paragraph recognizing that Rule 26(b)(4) focuses only on discovery, but expressing an expectation that "the same limitations will ordinarily be honored at trial." This paragraph was discussed at some length at the January Standing Committee meeting. The Subcommittee recommends that this paragraph be deleted. It does not seem an orderly exercise of the rulemaking process to address trial evidence rules by a Committee Note to a civil discovery rule.

Other: Judge Campbell noted that the Federal Magistrate Judges Association's comment suggested that Rule 26 might address the questions whether or when draft reports must be retained and whether they must be included in privilege logs. The Subcommittee recognized that retention and log requirements are important issues, but concluded that they are outside the scope of the current project.

Committee Note: Length: It was observed that the draft Committee Note is rather long, and asked whether it might be shortened. These amendments are trying to shut down unproductive forms of discovery that have been widely indulged. We need to be very clear on how firmly we are closing it down. Notes to the discovery rules generally tend to be longer than other Notes because they address intensely practical issues that stir lively concern and great ingenuity.

Approval: The Committee unanimously approved the Rule 26 amendments with a recommendation that the Standing Committee approve them for adoption by the Judicial Conference and the Supreme Court.

Judge Kravitz thanked the Subcommittee for its great work, noting that Committee discussions have followed the high tradition of "leaving clients at the door." He expressed particular thanks to Judge Campbell and Professor Marcus for their great effort and fine results.

Rule 8(c)

Judge Kravitz noted that in August 2007 the Standing Committee published for comment a proposal to remove "discharge in bankruptcy" from the list of affirmative defenses offered as illustrations in Rule 8(c). Only the Department of Justice expressed opposition. At the Department's request the Committee decided not to press ahead for adoption. The issues raised by the Department seemed obscure and it was important to reach a full understanding. Judge Wedoff discussed the questions with Department lawyers through the summer of 2008. The Department provided memoranda to supplement its comment and suggested it might help to solicit the views of others. It seemed better to instead ask the Bankruptcy Rules Committee for its views. The Bankruptcy Rules Committee recommends that "discharge in bankruptcy" be removed from Rule 8 (c). The question is thus clearly framed: should the proposal now be recommended for adoption, perhaps with some changes in the Committee Note, or should it be deferred a while longer to pursue further dialogue?

Judge Wedoff described the Bankruptcy Rules Committee's deliberations, based on a report he prepared for their discussion. The recommendation to delete "discharge in bankruptcy" from Rule 8(c) was nearly unanimous — only the Department of Justice representative dissented.

Section 524(a) of the Bankruptcy Code is inconsistent with Rule 8(c). A discharge enjoins all sorts of efforts to enforce personal liability on a discharged debt. If an action goes to judgment on a discharged debt, the judgment is void. Waiver by the debtor has no effect. Rule 8(c) creates a real tension with the statute because the ordinary effect of failure to plead an affirmative defense is that the defense is waived.

The plain language of the statute prevents treating discharge in bankruptcy as an affirmative defense. But if there is any room to find ambiguity in the language, the history of statute and rule make the result inescapable.

The 1898 bankruptcy statute made discharge an affirmative defense. When Rule 8(c) was adopted in 1938 it reflected that reality. Then, in 1970, the 1898 statute was amended. Discharge was transformed from a personal right to become an injunction, and any judgment on a discharged debt was made void. The House Report, quoted in the agenda materials, notes that often a debtor who has been discharged fails to appear in a subsequent action on the discharged claim, and suffers entry of a default judgment that is then used to enforce the discharged claim. "All this results because the discharge is an affirmative defense which, if not pleaded, is waived." The purpose of the statute was to change this result. This result was reconfirmed in the House Report describing the 1978 amendments. The discharge injunction "is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts." The discharge extinguishes the debt. The language added to § 524 stating that the injunction operates "whether or not discharge of such debt is waived" "is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section."

Courts have been clear in facing the statute and rule. Every decision that considers both § 524(a) and Rule 8(c) has ruled that discharge is not an affirmative defense that is lost by failure to plead. The most recent decision is In re Hamilton, 540 F.3d 367, 373 (6th Cir.2008). Courts that do not consider § 524(a), on the other hand, are misled by Rule 8(c). The very cases cited by the Department of Justice are all cases that looked only to Rule 8(c) without considering § 524(a),

demonstrating that Rule 8(c) has misled them. And a debtor who failed to appear and plead also might be misled into thinking that the effect of the discharge was forfeited by failure to appear and plead.

The Department has pointed out that under § 523(a) there are debts that are not discharged. These include a variety of things, including a debt to a creditor who was not notified of the bankruptcy proceeding. Section 524 does not apply to questions of dischargeability — there are a few questions of dischargeability that can be determined only by the bankruptcy court, but most can be determined by another court. If a creditor seeks a determination whether a debt was discharged, either by an adversary proceeding in the bankruptcy court or in an action to enforce the claim, the debtor should respond. It will not often happen that a creditor who does not know of the bankruptcy proceedings will sue on the claim and the debtor does not raise the discharge — the debtor has a great incentive to raise the discharge. But even if that happens, § 524(a) controls. "There cannot be a judgment as a result of failure to plead discharge as an affirmative defense" of the debt was in fact discharged.

The Department responded that the Rule 8(c) treatment of discharge in bankruptcy as an affirmative defense "has not caused much of a problem." The Seventh Circuit has ruled, albeit in an unpublished opinion that does not consider § 524(a), that failure to plead discharge loses the defense. A creditor may file an action on a claim because it had no notice of the bankruptcy proceeding or because it thinks the debt was not discharged. The debtor's failure to plead the discharge may be not a "waiver" in the true sense of knowing and voluntary surrender of a right; it is more a matter of procedural forfeiture. The conclusion depends on what meaning should attach to "waiver" in § 524(a).

Deleting "discharge in bankruptcy" from Rule 8(c) would "send the wrong message to debtors who might fail to appear."

The reference to the Seventh Circuit opinion was expanded by noting that it did cite to another case that did include some discussion of § 524. The case involved a counterclaim against a plaintiff who had been discharged in bankruptcy. (A later comment noted that the Seventh Circuit really means its rule that a nonprecedential opinion is not precedent for anything.)

It was asked how these questions arise for the Department. Suppose the debtor appears, pleads without raising discharge as a defense, no one inquires about discharge in discovery, and the action goes through to judgment on the merits. It was answered that a creditor who has notice of the bankruptcy will sue only if it thinks there is no discharge. But the question was put again: how likely is it that the creditor will not be told, somehow, of the discharge? It was pointed out that the likelihood may be substantially diminished by access to PACER to find the bankruptcy record of a defendant. But it was responded that this problem can affect creditors who do not have the same investigative resources as the Department. Some of the cases that consider § 524 together with Rule 8(c) involve egregious creditors who know of the bankruptcy and had no reason to think their claims had not been discharged.

Further explanation of the procedures for determining whether a claim was discharged was requested. Suppose an action on the claim: can the court where the collection action is filed determine the discharge question? Judge Wedoff answered that the most common method to determine discharge is by an adversary proceeding in bankruptcy. The bankruptcy proceeding can be reopened for this purpose. It is better to get a determination of dischargeability before addressing the merits. As compared to bringing an action on the claim, including a request for a determination of dischargeability, resort to the bankruptcy court has the advantage of avoiding contempt of the

discharge injunction if the debt in fact has been discharged. This procedure is different from making discharge an affirmative defense. If the debtor defaults the proceeding to determine dischargeability, or litigates and loses on the merits of dischargeability, the debtor is bound.

It was asked why, if this problem has been around for 39 years, it is only being addressed now? It was noted that there are other illustrations of failures to keep the Civil Rules in tune with changes in substantive law. Rule 8(c), for example, continues to refer to "contributory negligence," despite the widespread substitution of comparative responsibility in its place. Rule E(4)(f), to be discussed later at this meeting, is another example. Statutory changes are not always brought promptly to the Committee's attention.

The argument that it is misleading to characterize discharge as an affirmative defense was countered by observing that it also is misleading to omit any warning that there are times when the debtor really needs to appear.

The possibility of abuse came back into the discussion. Many bankruptcy debtors are unsophisticated. The statutory provisions were adopted to prevent unscrupulous creditors from attempting to recover on claims they know were discharged. Beyond that, how many tools should any creditor have? No one is arguing that a debt not discharged is discharged. The question is how the creditor should go about collecting a claim that has not been discharged. It is not at all clear that discharge should be made an affirmative defense to afford another tool to creditors, given the policies enacted in § 524.

In response to a question whether a discharge can be effective when the creditor has not been notified of the bankruptcy proceeding, it was stated that in a "no-asset" case a discharge often is effective even as to a creditor that had no notice. Lack of notice in a no-asset case makes a difference only when dischargeability must be determined in bankruptcy court.

A committee member asked the Department of Justice member why it cares about characterizing discharge as an affirmative defense when it only means to sue on claims that have not been discharged. The answer was that the Department is most likely to be pursuing a "client agency's" claims that cannot be discharged. If it does not know of the bankruptcy proceeding, gets a judgment, and then sues on the judgment, the judgment is void under a "so literal" reading of § 524. This answer was summarized by another member as suggesting that the Department wants "a negative consequence to the debtor for failing to put on notice."

It was suggested that Rule 8(c) seems in tension with § 524, but § 524 has nothing to do with exceptions to discharge. Rule 8(c) requires pleading of "any avoidance or affirmative defense." The list of examples is only that — a list of examples. Deleting discharge from the list of examples does not really change the arguments or the outcome. This suggestion met the objection that deleting discharge would clearly be intended to reflect a judgment that it is not an avoidance or affirmative defense. In any event, it is wrong to list it as an affirmative defense if it is not. It may be that discharged debtors will not be aware of the many years of including discharge as an affirmative defense, nor of its deletion, but that is no reason to keep it in.

Bringing the discussion toward a conclusion, it was observed that the Committee had no sense of urgency about this question when it was first raised — "discharge in bankruptcy" had persisted in Rule 8(c) for many years after 1970 without causing any apparent problems. But the Bankruptcy Rules Committee makes the point that courts in fact are being misled. That changes the urgency calculation. A sophisticated creditor can search for information about discharge outside a collection action, or by many means in a collection action, including a Rule 26(f) conference, pretrial conferences, and discovery.

This summary was seconded by observing that courts are being misled by relying on Rule 8(c). That is not right. A discharge defense is not lost for failure to plead it.

A motion to recommend that the Standing Committee approve deletion of "discharge in bankruptcy" from Rule 8(c) for adoption by the Judicial Conference and the Supreme Court passed 11 yes, 1 no.

Discussion turned to the Committee Note. Judge Wedoff presented a draft. Changes were discussed. As revised, the Note would carry forward the first three sentences of the Note as published, delete the final two sentences, and add:

> For these reasons it is confusing to describe discharge as an affirmative defense. But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor's claim, and in such a proceeding the debtor is required to respond.

A Committee member asked whether it is desirable to explain at such length. Why not make it much simpler? One simplifying suggestion was that the Note could say simply that the change does not affect the methods for determining discharge.

It was agreed that Judge Wedoff, the Reporter, and the Department representatives would work toward a suitably brief Note.

Supplemental Rule E(4)(f)

A working group of the Maritime Law Association has suggested that the time has come to eliminate the final sentence of Supplemental Rule E(4)(f). Rule E(4)(f) establishes the right to a hearing on a claim of interest in property that has been arrested or attached. The final sentence says that "this subdivision" does not apply to suits for seamen's wages under 46 U.S.C. §§ 603 and 604, "or to actions by the United States for forfeitures for violation of any statute of the United States." The two statutes were repealed in 1983. Supplemental Rule G, adopted in 2006, now governs forfeiture proceedings.

The Department of Justice has expressed concern that simply deleting the reference to forfeiture proceedings may lead to arguments that Rule E(4)(f) has come to provide a right to a hearing in forfeiture actions. Rule G(1) provides that Supplemental Rules C and E also apply to forfeiture actions "[t]o the extent that this rule does not address an issue." Rule G does not expressly address the question whether a hearing should be provided when an interest is claimed in property held for forfeiture. Rule E never has created a right to a hearing in forfeiture proceedings, and we should make certain that no new right is created inadvertently. The Department proposes substitution of a new sentence at the end of Rule E(4)(f): "Supplemental Rule G governs proceedings regarding property subject to a forfeiture action in rem." This language is better than the suggested alternative: "Supplemental Rule G governs the right to a hearing in a forfeiture action." That alternative implies that there is a right to a hearing under G.

Doubts were expressed about the Department's drafting. It could be read to undermine the part of Rule G(1) that invokes Rule E to fill in gaps in Rule G. Perhaps more to the point, supplemental Rule G(8)(f) provides that a person who has filed a claim to property may petition for its release if the property is held for forfeiture under a statute governed by 18 U.S.C. § 983(f). That clearly implies a right to a hearing. Rule G(5) establishes a procedure to assert an interest in the

defendant property and contest the forfeiture. That too implies a right to a hearing. The Department's concern, moreover, may be addressed by simplifying the final sentence to read: "Supplemental Rule G governs hearings in a forfeiture action."

It was asked whether it would be better simply to delete the present final sentence without any proposed replacement. Comments could be invited. The discussion concluded by recommending that the proposal be published by including a new final sentence in brackets, inviting comment on the need to have any reference to Rule G and the form of the reference: "[Supplemental Rule G governs hearings in a forfeiture action.]"

The recommendation will include the suggestion that publication be deferred to a time when other Civil Rules also are published for comment. There is no urgency about fixing this residual anomaly in Rule E.

Rule 4(i)(3)

Rule 4(i)(3) governs service on a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Service must be made on the United States. The employee also must be served under Rule 4(e), (f), or (g). Rule 4(e) is the provision most likely to be invoked. Rule 4(e)(1) adopts state-law methods of service. (e)(2) allows service by personal delivery to the defendant, leaving a copy at the defendant's dwelling or usual place of abode with a suitable person who resides there, or "delivering a copy * * * to an agent authorized by appointment or by law to receive service of process."

Judge Kravitz opened the discussion by describing the concerns that have grown up around this provision. It has been asked whether service on the United States should suffice. Alternatively, it has been asked whether it is possible to avoid the upset and occasional danger that accompany service at home, while walking down the street, and the like. These questions arise frequently in § 1983 actions against state and local employees. Plaintiffs often want the government to accept service on behalf of an employee, particularly when the plaintiff cannot readily find the employee. A common example is an action by a prison inmate against a prison guard. The government commonly balks. But it often agrees to accept service when discovery of the employee's address is suggested. At the same time, the government may refuse to accept service because it may decide not to provide a defense for the employee, or may even plan to prosecute the employee. Apart from these problems, making the government accept service on behalf of a former employee would create other difficulties.

The first response was that different approaches may be appropriate, distinguishing between the executive branch and the judiciary. This speaker, a former executive branch officer, said that there was not much visible concern about these questions during the time of his government service. He was personally served once while going to his car at home; "it was unpleasant." That was a case in which harassing individual government officials was part of the plaintiff's strategy. In most cases the plaintiff and the defendant have allied interests — the defendant authorizes the government to accept service, and the plaintiff easily accomplishes service. "This is routine for those who are automatic targets of suits" — they authorize an agent to receive service. And normally the plaintiff calls the Department of Justice and asks how to go about serving the defendant; "we work it out." At the same time, there would be problems if service could be made only on an agent and by requiring the employee to accept the government as agent. There may be risks of actual individual liability. And the problems with former employees may be mirrored by problems with employees who move from one agency to another. There may be conflicts of interest. And another member

noted that in actions against low-level employees the Department often does not find out about the action.

One possible approach, whether by court rule or by statute, would be to require service on the government in the first instance. The government would then have a period — perhaps 10 days — to provide the employee's acknowledgment of service or appointment of a general agent for service. This could work in cases that do not involve a request for urgent, immediate relief.

Court employees may face greater problems of security and harassment. And as compared to some executive branch agencies, there may be a higher level of trust among courts, judicial branch employees, and the Administrative Office. It might work to make the judge's court the agent for service on the judge.

An immediate question asked whether the Administrative Office would be comfortable accepting service for a judge in an action claiming direct, personal harassment by the judge? Administrative Office practice was described in response. The Office encourages courts to call immediately when a court official is sued. The office determines whether the Department of Justice will provide representation, and if not may retain a lawyer for the defendant.

The next observation was that if harassment is part of a plaintiff's tactics, protecting judges will work only if service on the court or the Administrative Office is made the exclusive means of service.

It was noted that in many tort claims against government employees the government has to accept the burden of providing a defense. But it is difficult for the government to do much of anything within 10 days, such as finding the employee and securing an authorization to accept service. The problem is difficult. This observation was seconded in part by another Committee Member, who observed that he had often been sued while in government service. "The idea that the government can do anything in 10 days is ludicrous." But this member continued to ask whether there is a real problem, and to wonder whether it is seemly to separate out government officials for special treatment. Why go into this?

Another observation was that officials, including judges, may be sued in courts that manifestly lack personal jurisdiction. It is convenient to get rid of the case for lack of personal service. This observation led to a more general question: care should be taken to consider the consequences of any new rule for personal jurisdiction. Making the government an agent for service might seem to create nationwide personal jurisdiction.

It was suggested again that judicial branch employees might be separated out, recognizing the greater security and privacy concerns they may face. The broad scope of judicial immunity, moreover, means that many actions against judges will be either frivolous or deliberately harassing. One possibility would be to make the United States Attorney or the clerk of court the judge's agent for service.

These views were supported by suggesting that the Committee should work on this. "There is an opportunity for harassment, and perhaps physical risk." It needs to be determined whether service on the United States alone should suffice.

Another committee member suggested that a low-level employee would worry about the risk of personal liability without personal service. There often are disputes whether an individual defendant's conduct was in connection with duties on the United States' behalf. Suppose the

plaintiff does not serve the defendant personally — does the plaintiff lose the right to hold the defendant personally liable?

The Committee agreed to carry this topic forward for further investigation. An initial focus will be on actions against judges for official acts. These actions tend to be brought by pro se plaintiffs. An effort will be made to find out from security agents and marshals how often they encounter problems arising from service of process.

Appellate-Civil Rules Questions

Judge Kravitz noted that the Appellate Rules Committee is working on projects that are likely to involve the Civil Rules. One of them raises the question whether Rule 58 should be amended to require entry of judgment on a separate document when the original judgment is altered or amended on one of the five post-judgment motions enumerated in Rule 58(a). Another asks whether the Civil Rules, the Appellate Rules, or both should be expanded to include some provisions for "manufactured finality." Several past packages of amendments have demonstrated the advantages of coordinated work. The chairs of the Appellate and Civil Rules Committees have agreed that it will be useful to appoint a joint Subcommittee to work on these questions, and perhaps additional questions that may arise while the work continues. Three members from each Committee have been appointed. The Civil Rules Committee members are Judge Colloton, who will chair the Subcommittee, Judge Walker, and Peter Keisler.

Judge Wedoff noted that the Bankruptcy Rules Committee is examining the Bankruptcy Rules provisions on appeals. There are likely to be fairly extensive revisions. They will coordinate with the Appellate Rules Committee. To the extent that Bankruptcy Rules issues overlap with issues being considered by the joint Subcommittee, the Bankruptcy Rules Committee will seek to coordinate on those issues as well.

Rule 45

Judge Campbell, reporting for the Discovery Subcommittee, noted that a year ago the Subcommittee was asked to begin studying Rule 45. The study has included a long memorandum by Andrea Kuperman surveying the secondary literature — much of it in bar-oriented publications — and communications with a number of bar groups.

It is clear that Rule 45 is a long and complicated rule. "You have to work hard to find what it means." Many judges say that it is a perfectly fine rule, that the problem is that lawyers do not understand it. A fine rule that lawyers cannot understand may deserve some clarification.

Two issues have figured prominently in recent experience. Some courts have concluded that because the 100-mile limit in Rule 45(c)(3)(A)(ii) addresses only a person who is neither a party nor a party's officer, a trial subpoena can command a party's officer to appear anywhere in the country. That reading seems contrary to Rule 45(b)(2), but it continues to have real influence. Another problem arises when a deposition subpoena for a nonparty witness issues not from the court where the action is pending but from another court where the witness is. Rule 26(c)(1) allows the witness to apply to the main-action court for a protective order, but a motion to compel compliance can be filed only in the court that issued the subpoena. The resulting questions may be better suited to resolution in the court where the main action is pending, but the cases have divided on the power to transfer the question, and transfer may be a burden for the witness.

Many other issues have been identified as well, including the contemporary wisdom of the 100-mile limit that has remained in place from times before mechanized transportation was invented.

For all of the questions, what Rule 45 does is remarkable. It covers most third-party discovery in the federal system. "There are many moving parts." An attempt to address some of the issues that seem to present problems might create more problems than it solves. How broad should the Subcommittee's inquiry be?

Judge Kravitz seized the opportunity to express thanks to the American Bar Association Litigation Section, the American College of Trial Lawyers, Gregory Joseph, and others who provided thoughtful and helpful responses to Subcommittee inquiries.

Professor Marcus introduced the list of possible Rule 45 issues by suggesting that a complete overhaul may be an overwhelming task. Rule 45 has been something of a stepchild. It is a very important part of private enforcement of the law in this country. It is not just a discovery tool. It applies at trial as well.

The agenda memorandum lists 17 possible issues that emerged from reviewing two leading treatises. Andrea Kuperman's survey of secondary literature discovered that Rule 45 has prompted a lot of writing, including additional issues. For purposes of introduction, the possible topics can be grouped.

One set of issues involves cost and burden. The more aggressive position is that a nonparty must be compensated for every penny spent in complying, including attorney fees to review potentially responsive materials. This position may be qualified by arguing that reimbursement of anything is required only if the nonparty objects to the subpoena. Rule 45 does not really say either of these things. There may be something awkward in requiring reimbursement for the costs of weeding out materials that are not produced in response to the subpoena: "I have to pay for things I don't even get to see?" These questions may raise the issue whether e-discovery should be treated differently from hard-copy discovery.

A second set of issues asks whether Rule 45 should address preservation by a nonparty.

A third set involves notice. Rule 45 was amended in 1991 to require notice to all parties before a document subpoena is served. It is not clear whether that has proved a good idea. Observers have raised the question whether the party who served the subpoena also should be required to notify other parties when documents are produced.

A fourth set of questions go to location. Should the reach of a trial subpoena be different from the reach of a deposition subpoena? Should document subpoenas be treated separately? Is the 100-mile limit still appropriate — and if there is a distance limit, should it be measured by air miles, most convenient route miles, shortest route miles, or something else?

A fifth set goes to timing. Can Rule 45 be used to circumvent a discovery cut off? What should be the time to respond — Rule 45(c)(2)(B) may imply that the time to respond can be set at less than 14 days by requiring that objections be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. And when must a privilege log be filed in relation to the time allowed to object?

A sixth issue goes to sanctions for disobedience. The only sanction specified in Rule 45 is subdivision (e), which provides for contempt. Should there be other sanctions?

A seventh issue asks whether a government agency is a "person" subject to subpoena. It may be that this issue has been generally resolved by the Court of Appeals for the District of Columbia Circuit.

An eighth set of issues addresses subpoenas in aid of arbitration proceedings.

Finally, is it possible to shorten and simplify Rule 45? To the extent that it may be ambiguous now, the goal of resolving ambiguities may conflict with the desire to shorten the rule. Ambiguities often are resolved by adding words.

Globally, the question is whether Rule 45 needs a major overhaul. Gregory Joseph has advised that it is not generally a problem. Is that right?

Discussion began with the reminder that Rule 45 is the only discovery rule that directly addresses nonparties. It is so complex that the recipient of a subpoena virtually has to consult a lawyer. But third-party discovery often makes the difference between winning and losing the case. A simpler and shorter rule would be better. Four concepts that can be covered in plain English may do the job. They will be elaborated as the work goes on. Agreement was expressed. The subpoena itself should include clear directions on what is required. Simply setting out the text of Rule 45(c) and (d), as required by 45(a)(1)(A)(iv), is no real help.

The choice of court for resolving discovery issues was identified as an important issue. The court where the action is pending has a real interest. But there is a real tension when the dispute involves a nonparty subpoenaed in a different court. The nonparty may deserve protection against being sent elsewhere. An Illinois nonparty does not want to have to litigate objections or questions of compliance in California. Flexibility is important. Perhaps a system could be worked out for referring the issues to the court of the main action without sending the nonparty there. Arguing by remote communication systems may be a good compromise.

The next observation was that "there is more control over discovery than is sometimes thought." Discovery often does not start until the judge thinks the case is ready to go ahead. The court where the action is not pending may overemphasize the burden of compliance because it is not sufficiently familiar with the case and the importance of compliance. It may make sense to resort first to the main court, particularly as to disputes between the parties. After the main court has resolved any disputes between the parties, issues raised by the nonparty may be resolved in the court that issued the subpoena. The CM/ECF system can be used to send important file records to the court that issued the subpoena.

Observers were invited to comment. One said that there are shortcomings in Rule 45. There should be a provision for notifying other parties that documents have been produced. It is important to address which court decides disputes. It may be possible to identify at least some of the factors, like costs to the person subpoenaed, to be weighed in determining what should be required. Privilege logs can be very burdensome. But generally the rule works well. Another said that the American College Civil Rules Committee has similar views. Rule 45 works well in most ways, but it might be improved. There is no sense of urgency about this. A third said that many employment lawyers feel that there are abuses in employment cases by subpoenas issued by employer defendants to former employers without giving plaintiffs the notice required by Rule 45. Another observer responded that in the types of cases he litigates the parties do comply with the Rule 45(b)(2) notice requirement. The second observer added that the problem of notice after documents are produced can be addressed in part by making a Rule 34 request to produce documents provided in response to a subpoena.

A different set of questions was raised. The party who issued the subpoena may negotiate privately with the person served to determine what documents will be produced, without giving notice to other parties. A case-management order might address this, but it might be better to

address the question in Rule 45 rather than depend on including these terms in a management order in every case.

A judge noted that he simply orders parties to give to other parties the documents received under subpoenas. Otherwise Rule 34 requests are made.

It was asked whether the Committee should venture into the problems and uncertainties arising from prehearing subpoenas issued by arbitrators. It was noted that these questions affect many constituencies in addition to the courts. The circuits have generated conflicts on some of the questions. These are not the kinds of issues that should be addressed by the Civil Rules.

It also may be that preservation issues should not be addressed. There were many requests that the e-discovery rules address preservation, and the requests were resisted from concern that preservation is not a topic appropriate for the rules.

Other issues may be put aside because there are workable pragmatic resolutions. The question whether a government agency is a "person" within Rule 45 is a good illustration.

It was agreed that the Subcommittee should consider the question of trial subpoenas issued to officers of a corporate party. The problem "arises from different readings of the rule we wrote."

It was agreed that there seem to be enough issues that present practical problems in real practice to justify putting aside other possible issues that do not present practical problems. The Subcommittee will forge ahead with its Rule 45 project.

2010 Conference

Judge Kravitz introduced discussion of planning for the 2010 conference by boasting that it had been a terrific decision to ask Judge Koeltl to chair the planning committee. He also noted that the ABA Litigation Section has been a big help.

Judge Koeltl confirmed that the conference will be held May 10 and 11, 2010, at the Duke University Law School. The purpose will be to explore the costs of litigation, especially discovery and e-discovery. Are there problems with the system? What are the possible solutions — new rules, judicial education, best practice advice for lawyers?

Part I of the conference, focusing on empirical research, will be a cornerstone. The study by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System found widespread dissatisfaction with the federal discovery system. There are significant problems. That seems to be different from the results of the 1997 FJC study, which found that most lawyers did not have problems with the scope of discovery or proportionality. The FJC study did find problems in complex, high-stakes cases where relations between the lawyers were not as good. We need to find the current state of the system, measuring satisfaction and dissatisfaction. Is dissatisfaction limited to certain areas? Do we need systemic responses? More focused responses?

The FJC will survey some 5,700 lawyers in more than 2,800 federal cases terminated in the last quarter of 2008. The survey will include e-discovery questions that were not asked in the 1997 survey. The survey will be distributed in May; it is hoped that preliminary results will be available in the fall. There will be follow-up interviews with 20 or 30 lawyers to obtain responses at deeper levels.

The ABA Litigation Section will, with some improvements, send the American College - IAALS survey to all its members. The survey will go out in June. Results are expected in November.

It is not too early to express thanks for the work already done by the FJC and the Litigation Section.

RAND has been working on e-discovery. Nick Pace is on the 2010 Conference planning committee. He has encountered some difficulty in getting the kinds of information he wants because there are proprietary concerns that make lawyers and clients reluctant to respond. Efforts are under way to persuade them that empirical research is important if they hope to support their complaints about the costs of e-discovery.

Professor Theodore Eisenberg of Cornell has been asked to help. One possible topic for research would be whether fact-based pleading under the PSLRA actually streamlines litigation and reduces costs.

It has been noted that California state court data seem to show a significantly higher rate of trials than found in federal courts in California. If that proves out, it would be interesting to explore the reasons. Is this due to federal pretrial procedures?

These empirical inquiries can fill most of the morning of the first day.

A second important part of the conference will be the overview papers. Great people already have agreed to produce some of these papers. They will be available relatively soon to help further development, but the authors will be free to revise them up to the time of the conference. Elizabeth Cabraser will address discovery. Gregory Joseph will address e-discovery. Arthur R. Miller will address pleadings and dispositive motions. Judge Patrick Higginbotham will address judicial perspectives. Justice Andrew Hurwitz will address state discovery — Arizona has rejected Twombly pleading, and has adopted expansive disclosure.

Then there will be a series of panels on the papers. And a panel by users of the system, including representatives of general corporate counsel, the plaintiffs' bar, the Department of Justice, and public-interest firms. There also will be a panel of representatives from organized bar groups. They will be invited to spend the next year developing their views for presentation. And we hope to have a panel of alumni of the Rules process — Professor Miller, Judge Higginbotham, and perhaps two of the Duke faculty, Professor Carrington and Dean Levi.

Thomas Willging described the nature of the FJC survey. The sampling design will include 2865 cases. More than 5,700 attorneys will receive the survey. The sample will be selected at three levels, principally designed by Emery Lee. The sample will include every case that went to trial in the fourth quarter of 2008, October through December; that is 529 cases. It will include every long-pending case that took more than four years to be terminated; that is 321 cases. The rest is a random sample of 2,000 cases after filtering out cases not likely to have discovery — cases closed administratively, cases related to bankruptcy, and the like. Other excluded categories include social security cases, student loans, bankruptcy, condemnation, drug-forfeiture, asbestos, and cases transferred by the MDL panel.

The final draft of the survey instrument has been prepared. Many people provided comments on initial drafts. The process is like a freight train — everyone wants to put something on board as it passes. Half of the questions address factors of the individual cases: what was discussed in the Rule 26(f) conference, and so on. (There are 28 possible responses to that question).

It was noted that as compared to the American College survey, this instrument is very specific in terms of how many depositions, interrogatories, requests for documents, requests for admission, and so on. This specificity may help to flesh out the question whether there are problems with e-discovery.

The FJC hopes the questions are engaging enough, and the topic important enough, that lawyers will make the effort to respond. The introduction is designed to make clear that the survey is important. The questions include what the judge did, what the costs were, and what were the stakes. Case characteristics and attorney characteristics are covered next. Then come questions addressed to reform proposals and "rules." The reform proposals focus on ADR; on when the issues were narrowed in this case, and when are they narrowed in most cases. There also is a one-paragraph description of the simplified procedure model once developed for this Committee, asking whether the attorney would recommend such a system to a client. Other questions look to a comparison of costs in federal courts to costs in state courts, and to the desirability of changes in the rules to reduce all discovery or e-discovery or to increase case management.

Lorna Schofield thanked Judge Rosenthal and Judge Kravitz for the productive relationship between the Committee and the Litigation Section, and to Judge Koeltl for including the Section in the program. Their encouragement for the survey has been welcome. The Section has e-mail addresses for 55,000 section members, who will receive the survey. A task force is being formed to explore problems of civil procedure, including not only topics that might be addressed by the Civil Rules but also topics that can be addressed only by other means.

Judge Koeltl urged suggestions for people who would be good panelists. We should have a broad dispersion in terms of geography, youth and experience, plaintiffs and defendants.

Judge Kravitz said that the Conference will be a big help for the Committee's work. He expressed the Committee's deep appreciation and thanks to Judge Rothstein for supporting the great help we are getting from the FJC.

It was noted that individual responses to the FJC survey will not be made public.

It also was noted that the spring 2010 Committee meeting probably will not be held in conjunction with the Conference. The Conference will be a lot of work on its own.

Judge Koeltl expressed hope that the conference would result in directions for change. How specific recommendations for rules changes can be remains to be seen. We do need to guard against discussion that is too theoretical or too anecdotal to help advance specific reform responses. Concrete suggestions will be important, even when they involve things that can be done only by statute.

The approaches taken by state courts will be part of the program. Judge Kourlis is working on this with the IAALS, and the work will be part of the program.

Invitations will be extended to people who are not panelists, but there will be physical limits on the number of people who can be accommodated. The Conference will be public, as everything the Committee does. It was noted that the Seventh Circuit Bar Association recently arranged a relatively low-cost web cast of a program celebrating Lincoln's 200th birthday. A DVD also was made. And it was suggested that the federal judiciary TV network might be hooked up. It also may be possible to create a camera link to screens in a room adjacent to the meeting room.

One judge commented on the common tendency of lawyers at Committee hearings to testify to how things are done where they practice. Lawyers may respond to research questions in two

ways, either by reacting on a hypothetical basis or by thinking of actual experiences. We do not want to be entirely self-referential. We aim get new data and to hear from new voices. And to be concrete about getting suggestions for things that can be accomplished in a lifetime.

Other Matters

A new Privacy Subcommittee has been formed with representatives from the Advisory Committees. Judge Raggi will chair the Subcommittee. Judge Koeltl is the Civil Rules nominee. Problems of the sort addressed by Civil Rule 5.2 persist, and new ones have arisen. Some court filings still have social security numbers and other personal identifiers. Identifiers not listed in Rule 5.2 might be added to the list — alien registration numbers are often suggested. Current methods of implementing the rules are open to review. In criminal proceedings, questions arise about plea hearings and cooperation agreements; those questions are complicated. Maintaining public access to court records and protecting legitimate privacy concerns will be a problem for a long time. The problems will be exacerbated if PACER is made generally available without charge. The time to revisit these questions is upon us.

The FJC continues to work on its CAFA study. Present work is focused on completing the coding of pre-CAFA case information. They hope to have a report in the fall. California has published information on class-action filings in both California state courts and federal courts in California. The data show a temporary decrease in filings after CAFA, and then a return.

The Sealed Case Subcommittee continues its work. The analysis is very thorough. Quite a few sealed cases have been found. But many of them are magistrate-judge cases involving search warrants, applications for pen registers, and the like. There also are sealed appeals and sealed criminal cases. When courts are approached for information about cases that cannot be found in the docket, they often express surprise to discover that the cases remain sealed. As the information becomes complete, the Subcommittee will begin the task of considering what to make of it.

Next Meeting

The next meeting will be held on October 8 and 9 in Washington. The spring meeting in 2010 may be held in Atlanta. Chilton Varner will explore the possibility of meeting at Emory University School of Law.

Judge Rosenthal said that the meeting had been a real pleasure. It marks the apparent conclusion of the Committee's work on two important and difficult projects, summary judgment and discovery of expert trial witnesses. It has been a remarkable example of the rules process working very well. She also repeated her thanks to Judge Hagy for six years of fine work with the Committee.

Respectfully submitted,

Edward H. Cooper
Reporter