MINUTES

CIVIL RULES ADVISORY COMMITTEE

SEPTEMBER 7-8, 2006

The Civil Rules Advisory Committee met on September 7 and 8, 2006, at Vanderbilt University Law School in Nashville, Tennessee. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge Jose A. Cabranes; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Hon. Peter D. Keisler; Judge Thomas B. Russell; and Chilton Davis Varner, Esq.. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge David F. Levi, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Joe Cecil and Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Alfred W. Cortese, Jr., Esq., Jeffrey Greenbaum (ABA Litigation Section liaison), and Matthew Hall attended as observers.

Judge Rosenthal opened the meeting by thanking Dean Edward L. Rubin and Professor Richard A. Nagareda for inviting the Committee to meet at the Law School. Dean Rubin welcomed the Committee, noting that the beautiful Vanderbilt campus is a national arboretum. The Law School is engaged in reforming its curriculum, rethinking what legal education should be for the Twenty-First Century. The "topography of law" has changed in the last 130 years, and the curriculum must reflect that. One area of change includes civil procedure and litigation. The realities of contemporary litigation should be brought into the classroom. The complexity of fact gathering, the real nature of the institutions of adjudication, and international dimensions all must be explored. The second and third years will be structured to enable students to make the most of these opportunities and similar opportunities in other areas. Professor Nagareda added that for litigation, the capstone will be a third-year seminar on the financing of large-scale litigation, the strategies pursued, and the rest of the real-world problems.

Judge Rosenthal noted that Judge Walker has completed his terms as a member of the Bankruptcy Rules Committee and will be succeeded by a new liaison to the Civil Rules Committee. The Bankruptcy Rules Committee has been forced into heroic efforts in the last few years, and Judge Walker's willingness to add the liaison duties to these chores is appreciated. His contributions to the Civil Rules discussions, both on the rules themselves and on integration with the Bankruptcy Rules, have been most helpful. The Committee will be fortunate to have a successor who is as congenial and helpful. Judge Walker responded that it has been a pleasure to work with the Civil Rules Committee, and a useful insight into common problems.

Judge Rosenthal also noted that this is the last meeting before expiration of the terms of members Cicero, Hecht, and Russell. Expressions of appreciation and farewell will be offered at the carry-over meeting next spring. She also expressed congratulations to Peter Keisler on his nomination to become a United States Circuit Judge. Finally, she noted that Judge Patrick Higginbotham, a former chair member who guided the Committee through exploration of a number of creative approaches to amending the class-action rules, has taken senior status.

Judge Levi reported on the June meeting of the Standing Committee. Both Chief Justice Roberts and Justice Alito appeared at the meeting; they joked that perhaps they had been appointed because their contribution to the development of Appellate Rule 32.1 in the Appellate Rules Committee reassured the President that the Rule would be approved by the Supreme Court. Chief Justice Roberts, both at the meeting and since, has shown keen interest in the work of the Standing Committee and the Advisory Committees. He is supportive of the rules work.

46 Judge Levi also summarized briefly the work of the other advisory committees. The
47 Appellate Rules Committee has a new reporter, Professor Catherine Struve; her work with the Time-
48 Computation Project Subcommittee is already familiar to — and admired by — the Civil Rules
49 Committee as well as the other advisory committees. The Bankruptcy Rules Committee has been
50 the busiest of all because of work mandated by the Bankruptcy Reform Act. They were given 180
51 days to develop a massive set of implementing rules. The task was complicated by problems in the
52 Reform Act that were recognized even in Congress but left unresolved in the press for enactment.
53 The technical problems are not likely to be fixed soon by Congress. This committee "meets all the
54 time"; they have done a fair ten years' worth of rulemaking in one. It has been a marvelous job.
55 The Criminal Rules Committee has been working on two contentious rules. One, Criminal Rule
56 29.1, was published this summer; it allows a pre-verdict directed verdict of acquittal only if the
57 defendant waives the double-jeopardy protection against appeal by the government. The other is
58 a revision of Criminal Rule 16 to codify the Brady Rule; this revision seems to be on the way to the
59 Standing Committee. The Evidence Rules Committee published Rule 502 for comment this
60 summer. It deals with some aspects of inadvertent waiver, a subject that has troubled development
61 of the civil discovery rules, and also includes a bracketed provision on selective waiver. Congress
62 has already expressed support for this Evidence Rules project.

63 Judge Rosenthal expanded the discussion of Evidence Rule 502 by observing that it dovetails
64 in important ways with the e-discovery rules that remain on track to take effect this December 1.
65 The Civil Rules Committee is grateful to have been allowed to participate in the Evidence Rules
66 Committee's work developing the rule.

67 John Rabiej reported that things are quiet on the legislative front. The perennial bills to
68 revise Civil Rule 11 are not moving. Concerns about some of the Criminal Rules have been
69 expressed in the Senate and are being addressed by the Administrative Office staff. Bills to protect
70 the confidentiality of news sources are ready for markup.

71 Judge Rosenthal said that the Civil Rules Style Project is on the consent calendar for the
72 September Judicial Conference meeting and so far no member has asked to move it to the discussion
73 calendar.

74 Finally, Judge Rosenthal reminded the Committee that for once the agenda concentrates on
75 future work. Last spring the Committee decided not to ask for publication this summer of its
76 completed proposals to amend Rules 13(f), 15(a), and 48 and to adopt a new Rule 62.1 on indicative
77 rulings. Instead, those proposals will be recommended to the Standing Committee for publication
78 in August, 2007. This delay will allow an interval for the bench and bar to become accustomed to
79 the important amendments scheduled to take effect this December 1, including the e-discovery
80 amendments, and to the Style Project, aimed to take effect on December 1, 2007.

81 *May 2006 Minutes*

82 The draft Minutes for the May 2006 meeting were approved, subject to correction of
83 typographical errors and similar matters.

84 *Time-Computation Project*

85 Discussion of the Time-Computation project involves two separate blocks of material. One
86 is the common provisions being developed for all of the rules sets other than the Evidence Rules.
87 The Standing Committee Time-Computation Project Subcommittee has helpfully framed its template
88 as Civil Rule 6(a). The template rule has been developed further over the summer, primarily
89 through the work of Judge Kravitz and Professor Struve, in response to matters discussed at the June

90 Standing Committee meeting. It is in fine shape, but no doubt further revisions will be suggested
91 in the several advisory committee meetings this fall. The other block of material emerges from the
92 work of the two Civil Rules Subcommittees that have considered the time periods set in all of the
93 Civil Rules both for adjustment to the new template rule and for intrinsic usefulness.

94 The template, Rule 6(a), was introduced by suggesting that three subjects may deserve
95 consideration at this point. These include the new definition of the "last day," the restoration of the
96 provision that includes state holidays in the definition of "legal holiday," and the impact on statutory
97 time periods of the decision to eliminate the rule that excludes intermediate Saturdays, Sundays, and
98 legal holidays in calculating periods less than eleven days. The statutory time period question will
99 be deferred to the end of the discussion.

100 Last Day defined. Several aspects of subdivision (4), defining the end of the last day, were accepted
101 without discussion. Allowing the day to run to midnight in the court's time zone for electronic filing
102 was accepted without demur. Concluding the day for filing by other means at the close of the clerk's
103 office or the time designated by local rule was accepted apart from the difficulties generated by the
104 problem of filing by delivery to a court official after that time. The court's authority to set a
105 different concluding time "by order in the case" also was accepted as important for all methods of
106 filing.

107 Discussion focused primarily on paragraph (4)(B)(ii), which allows a paper filing to be made
108 after the closing of the clerk's office by personal delivery "to an appropriate court official" "prior
109 to" midnight. It was recognized that "prior to" will become "before" in the Style process. The
110 provision otherwise presents difficult questions.

111 Item (ii) was added to subparagraph (B) as a response to 28 U.S.C. § 452 and the rules
112 provisions that reflect it, such as Civil Rule 77(a). The statute and rules say that the court is
113 "deemed" or "considered" always open. Apart from the fiction inherent in "deemed," these
114 provisions have never been interpreted to mean that the court must be physically open at all times.
115 Nor is there any indication that the statute was intended to address filing time. Instead, it seems
116 most likely that it was adopted to ensure that judges — the court — have authority to act at any time.
117 But Professor Struve's research shows that some decisions have relied on this statute in recognizing
118 filing by delivery to a clerk, deputy clerk, or judge. Civil Rule 5(e), moreover, defines filing "with
119 the court" to mean filing with the clerk or with a judge who permits filing by that means; it does not
120 say that filing must be made with the clerk during the clerk's office hours.

121 The first comment was that the need for filing by delivery to a court official ties to the
122 provision that extends time when the clerk's office is inaccessible. The rule cannot require pro se
123 litigants who lack access to electronic filing to resort to electronic filing when the clerk's office is
124 inaccessible. But service by hunting down a court clerk or a judge presents obvious and serious
125 problems of security. The question is how seriously this method should be discouraged.

126 The next question was whether adoption of the template as now drafted would make it
127 desirable to amend Rule 5(e) (to become Style Rule 5(d)) — to substitute "appropriate court official"
128 for the choice of filing with the clerk or with a willing judge. But the revision might not be quite
129 so straight-forward; the notion that filing with the judge is permited only if the judge agrees to
130 accept filing should be carried forward.

131 It was then asked whether there is a reason why a court should not have a time-stamped
132 depository for filing. The response was that increased security concerns, often reflecting specific
133 courthouse design and security capabilities, have led some courts to abandon facilities of this sort
134 in recent years.

It was suggested that it would be better to confine Rule 6(a) to a statement that the last day ends at midnight for all forms of filing, without offering any advice on how to accomplish filing after the clerk's office closes. But that approach might in fact encourage people to go off in search of a clerk or judge at home — the rule would seem to encourage paper filing as well as electronic filing at any time up to midnight. The potential for encouragement might be reduced, however, by framing the rule as allowing filing with an official who is willing to accept the filing.

The question whether all of this concern with filing after the close of the clerk's office hinges on § 452 went largely unanswered. But it was noted that there are circumstances that make after-hours filing important, even for litigants who have ready access to electronic filing. Needs for a temporary restraining order, attachment of a vessel about to sail, or for a receivership may arise after hours. But Rule 5 can accommodate emergency needs without saying anything about the topic in Rule 6(a).

The element of the draft that recognizes local rules was remarked with approval. It should be clear that a court willing to maintain a drop-box is free to do so, and to set the terms for use.

In the same vein, the provision for filing as directed by order in the case was suggested to be sufficient for the needs that cannot be addressed by local rules tailored to the circumstances of each particular court. This authority should apply to electronic filing as well as paper filing.

The conclusion of this discussion was a recommendation that the Time-Computation Project Subcommittee consider deletion of any express reference to filing by personal delivery to an appropriate court official, revising the structure to read:

(4) ***"Last Day" Defined.*** Unless a different concluding time is set by local rule or by order in the case, ~~T~~the last day concludes:

- **(A)** ~~(i)~~ for electronic filing, at midnight in the court's time zone, and
- **(B)** ~~(ii)~~for filing by other means, at the closing of the clerk's office. ~~or the time designated by local rule, unless~~
- ~~**(B)** (i) the court by order in the case sets a different concluding time; or (ii) a paper filing made after the closing of the clerk's office is personally delivered prior to midnight to an appropriate court official.~~

Or the local rule provision could be limited to filing by other means, establishing a mandatory national rule that all courts must permit electronic filing up to midnight local time.

No views were expressed on the wisdom of discussing filing with a court official, § 452, or Rule 77(a) in the Committee Note.

State Holidays. An observer recounted a personal experience. A 10-day TRO prohibited a transfer of funds. The tenth day was a state holiday. The funds were disbursed, leaving the question whether the order had been violated because the tenth day was automatically extended to the next day that was not a Saturday, Sunday, or "legal holiday." Other problems arise with events that are not legal holidays — or may not be — within the Rule 6(a)(5) definition. A local order "closes" the court for Friday, January 2, or the President declares the Friday after Thanksgiving a federal employee holiday. A litigant could easily be confused. Electronic filing can easily continue on those days; commonly a skeleton crew will staff the clerk's office. And there is another wrinkle. Some courts distinguish between holidays and "days of holding court," designating days that are not holidays as days when court is not held.

177 It was pointed out that multidistrict litigation presents a particular problem for lawyers in
178 states away from the consolidation court. Any attempt to calendar a motion will require research
179 into local holidays observed where the consolidation court sits. The problem can be resolved, but
180 it will be a nuisance.

181 This discussion led to the pointed reminder that the definition governs not merely filing but
182 also "real world events" such as the expiration of a TRO. It also will reach rules that address
183 obligations to serve rather than file. Perhaps the most noteworthy example is the Rule 4(m)
184 presumptive 120-day period to serve the summons and complaint: the 120th day may fall on a state
185 holiday when offices are closed and individuals are away from home.

186 Similar discussions in the past, while noting the risks of confusion, also have encountered
187 reluctance to complicate this part of the rule still further.

188 Discussion turned to the provisions that extend filing time when the clerk's office is
189 inaccessible. Closing to honor a state holiday may make the office inaccessible for physical filing,
190 but not for electronic filing. This discussion in turn digressed to the familiar questions that arise
191 from system failures in electronic filing. A model local rule was recently adopted to address failure
192 of the court's system. But earlier discussions have tended to conclude that it is better to rely on the
193 court's discretionary power to extend most time periods when the filer's system fails. The periods
194 that cannot be extended under Rule 6(b) present some difficulty on this score, but the difficulty will
195 be reduced if some softening is introduced into the Rule 50, 52, and 59 periods. It is not clear
196 whether the Committee Note to Rule 6(a) should attempt to offer advice on any of these problems.

197 "Next Day" Defined. The paragraph (3) definition of "next day" was discussed briefly. Some
198 Committee members thought it difficult to unravel the directions to "count forward" and to "count
199 backward." One suggestion was that the drafting would be improved by changing the references
200 to "next" day, beginning with (a)(1)(C), to "first" day. So the period continues to run to "the first
201 day that is not" an excluded day; counting continues forward or backward to the "first day" that is
202 not excluded.

203 Statute Time Periods Less Than 11 Days. The Rule 6(a) template continues to establish rules for
204 computing a time period specified in a statute. Rule 6(a) has included statutory time periods from
205 its birth in 1938. Last spring the Appellate Rules Committee raised the question whether it is unfair
206 to the practicing bar to reduce the practical effect of many statutory time periods by eliminating the
207 rule that excludes intermediate Saturdays, Sundays, and legal holidays in computing periods of less
208 than 11 days. This question was discussed extensively at the May meeting and at the June Standing
209 Committee meeting. No clear answer was reached.

210 Uncertainty clouds the premise that dropping the "less-than-eleven-days" rule will have a
211 significant effect on current practice. It is far from clear that many lawyers very often rely on Rule
212 6(a) to extend the periods set by statute. It may be that only a small set of highly sophisticated
213 lawyers are even aware of the potential uses of the rule, much less willing to rely on it. At least one
214 participant in the project reports that there is "mass confusion" in the bar about the impact of such
215 rules as Rule 6(a). Mass confusion does not suggest widespread reliance on the rules to extend
216 statutory time periods. The impetus for the whole Time-Computation project has been the bar's
217 desire for clear time-counting rules. Uniform abolition of the "eleven-day" rule may be better for
218 the bar than any other approach.

219 The obvious alternatives in addressing possible effects on statutory time periods in practice
220 are unattractive. One is to maintain uniformity by restoring the "less-than-eleven-days" rule for all
221 purposes. That would be a great step backward in the project. Another is to retain the rule only for

222 calculating statutory time periods, either by drafting Rule 6(a) that way or by urging Congress to
223 adopt the rule by a general statute. That may be the worst of all possible worlds, afflicting the bar
224 with different methods of time counting. The problem of different methods would be particularly
225 troubling when the same question seems to be addressed both by statute and court rule. It is not
226 uncommon for a statute to set a 10-day period for a temporary restraining order. Rule 65(b) sets a
227 10-day period for no-notice TROs. Computing the statutory period by a different method could
228 cause real confusion. A third approach would be to abandon any reference to statutory time periods
229 in Rule 6(a). That approach would lose the advantage of applying the rest of Rule 6(a) to statutory
230 time periods, including the rules that exclude the day of the initiating event, include the last day,
231 extend time when the last day is a Saturday, Sunday, or legal holiday, define the "next day," and
232 define the end of the day.

233 These considerations led to a suggestion that it may be best to continue to address statutes
234 in Rule 6(a), and to adhere to the decision to delete the "eleven-day" rule. When it seems important
235 to extend a statutory time period that is integral with the rules, the supersession effects of the current
236 rules could be carried forward on a rule-specific basis. The clear example is Rule 72. 28 U.S.C. §
237 636 sets a 10-day period to object to a magistrate judge's report and recommendations. Rule 72
238 adopts the 10-day period. Today the effect of Rule 6(a) is to extend the 10-day period to a minimum
239 of 14 days. Elimination of the "eleven-day" rule can be offset by changing the time in Rule 72 to
240 14 days. The result is to carry forward the same supersession that has been in effect for many years.
241 Another illustration is Rule 4 of the § 2254 habeas corpus rules; since 1976, this rule has superseded
242 the § 2243 time to respond to a petition.

243 Since last spring, Professor Struve has begun to compile a lengthy list of statutes that direct
244 action in periods shorter than 11 days. The list is not yet complete, and — particularly given the
245 difficulty of searching statutes not in the United States Code — is not likely to be complete even for
246 statutes now in force. But it is long and varied enough to give a good picture of the problems that
247 would be encountered by any thorough-going attempt to consider each statute. The problems arise
248 not only from number and variety, but also from the difficulty of understanding the practical
249 demands that are placed on lawyers in each context. The first entry in Professor Struve's chart
250 provides an illustration. 2 U.S.C. § 8(b)(4)(B) sets time limits for an action to challenge an
251 announcement by the Speaker of the House of Representatives that "vacancies in the representation
252 from the States in the House exceed 100." The action must be filed "not later than 2 days after the
253 announcement." The final decision "shall be made within 3 days of the filing of such action and
254 shall not be reviewable." In most settings at least one of these very brief periods would be extended
255 by the "eleven-day" rule. It is safe to surmise that — unlike many other statutory periods — there
256 is no obscure body of real-world practice that might illuminate our understanding of the impact of
257 applying, or not applying, the "eleven-day" rule. Many other statutes obscure to most lawyers,
258 however, may have generated clear understanding of time-computation methods within a small and
259 highly specialized bar. Learning those understandings and measuring their importance would be a
260 challenging and often frustrated task.

261 Additional problems arise from any attempt to find an abstract definition of the point at
262 which a statutory time period sufficiently involves court procedure to come within Rule 6(a). A
263 statute that directs a Cabinet Secretary to act on a matter in 10 days does not seem a legitimate
264 subject of regulation by court rule. But a related subsection that requires any petition for review to
265 be filed with a court within 10 days may be a legitimate subject of court rule concern. Yet it would
266 be confusing to apply different computation rules to successive subsections in a single statute.

267 Many brief statutory periods, moreover, address topics of great sensitivity. Labor statutes
268 addressing temporary restraining orders or preliminary injunctions are a familiar example that may
269 be satisfactorily addressed by Rule 65(e), which says that the Civil rules do not modify any federal
270 statute addressing TROs or preliminary injunctions "in actions affecting employer and employee."
271 But other examples abound. 28 U.S.C. § 144 requires that an affidavit of a judge's personal bias or
272 prejudice "shall be filed not less than ten days before the beginning of the term at which the
273 proceeding is to be heard." Formal terms have been abolished, § 138, creating an indistinctness
274 about the point that sets the time period. Apart from that, the rulemaking process should be cautious
275 in extending a deadline in a way that makes it more difficult to challenge a judge. Section 754
276 directs that a receiver for property situated in different districts has 10 days after appointment to file
277 copies of the complaint and the order of appointment in each district in which property is located.
278 The statutory desire for prompt action is manifest, but this period may be much less sensitive.

279 General discussion began by noting that the Criminal Rules do not apply the rule time-
280 counting provisions to periods set by statute. The Criminal Rules Committee is currently
281 deliberating this question. Adding statutes to the Criminal Rule (or perhaps it will be restoring —
282 apparently the pre-Style rule was ambiguous) would not disrupt justified reliance on the "eleven-
283 day" rule. And the absence of an "eleven-day" rule may lend some support to carrying forward with
284 Rule 6(a) as currently drafted. Uniformity across civil and criminal practice is desirable absent some
285 clear reason for disuniformity. The advantages of including statutory time periods would be the
286 same as in the Civil Rules. It will be important to assist the Time-Computation Project
287 Subcommittee in coordinating the separate sets of rules.

288 The difficulty of defining the reach of Rule 6 was offered as a reason for deleting the
289 "eleven-day" rule for all purposes. Rule 1 limits application of the rules to civil actions or
290 proceedings in the district courts. Some statutory periods clearly address matters too removed from
291 court proceedings to be covered by Rule 6(a). Others may present more ambiguous questions. And
292 there may be some uncertainty about the reach of Rule 6(a) "in computing any time period." 15
293 U.S.C. § 1116(d)(10)(A), for example, directs the court to hold a hearing on the date set in the order
294 of seizure, which "shall be not sooner than ten days after the order is issued and not later than 15
295 days after the order is issued." This statute can be read to include time periods that must be
296 computed, so that the 10 days becomes at least 14 days under the "eleven-day" rule. Or it can be
297 read as a direction to set a date, an interpretation that makes more sense because it seems unlikely
298 that Congress intended to set a choice at 14 or 15 days, and even more unlikely that it intended the
299 bizarre consequence that would follow when a pattern of holidays means the hearing must be set no
300 later than 15 days but no sooner than 16 days after the order issues.

301 It was reported that at least one member of the Appellate Rules Subcommittee designated
302 to study the statutory time-period problem thinks the problem is so serious that the "eleven-day" rule
303 should be retained for all purposes. But it was suggested that this view may be an over-reaction to
304 the sudden emergence of a difficult question at a time when the project was making great progress.
305 Congress is not likely to be offended by whatever answer seems best at the conclusion of the
306 rulemaking process. It is clear that many statutes reflect a desire to direct prompt action by setting
307 short periods. But if a specific statute seems to present a real problem, either of two approaches is
308 likely to be acceptable. One is a situation-specific exercise of the supersession power. That is
309 particularly easy with respect to statutes that already have been superseded, as with Rule 72 on
310 objections to a magistrate judge's report. The other is to ask Congress to amend the statute.
311 Congress is receptive to addressing specific problems of this sort in the periodic judicial
312 improvement bills. But so far no advisory committee has identified a statute that seems to call for
313 revision.

314 Discussion concluded with consensus that the project brings great benefits for the bar. For
315 the world of statutes, the present rules do not establish clear conventions that lawyers can rely on.
316 It is better to go forward with the template that applies Rule 6(a) to statutes and deletes the "eleven-
317 day" rule for all applications. Problems raised by specific statutes should be addressed on a specific
318 basis. Rule 72 is a good example of a situation that readily justifies extending a statutory 10-day
319 period to a rule 14-day period to offset deletion of the "eleven-day" rule.

320 Specific Rule Time Periods. Two subcommittees, chaired by Judges Baylson and Campbell,
321 reviewed the time periods in all of the rules. Many of the recommended changes fall into common
322 patterns that are readily answered by routine amendments. Most 10-day periods will be changed to
323 14 days, recognizing that the present "eleven-day" rule means that a 10-day period is at least 14 days
324 and may be longer still. Some, however, may deserve different treatment, as proved to be the case
325 with Rules 50, 52, and 59. Periods shorter than 10 days require individual examination to balance
326 apparent desires for urgent action against occasionally unrealistically brief times to act. Twenty-day
327 periods are routinely extended to 21 days to realize the simplification of counting in week-long
328 units. Periods set at 30 days or more, on the other hand, commonly are left untouched. Discussion
329 accordingly focused on specific issues that presented special questions in subcommittee
330 deliberations.

331 Rule 5.1. This new rule requires the Attorney General to intervene in an action challenging the
332 constitutionality of a statute at the earlier of 60 days after the notice challenging the statute is filed
333 or 60 days after the court certifies the challenge. The Department of Justice has again considered
334 this period and considers it workable. No change will be recommended.

335 Rule 6(d), Style 6(c)(1) and (2). It was accepted that the time to serve a written motion and notice
336 of hearing should be extended from 5 days to 14 days. But a question was raised whether the rule
337 adequately addresses a TRO issued after notice. One of the exceptions applies when a motion
338 "may" be heard ex parte — that may reach all TROs, which may be heard ex parte even though a
339 hearing is provided in the particular case. (It was noted that some orders must issue ex parte, as if
340 it is not known yet who the "defendant" will be and the order is issued conditioned on serving the
341 person to be restrained.) Another exception applies when the court sets a different period. The
342 order setting a hearing seems to fall within this exception. It was concluded that the rule does not
343 need further changes.

344 Rule 16(b). Some concern has been expressed that the 90- and 120-day periods for issuing the
345 scheduling order are compressed when the defendant has 60 days to answer, as in actions against
346 the government. But the Department of Justice has concluded that there is no need for change.
347 Although the period between answer and scheduling order is shorter than in cases with a 20-day
348 period to answer, the difference is partly offset by the time available to answer.

349 Rule 23(h)(1). It was agreed that any consideration of the time to move for attorney fees in a class
350 action should be treated as a new agenda item independent of the Time-Computation Project.

351 Rule 26(f). Subcommittee A considered the question whether the time for the parties's conference
352 should be pushed back to 14 days before a scheduling conference is held, and the report to 7 days
353 after the parties' conference. The Committee concurred in the recommendation that no change be
354 made, observing that the question may deserve further attention as experience develops under the
355 new rules on discovery of electronically stored information.

356 Rule 41(c). The Committee concluded that the Time-Computation Project is not the occasion to
357 decide whether a motion for summary judgment should cut off the right to a unilateral voluntary
358 dismissal without prejudice of a counterclaim, cross-claim, or third-party claim.

359 Rule 50, 52, 59. Rule 6(b) prohibits extension of the 10-day time periods set in these rules.
360 Preliminary discussion focused on a suggestion that the 10-day period should be retained without
361 following the general conversion of 10-day periods to 14 days, but that authority should be created
362 to extend the period. After brief discussion of the value of uniformity in setting 14-day periods,
363 further discussion was postponed for separate consideration of Rule 6(b).

364 Rule 54(d)(a). This Rule now provides that the clerk may tax costs on one-day's notice. Informal
365 inquiries suggest that practice varies greatly among different courts. But 1-day's notice allows very
366 little time to respond. The Committee adopted the recommendation to extend the notice period to
367 14 days, and — adhering to the convention — to extend the time to serve a responding motion to
368 7 days.

369 Rule 56. Rule 56 is the subject of a separate project. The time provisions need serious changes, and
370 have been studied by both subcommittees. It may prove possible to publish a proposed Rule 56 at
371 the same time as the time rules. But if not, the time provisions can be adopted as part of the Time-
372 Computation Project; the constraints that applied in the Style Project do not apply to time
373 computation — "substantive" changes are permitted. Perhaps the most important observation is that
374 commonly the time for summary-judgment motions will be set by a scheduling order. The "default"
375 time periods provided by Rule 56 remain important, however, and the proposed revisions include
376 express provision for a motion to be served "at any time," including with the complaint. A motion
377 served with the complaint almost inevitably will be made before the scheduling conference.

378 A clear weakness in the current rule allows an opposing party to "serve" affidavits before
379 the hearing day. Service by mail almost ensures that the affidavits will not be received before the
380 hearing. Many local rules set more realistic periods; if they are not invalid, it is only because they
381 correct an inappropriate national rule.

382 The proposed rule, unlike the present rule, establishes a cut-off for filing a summary-
383 judgment motion. The motion may be made at any time "until the earlier of 30 days after the close
384 of discovery or 60 days before the date set for trial."

385 Discussion began by noting that the "close of discovery" is not always a clear moment. A
386 scheduling order, for example, may set a time to end discovery, and a different time to end "expert
387 discovery." Should the rule be "the close of all discovery"? Or discovery may be staged, limiting
388 initial discovery to defined topics — among other motives, the purpose may be to address first an
389 issue or set of issues that may be likely candidates for disposition by summary judgment or other
390 court action. Interpretation of a patent claim, a matter for the court, might be first, or issues of
391 validity. The question is not so much a matter of the concept as the need for clarity. One response
392 might be to refer to the close of discovery "on the issues for which summary judgment is sought,"
393 although that approach is likely to work only when there is an order clearly staging discovery on
394 different issues. But it may be that clarity is best achieved by the general reference as drafted,
395 relying on intelligent application and on the expectation that when a court order sets a time or times
396 to complete discovery the order is also likely to address the time for summary judgment. A different
397 form of indeterminacy will arise in cases that do not have an order defining the time to complete
398 discovery. Rule 16(b) allows exemptions from the scheduling-order requirement. But those
399 situations too are likely to yield to common-sense application.

400 It was suggested that the period set at 60 days before trial is too short. Lawyers need a ruling
401 before the time to make Rule 26(a)(3) pretrial disclosures. The local rule in the Northern District
402 of Texas sets 90 days before trial, "and that's a minimum. 120 days would be better."

403 A response suggested that it would be better to have only one cut-off date: 30 days after the
404 close of discovery. But it was observed that it may be necessary to carry on discovery until a time
405 just before trial. One instance would be consolidation of a preliminary-injunction hearing with trial
406 on the merits. For that matter, surprise events may be met by a continuance to allow mid-trial
407 discovery.

408 A different perspective was offered. "There is only so much we can do with case
409 management in the Rules." Reference to the close of discovery is ambiguous. The better approach
410 would be to set the limit at 90 days before trial. But this suggestion was met with the observation
411 that the local rule in the Northern District of Georgia sets the time at 20 days after discovery. That
412 rule forces judges to enter scheduling orders — and they commonly set a different period. They do
413 not set trial dates, so the cut-off must be defined by the close of discovery.

414 This complication led to the suggestion that if different districts take different approaches
415 to defining a cut-off now, it may make most sense to carry forward the alternative cut-off points,
416 aimed both at the conclusion of discovery and at trial. The Rule 56 provisions will serve only as a
417 default for cases without a scheduling order that sets the time, but also will help by suggesting
418 approaches that generally work in framing a scheduling order. Setting alternatives also reinforces
419 the integration with Rule 56(f)'s provisions for deferring action on a motion when the nonmovant
420 needs more time for discovery or other investigation. The alternatives allow greater flexibility,
421 including cases in which there is no discovery. Many cases, for example, come up for decision on
422 an administrative record and readily lead to "summary judgment" without need for any discovery.

423 This discussion led back to the question whether there is a need for a national rule. There
424 are many local rules now. Individual case management is provided for most of the cases that need
425 a firm schedule. Setting the time at 30 days after the close of discovery can be too short —
426 deposition transcripts may not be immediately available. At least, there should be an exception that
427 recognizes the legitimacy of local rules that depart from the national rule. The need for local rules
428 may be reduced by adoption of a satisfactory national rule, but it should be remembered that the
429 reason the Local Rules Project did not challenge summary-judgment rules that seem inconsistent
430 with the national rule is because the local rules often seem better. On the other hand, a national rule
431 may be welcomed because it reduces the need for scheduling orders in all cases, including categories
432 of cases exempted from Rule 16(b) by local rule.

433 The suggestion that the cut-off should be tied to the trial date was renewed, with the time set
434 at 120 days to be "symmetrical with the 120-day period in Rule 16(b)." Lawyers want the summary-
435 judgment ruling before they prepare for the final pretrial conferences. And if the reference to the
436 close of discovery is carried forward, it should be made clear that it does not mean that summary
437 judgment may be sought only after discovery is completed.

438 In similar vein, it was noted that the reference to the completion of discovery will lead to
439 cases without a clear cut-off. It is easier to set a cut-off by looking to the trial date.

440 This discussion led to the question whether the attempt to set a cut-off date is an attempt to
441 fix something that is not broken. The rule does not now set a cut-off. Does adding this to the rule
442 "tread too much on the court's autonomy"?

443 The first response was that the system — or at least the national rule — is broken. A default
444 should be set. But it must be recognized that the default in the national rule will tend to be viewed
445 as the standard. That seems to have happened with the period set by Rule 26(a)(2)(B) for disclosing
446 an expert trial witness report.

447 Further discussion led to several conclusions. The rule should have alternative cut-offs that
448 relate to the close of discovery and to the trial date. Some courts do not set trial dates; a cut-off
449 directed only to the trial date could catch the parties by surprise when they suddenly find that trial
450 will occur at a time that cut off the summary-judgment period before any motion was made. 120
451 days before trial may allow too little time in cases in which early trials are set. Exceptions should
452 be made for local rules. And the court's authority to set a different time should clearly apply to the
453 nonmovant's response as well as to the initial motion.

454 Public comment on a published proposal may provide useful information about the pressures
455 encountered in practice.

456 The result, subject to further consideration by the time-computation and summary-judgment
457 subcommittees, is a tentative draft:

458 **(a)** Unless a different time is set by local rule or by an order in the case:

459 **(1)** a party may move for summary judgment on all or part of a claim or
460 defense at any time until the earlier of 30 days after the close of
461 discovery or 60 days before the date set for trial; and

462 **(2)** a party opposing the motion may file a response within 20 days after the
463 motion is served.

464 A post-script observed that setting the time to respond by service of the motion renews the
465 continual question whether time periods should be set by filing rather than service. Filing is a
466 clearly defined event. The time of service may be disputed. And reliance on filing may become
467 easier as service comes to be made by electronic means that essentially coincide with filing.

468 Rule 59(c). Rule 59(c) provides that a party opposing a new-trial motion that is supported by
469 affidavits may file opposing affidavits within 10 days after being served, "but that period may be
470 extended for up to 20 days." Changing 10 days to 14 and 20 days to 21 conforms to the consistent
471 format adopted for many rules. But closer examination shows an apparent dissonance with Rule
472 6(b). Rule 6(b) on its face authorizes the court to extend the times set by Rule 59(c) without setting
473 any outer limit. The ordinary reaction would be that the more specific limit set in Rule 59(c) should
474 control. But until 1948, Rule 6(b) specifically directed that time could be extended under Rule 59(c)
475 only as directed in Rule 59(c). This reference to the limit in Rule 59(c) was deleted in 1948. The
476 Committee Note says clearly that there is no reason to carry forward a specific limit on the time
477 allowed to file opposing affidavits. The new-trial motion has upset finality and the court should
478 have its ordinary discretion to allow the time appropriate to the needs of the situation. This question
479 is independent of the strict rules that set nonextendable 10-day limits for motions under Rules 50,
480 52, and 59. It was agreed that Rule 59(c) should be amended to read: "The opposing party has 14
481 days after being served to file opposing affidavits~~; but that period may be extended for up to 20~~
482 ~~days~~." Extensions will be governed by Rule 6(b).

483 Rule 65(b). Subcommittee B recommended that no change be made in the Rule 65(b) provision
484 allowing a motion to dissolve or modify a no-notice TRO "on 2 days' notice." Depending on the
485 day of the week chosen to file the motion, the result may be less notice than is provided by
486 application of the "eleven-day" rule. But the unique nature of TROs makes that appropriate. The
487 Committee agreed.

488 Rule 68. Rule 68 allows an offer of judgment to be served at least 10 days before trial. The 10-day
489 period will be extended to 14. In addition, the Committee agreed that uncertainty about trial dates
490 should be addressed by adding three words: "At least 14 days before the date set for trial * * *."

491 Rule 81(c). Subcommittee B recommended that the 10-day period to demand jury trial after removal
492 either be reduced to 7 days or set at 14 days. No reason was found to reduce the time now available.
493 The Committee concluded that the time should be set at 14 days, giving the same practical effect as
494 the present rule. Removal itself can raise complicated questions and the time may well be needed.

495 Supplemental Rule G(4)(b)(ii)(C). This rule specifies that notice of a civil forfeiture action must
496 state that an answer or a Rule 12 motion must be filed no later than 20 days after filing a claim. The
497 civil asset forfeiture reform legislation sets the 20-day period. Nonetheless it seems appropriate to
498 add the extra day to conform to the uniform rules preference for 21 days. This is the mildest form
499 of supersession imaginable, and is an even smaller change than other departures from statutory time
500 periods deliberately adopted and defended in drafting new Rule G.

501 Rule 6(b); Rules 50, 52, 59, and 60. Rule 6(b) establishes the general authority to extend time
502 periods set by the rules. As expressed in Style Rule 6(b)(2), it also says: "A court must not extend
503 the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules
504 allow."

505 One aspect of Rule 6(b) seems to call out for revision. None of the rules referred to allows
506 an extension of time. These words seem to have hung on in the rule from earlier days when the list
507 included former Rule 73's appeal-time provisions and an explicit reference to the Rule 59(c)
508 provision that did allow an extension of time. They must cause many anxious moments as puzzled
509 lawyers and judges search the rules for provisions that allow an extension. These words should be
510 deleted.

511 The more important question ties directly to the time periods set in Rules 50, 52, and 59.
512 Each rule requires post-trial motions to be filed within 10 days from the entry of judgment.
513 Experience has shown that often the 10-day period is too short. A well-crafted motion requires more
514 than 10 days to prepare when the case is complex, when a trial transcript is not immediately
515 available, or when other circumstances place competing demands on the parties' time. Courts
516 respond to this problem in a variety of ways. The simplest is to defer the entry of judgment. This
517 tactic often inspires feelings of guilt because it seems a questionable tactic to subvert Rule 6(b).
518 Guilt may in turn cause a court to enter judgment promptly even though it might wish to defer. A
519 different reaction may be to insist on a timely motion, but to provide an extended time to brief the
520 motion and to take an indulgent view of the motion in determining that the arguments in brief are
521 supported by the motion, or else to exercise the authority to grant a timely motion on grounds not
522 stated in the motion. These reactions of themselves suggest that it might be better to relax the
523 absolute prohibition.

524 Additional reasons to relax the prohibition appear in the continuing occurrence of cases in
525 which lawyers — at times with the apparent concurrence of the court — mistakenly request and
526 receive extensions forbidden by Rule 6(b). Reliance on an unauthorized extension may mean only
527 that relief under Rule 50, 52, or 59 cannot be granted. But it also may mean loss of the opportunity
528 to appeal, since only a timely motion suspends appeal time under Appellate Rule 4. Sympathy for
529 lawyers who make such mistakes generated a "unique circumstances" doctrine that gave effect to
530 an untimely motion if the court went beyond mere granting of an extension to affirmative statements
531 that induced reliance on the belief that the extension was effective. The "unique circumstances"

532 doctrine is at best under a cloud; recent restatements suggest either that it has become very narrow
533 or that it has been abandoned.

534 Several responses are possible. The easiest is to do nothing. The rules were deliberately
535 crafted in the belief that strict time limits should be set once final judgment is entered. At that point
536 it is important either to achieve true finality or to expedite the launching of an appeal. There is little
537 reason to grieve for clients whose lawyers fail so simple a task as the duty to read the rules. But this
538 view provides an uncertain response to the many courts that have found it desirable to extend time
539 by resort to devices not spelled out in the rules.

540 Another possible approach would be to amend Rule 58 to expressly authorize the common
541 practice of deferring entry of judgment to afford the time needed to prepare and file post-trial
542 motions. This approach would avoid technical complications, at least so long as attorneys can be
543 trained to find the rule and remember it.

544 Still another approach would be to amend Rule 6(b) to authorize extensions under tight
545 control. Good cause would be required. The motion for an extension would be required within the
546 initial 10-day period, and a maximum extension would be specified — perhaps no more than an
547 additional 30 days, setting an outer limit at 40 days from judgment. But the drafting would prove
548 complex. If the court does not act on the motion by the 10th day, the party seeking an extension
549 must file the motion or run the risk that no motion can be filed because the extension will be denied.
550 That risk could be addressed by requiring a ruling by the 10th day, but that will not work unless the
551 motion must be filed early in the 10-day period. A similar problem would arise if there is no ruling
552 on the request for an extension within appeal time: the notice of appeal must be filed even though
553 the moving party still hopes to be allowed to file a motion for post-judgment relief. The response
554 again must be complicated.

555 Yet another approach was suggested. Why not avoid any further complication — and the
556 attending need to add corresponding reflexes in the bench and bar — by adhering to the present rule,
557 but establishing a uniform 30-day period to make any of the Rule 50, 52, and 59 motions now
558 constrained by a 10-day limit. An appellate judge observed that appellate courts would not be at all
559 concerned with such a change. It also was observed that a 30-day period is congruent with the
560 appeal time set for most civil actions: all parties know that a final judgment remains vulnerable to
561 post-trial attack or appeal for 30 days. Nor will the change have any complicating effects on Rule
562 62(b), which allows a stay of execution or enforcement pending disposition of motions under Rules
563 50, 52, 59, or 60.

564 A motion to set the times in Rules 50, 52, and 59 at 30 days was approved without dissent.

565 Finally, it was agreed that there is no reason to change the maximum one-year time allowed
566 to seek relief from a judgment under Rule 60(b)(1), (2), or (3). One year is a good point to achieve
567 true finality as against belated attack on these grounds.

568 ***Discovery Subcommittee***

569 Judge Campbell and Professor Marcus delivered the report of the Discovery Subcommittee.

570 *Rule 30(b)(6)*

571 The Discovery Subcommittee reported on its study of Rule 30(b)(6) at the May meeting. The
572 Committee accepted its recommendation to abandon present work on several possible amendments.
573 But three issues were recommended for further study. The Subcommittee now recommends that
574 none of these three be acted on now.

575 The first open issue is whether Rule 30(b)(6) should be amended to address the "binding"
576 effect of the deposition answers given by a person designated to testify for an organization named
577 as deponent. Some comments have urged that the answers should be more binding, arguing that
578 organization deponents often fail the duty to prepare the witness adequately. This approach seems
579 to involve the obligation to prepare the witness. But case law is clear that the organization is obliged
580 to prepare one or more witnesses to provide all "matters known or reasonably available to the
581 organization." Other comments urge that courts now give the deposition answers greater binding
582 effect than they deserve. But a survey of the cases suggests that courts are generally getting it right.
583 The deposition testimony is not treated as a judicial admission. The testimony instead is treated as
584 any deposition testimony by a party deponent. Cases that seem to give greater "binding" effect
585 generally involve sanctions for failure to prepare the witness. The concern that the answers may
586 have undue effect seems to arise not from the case law but from the statement in Moore's treatise
587 that the answer is binding on the organization. It may be more appropriate for the editors to
588 reconsider the position taken in the treatise than to amend the rule to negate it.

589 The second open issue is whether there should be an express provision allowing an
590 organization deponent to supplement the deposition testimony of its designated witness. This issue
591 springs from the concern that the testimony may be given an undue binding effect. Since there is
592 little apparent problem with binding effect in practice, there seems little reason to amend the rules.

593 The third open issue is whether something should be said in the rules about the effects of
594 sharing work-product material with the designated witness during preparation to testify. This issue
595 ties to the work-product and privilege questions that arise from Rule 26(a)(2)(B), to be discussed
596 in the second part of the report. The present recommendation is that consideration of this aspect of
597 Rule 30(b)(6) be deferred for study along with the expert trial witness issues.

598 A practitioner observed that there is a lot of concern about the role of work-product
599 information used to prepare organization witnesses to testify to matters known or reasonably
600 available to the organization. Almost inevitably the task of gathering the information will be
601 directed by counsel. It is almost as inevitable that counsel will direct the process of educating the
602 witness in what the organization knows. As an illustration, a company may hire counsel to
603 investigate "an event in the company." Counsel reports to the board on the facts as counsel
604 understands them. Does the company have an obligation to educate the designated witness in the
605 facts as counsel found them? It has been argued that these facts should be revealed to the witness.
606 A different approach would be that counsel's investigation is protected as work product if the facts
607 can be found from independent sources in discovery. The problem may be best focused with
608 counsel relies on information from sources within the company. The same information would have
609 to be sought out in response to the deposition notice, and transmitted from the company sources to
610 the witness, if counsel had not undertaken any prior investigation. If the information came from
611 sources outside the company, on the other hand, the outcome may be more confused. Perhaps the
612 witness should be educated in the identity of the sources, but not made to paraphrase counsel's
613 paraphrase of what the sources know. Another source of confusion will arise when counsel has
614 gathered information from sources outside the company that counsel does not believe true.

615 These questions will remain under study in conjunction with the parallel questions that arise
616 from disclosure and discovery of expert trial witnesses.

617 *Rule 26(a)(2)(B)*

618 The introductory statement identified three broad categories of questions arising under Rule
619 26(a)(2)(B). One involves identification of the trial witnesses that should be required to prepare a

620 report — questions have arisen both as to a party's employee whose duties do not regularly involve
621 giving expert testimony, a matter identified in rule text, and also as to a treating physician, a matter
622 identified in the 1993 Committee Note.

623 The second category involves the impact on privilege and work-product protection of the
624 mandate that the trial expert witness report state "the data or other information considered by the
625 expert in forming the opinions." The 1993 Committee Note says, perhaps ambiguously, that this
626 obligation means that "litigants should no longer be able to argue that materials furnished to their
627 experts to be used in forming their opinions — whether or not ultimately relied upon by the expert
628 — are privileged or otherwise protected from disclosure when such persons are testifying or being
629 deposed." There is a lot of confusion about this issue. In 2000 a New York State Bar Association
630 committee recommended that the confusion be resolved by requiring disclosure of everything
631 considered by the witness, defeating any privilege or work-product protection that otherwise would
632 apply. This summer the American Bar Association House of Delegates approved a recommendation
633 by the Section of Litigation that otherwise privileged or protected information should remain
634 protected despite disclosure to an expert trial witness in the course of developing the expert opinion.

635 The third category involves the retention and discovery of draft reports. Rule 26(a)(2)(B)
636 and (b)(4)(A) do not now address this question. Many experts go to great lengths to avoid keeping
637 any draft reports.

638 Professor Marcus elaborated on this introduction, observing first that these issues have been
639 developing for several years. The line has been moving toward more disclosure; perhaps it has
640 moved too far. It might be attractive to develop bright lines, but bright lines may be difficult to
641 draft.

642 The context of the present problem goes back to the 1970 discovery amendments. Before
643 1970 courts divided in their treatment of expert witnesses, but discovery was very difficult in most
644 courts. The 1970 amendments expanded discovery, but discovery of right was limited to
645 interrogatories demanding identification of the subject on which each expert would testify, the
646 substance of the facts and opinions to be stated, and a summary of the grounds for each opinion.
647 Practice under this rule apparently developed differently in different parts of the country. In some
648 places it became common practice to depose trial experts. In other places depositions were not
649 common. There also was a problem in getting an expert to agree that the opinion relied on a learned
650 treatise.

651 The expert-witness disclosures required by Rule 26(a)(2) in 1993 somehow failed to draw
652 much attention. The focus of debate was on the initial disclosure provisions in 26(a)(1). The 1993
653 amendments, however, greatly expanded access to an adversary's trial experts. All must be
654 identified. Elaborate reports must be disclosed as to most, including identification of matters
655 "considered" rather than those "relied upon" in forming expert opinions. And there was a right to
656 depose a trial-expert witness, although it is postponed until a report has been disclosed if the expert
657 must provide the report. The hope was that the report would at least focus and expedite the
658 deposition, and even avoid any need for a deposition in some cases.

659 Along the way, Evidence Rule 701 was amended to state that lay opinion testimony that
660 relies on expert knowledge must be evaluated under Rule 702. It was noted that the disclosure
661 obligations of Rule 26(a)(2) would apply to a lay witness relying on expert knowledge.

662 The treating physician question was addressed in the Committee Note as an illustration of
663 an expert witness not retained or specially employed to provide expert testimony. The fear was that
664 preparation of a report would be an undue burden, an intrusion on treatment of other patients, and

665 a deterrent to testifying at all. But the complication is that it may become difficult to distinguish the
666 roles of a treating physician who also testifies to the likely future effects of an injury, pain and
667 suffering, or other matters that do not arise naturally from treating the injuries.

668 The distinction between employees whose duties do not regularly involve giving expert
669 testimony and employees whose duties do regularly involve expert testimony is not clearly explained
670 in the 1993 Committee Note. The purposes are left to inference. At the extreme, it might be argued
671 that as soon as an employee is designated to provide expert testimony the employee has been
672 retained or specially employed for that purpose. That approach dissolves the distinction deliberately
673 drawn in the rule, however, and is not convincing. A different problem arises with the employee
674 who is both an actor or viewer with respect to events in suit and also an expert in the subject. The
675 Eleventh Circuit says that a Rule 26(a)(2)(B) report should be provided when the employee is a
676 "pure expert," but not when the employee is also an actor or viewer. But a report has value
677 whenever expert opinions are to be expressed. The article that was filed as a proposal to amend the
678 rule says that reports are essential. It also predicts that if reports are not required of the "regular
679 employee," use of such witnesses will expand rapidly.

680 The 1993 Committee Note reference to materials considered by an expert and privileged or
681 otherwise protected does not explain why waiver should be required only if a report is required by
682 26(a)(2)(B). For that matter, it is not quite clear what it means. It builds on the obligation to
683 disclose "information" considered by the expert. "Information" could be read in pari materia with
684 "data," looking for facts and general theory in the expert's field, not case strategy discussed by the
685 lawyer. It has been read broadly, however, to effect waiver. The American Bar Association report
686 says that this approach is too intrusive. It adds that the intrusiveness is recognized by experienced
687 lawyers, who often stipulate out of this effect.

688 Evidence Rule 612(2) may seem to relate to the waiver question. It provides that a court may
689 order production of materials considered by a witness to refresh memory before testifying. But it
690 is not clear that materials considered to form an opinion are used to refresh memory.

691 Drafts of expert witness reports are not explicitly addressed by Rule 26(a)(2)(B) unless it be
692 as materials considered in forming an opinion. There is a strong tendency to compel discovery. The
693 American Bar Association asserts that the reaction by experts is to take care to avoid ever having
694 a draft that can be disclosed. In turn, some judges respond by ordering that drafts be retained, and
695 have imposed sanctions for disobedience.

696 The American Bar Association recommendations rest on the belief that collaboration
697 between attorney and expert witness should be protected by confidentiality. The expert needs
698 privacy in developing opinions. What the lawyer told the expert should be protected, as should the
699 process by which the expert developed an opinion in the framework of working with the lawyer.
700 The 1993 Committee Note recognizes that the lawyer may assist in preparing the expert witness's
701 report; that does not of itself speak to protecting their interaction from disclosure or discovery.

702 The other side of the argument can be illustrated by imagining an expert report delivered to
703 the lawyer who responds that a different report is required — the answer should be "no," not "yes."
704 Should only the final "no" report be discoverable?

705 Any number of rules changes might be considered in responding to these questions. Many
706 are sketched at pages 222 to 225 of the agenda materials. An obvious possibility would be to require
707 a disclosure report of any employee who will offer an expert opinion, deleting the exemption for an
708 employee whose duties do not regularly involve giving expert testimony. This possibility could be
709 complicated by distinguishing between the "pure" expert employee who is not an actor or viewer

710 of the events in suit and a "hybrid" employee who is an actor or viewer and also has expert
711 knowledge. Something might be done as to the treating physician, perhaps by attempting to
712 distinguish between opinions formed in the course of treatment and opinions developed for the
713 purpose of trial.

714 The problem of privileged or work-product material shared with an expert witness could be
715 separated from the disclosure report. A broad approach might be to narrow the requirement to
716 disclose all information "considered" to a requirement to disclose only information "relied upon"
717 in forming an opinion. Or "core" work product might be exempted from disclosure. Or an attempt
718 might be made to protect privileged and work-product information that comes to an employee in the
719 regular course of work, not only in collaboration with counsel in preparing an expert opinion.

720 More general approaches might address work-product and privilege explicitly in Rule
721 26(a)(2)(B). Or the project could undertake a more general review of the work-product provisions
722 in Rule 26(b)(3). The Rule protects only documents and tangible things, leaving other work-product
723 to protection by decisional law. It does not define "core" work product. It does not clearly say
724 whether a party can generate core work product, or only an attorney. But further development of
725 26(b)(3) would be challenging.

726 Rule 26(a)(2)(B) could be revised to insulate draft reports. But that must confront the risk
727 that it really was the lawyer who wrote the report's content as well as the expression. Do we really
728 want to protect that information?

729 If the conclusion is that maximum intrusion is desirable, there is little apparent need to
730 amend the rules. That is where we seem to be now. The Committee could let things percolate along,
731 bypassing minor wrinkles. Assuming that the 1993 amendments were intended to establish complete
732 disclosure and discovery, they are working pretty much as intended.

733 Discussion followed. The first observation was that indeed the law seems to be moving away
734 from the rule's clear meaning with respect to reports from employees whose duties do not regularly
735 involve giving expert testimony. In a pharmaceutical product action, for example, an officer-
736 employee might be asked whether the company properly designed a clinical trial. It will be objected
737 that a report was required. But you have to ask the question — the jury will wonder why you did
738 not. The 1993 rule got it right; the cases that require reports, disregarding the rule, are wrong. The
739 1993 Committee Note also got it right as to treating physicians. These witnesses "did not go looking
740 for employment as expert witnesses. They would rather not be witnesses." A treating physician may
741 refuse to testify at all if a report is required. The regular employee often has privileged information
742 not because of the witness role but because of ordinary work duties.

743 The general question was renewed directly: Why should waiver of privilege and work-
744 product protection depend on whether Rule 26(a)(2)(B) requires a disclosure report? If waiver is
745 proper because the court needs to assess the line between witness as expert and witness as advocate
746 coached by the lawyer, why should there not be waiver as to all expert opinions at deposition and
747 at trial no matter whether a disclosure report is required? And for that matter, why is it proper to
748 tie waiver of privilege to the discovery rules — the argument seems to be that it is privileged, but
749 we have decided to require discovery so you waive privilege by complying with the discovery rules.
750 Clearer justification is needed.

751 This broad approach was extended still further, not only picking up the question whether the
752 disclosure and discovery issues can be addressed without addressing waiver for all purposes but also
753 asking whether the choice between waiver and protection can be made without addressing the
754 general problems with the ways in which expert witnesses are used.

755 This discussion was tied back to the Rule 30(b)(6) discussion by observing that work-product
756 waiver must be confronted whenever an organization's attorney participates in preparing the
757 organization's designated witness for the deposition. To be sure, many 30(b)(6) witnesses are not
758 testifying as experts. But among other common threads, the use of materials to educate the witness
759 presents the issue whether this is to "refresh" recollection within the meaning of Evidence Rule 612
760 or whether it is to impart new understanding.

761 The "hybrid employee" question came back with the observation that this question may not
762 have been considered in drafting Rule 26(a)(2)(B). Perhaps the drafters were thinking only of
763 excluding any report requirement when an employee is asked a question like "what do you do in
764 operating this machine?". This was followed by observing that it is not possible to draft a rule that
765 fairly addresses all of the soft edges of privilege and work-product protection. Suppose an employee
766 sues the employer and the manufacturer of a machine involved with the employee's injury.
767 Coworkers are asked about the working of the machine. Their knowledge may qualify as "expert"
768 knowledge. And they may have had communications with counsel on the subject. Separating fact
769 from communication can be difficult, yet a fact cannot be made privileged by communicating it to
770 a lawyer.

771 Looking back to Evidence Rules 701 and 702, it was stated that the amendments reflected
772 concern that expert testimony was being introduced through lay witnesses, bypassing the Rule
773 26(a)(2) disclosure requirements. Another participant observed that Rule 26(a)(2)(B) was in fact
774 drafted with an eye to excluding the drill press operator from the report disclosure requirement.

775 More generally, it was reported that in complex cases there is a protocol that counsel may
776 agree to: no one exchanges or seeks discovery of export report drafts. The expert discloses anything
777 relied upon, but not all things that were considered. As to employee witnesses, on the other hand,
778 they may present "very expert testimony" and it is desirable to have reports from them. In cases
779 where the lawyers do not agree to this protocol, "we fall back on the rules, but these protocols are
780 surprisingly common." They may be more common, however, in cases in which both sides have
781 much discoverable information; practice in "one-way" discovery situations may not be as prone to
782 these agreements.

783 In presenting the ABA resolution, Mr. Greenbaum suggested that proponents of the "full
784 disclosure" approach tend to be judges and professors not involved in daily expert-witness practice.
785 They like the theory, and are pushing the case law in that direction. But the results defy common
786 sense, and often give advantages to wealthy litigants who can retain separate sets of consulting
787 experts and trial-witness experts. Practicing lawyers strongly urge change. The American Bar
788 Association Task Force includes lawyers both for plaintiffs and defendants, as does the House of
789 Delegates. The ABA resolution "solves many of the problems." The purpose of the report
790 requirement adopted in 1993 was to help the adversary decide whether it needed to hire its own
791 expert, whether it needed to depose the reporting expert, and how to conduct the deposition
792 efficiently if one is needed. Everyone understands that a trial expert witness will testify in favor of
793 the side that presents the witness. Everyone understands that the favorable testimony will be
794 formulated in exchanges with counsel that educate the witness on the issues in the case, and that the
795 expert's testimony will be reviewed with counsel. It is not useful to find out what role the attorney
796 played in a particular case, and in any event you never really find out. The interchange between
797 counsel and witness is evolutionary, and when asked the witness will remember only in (usually
798 innocuous) part. The question at trial should be whether the opinion is well-founded in its own
799 terms. Massachusetts, Texas, and New Jersey do not allow discovery of expert reports. Their
800 systems work well.

801 These observations continued by asserting that the requirement that the expert disclosure
802 report include all information considered was intended to support cross-examination on facts similar
803 to "data." "[I]nformation" was not intended to include work-product revealed by counsel. Work-
804 product protection should extend to all exchanges with trial expert witnesses. "Fair notice of what
805 the expert is going to say is all we should require."

806 The lawyer for one side, further, needs an expert to prepare to depose or examine the other
807 side's experts. If the client can afford a separate consulting expert, the preparation can proceed
808 unimpeded by concerns for discovery of the expert's participation. But if only a trial expert witness
809 can be afforded, is it fair to require disclosure and allow discovery of all communications between
810 witness and counsel?

811 Discovery of draft reports in addition to communications means that in reality there are no
812 drafts. Experienced expert witnesses have learned not to keep them. Their habits in turn open the
813 specter of costly computer forensic inquiry into the not-quite-deleted contents of their computer hard
814 drives. "This is uncomfortable behavior." Lawyers feel obliged to advise the witness not to print
815 or e-mail a draft report, but instead to bring it along on a lap-top computer or to read it over the
816 phone. They go to great lengths to avoid creating material that might hurt the case. Reasonable
817 lawyers stipulate out of such discovery, but not all lawyers are reasonable. And it would be better
818 for experts to be able to make and keep notes; good expert witness preparation is harmed by
819 overbroad discovery.

820 In response to a question it was reported that the Litigation Section Resolution reflects a
821 strong consensus, but not a unanimous view. Two judges on the task force abstained. In the section
822 Council, one person was a "purist" who believed that "everything should come out." After vigorous
823 debate, the House of Delegates approved the resolution with more than sixty percent in favor.

824 The New Jersey rule "is a pleasure to work with." It makes it possible to work more
825 effectively with "my own experts."

826 A Committee member agreed that discovery in this area has become "pretty artificial," but
827 asked Mr. Greenbaum how he would argue the other side. The response was to recall a particular
828 case in which the attorney simply presented the expert with a report of the testimony the expert
829 should offer. Discovery was allowed. But even that case is not persuasive. The expert's testimony
830 would not have stood up under cross-examination. The price of the ABA proposals is not high. To
831 borrow a phrase used to describe a long-ago class-action proposal, all the obfuscation and effort that
832 go into much present discovery of expert testimony "just ain't worth it." And this was a problem
833 before discovery of electronically stored information — drafts were not retained in paper form. In
834 short, facts and data considered by the expert are fair game for discovery. Consultation with the
835 attorney is not.

836 A Committee member observed that when you are trying to retain a good expert who is not
837 a "practiced expert witness," it can be difficult to overcome the reluctance that arises on learning
838 everything that must be done to thwart discovery.

839 Discussion turned back to the practice of stipulating to narrow discovery. It was agreed that
840 some lawyers do this, but the stipulation may not extend to all issues in the case, and it is not
841 followed in all cases. If you have to go to court, the court will resolve disputes by ordering that
842 drafts be produced. But that is undesirable. The expert has to defend the opinion in its own terms;
843 that should suffice. The general work-product tests are good, and should apply to communications
844 between counsel and expert witness — the attorney should be able to discuss work-product with an

845 expert witness, protected against disclosure or discovery unless the 26(b)(3) showings of substantial
846 need and undue hardship can be made.

847 Turning to employees as "experts," the line between lay opinion and expert opinion should
848 be the same for disclosure and discovery as at trial. "The opinion should be disclosed" when the
849 employee has the skills and learning needed to give an expert opinion.

850 Judicial management was suggested as an answer to these problems. The discussion has
851 been illuminating, but it does not point up a need to revise the rules, apart from a rule denying
852 discovery of draft reports. Imagine this event: the lawyer tells the expert witness that a part was
853 missing from the malfunctioning machine. The expert prepares a report that addresses the
854 malfunction both if the part was missing and if the part was not missing, but without expressly
855 referring to the part's absence. The fact that the part was missing should be subject to disclosure
856 and discovery.

857 The relationship between Rules 26(b)(3) and (b)(4) was noted. From 1970 to 1993, Rule
858 26(b)(4) opened by stating that discovery of facts known and opinions held by an expert and
859 acquired or developed in anticipation of litigation or for trial "may be obtained only as follows."
860 That clearly superseded application of the (b)(3) tests. This language was deleted from (b)(4) by
861 the 1993 amendments without changing the introduction that makes (b)(3) "subject to the provisions
862 of subdivision (b)(4)." There is no indication that any thought was given to the effect of this change
863 on the relationship between (b)(4) and (b)(3). As a matter of rule text, it is easy to read (b)(3) to
864 apply to an expert witness as a party's representative or as a party's consultant. If the purpose in
865 1970 was to substitute the apparently more discretionary standard of 1970 (b)(4)(A) and the
866 apparently more demanding standard of 1970 (b)(4)(B) for the work-product tests of (b)(3), the
867 purpose of the present structure is more difficult to fathom. Perhaps it would help to reconsider the
868 interrelation of (b)(3) with (b)(4) in light of the present problems.

869 Turning again to discovery of draft reports, an expert witness from Massachusetts reported
870 that practice under the Massachusetts state rule is much better. The Massachusetts rule fully protects
871 attorney-expert communications, and bars discovery of draft reports. This practice is much less
872 expensive for the client than the procedure in Massachusetts federal courts. The federal rules lead
873 to lengthy depositions. "Then they settle." State-court cases are more likely to be tried. Cross-
874 examination goes much faster at trial than in the federal cases that do go to trial. Speedy cross-
875 examination is better for the jury. And lawyers are much more respectful of the witness in front of
876 a jury than they are at deposition.

877 After adjournment for the evening, discussion resumed by focusing on the most promising
878 paths for further work. Professor Marcus summarized a number of possible topics suggested by the
879 earlier discussion:

880 Disclosure of "data or other information considered by the witness" could be revised to
881 exclude work-product from the apparently all-encompassing reach of "information."

882 The rules could "move away from the idea" that we need disclosure and discovery of all
883 interchanges between attorney and a trial-expert witness.

884 It may be possible to add a definition of "core" work product, and to distinguish between
885 communications that share core work product with a trial expert witness and communications that
886 share other, less protected forms of work product.

887 Disclosure of all information "considered" might be tightened by limiting disclosure and
888 discovery to information "relied upon."

889 The contents of the disclosure report might be reconsidered, perhaps with a view that the
890 limits of discovery would coincide with the limits on the reporting obligation.

891 Rule 26(b)(3) might be considered for revision, but that may be reaching further than the
892 present issues warrant.

893 The rules might clearly sever any notion of waiver from the disclosure report.

894 It would be possible in much the same way to provide that the disclosure report need not
895 disclose discussion of work-product material between attorney and expert, while such discussions
896 remain a proper subject of inquiry at deposition.

897 An attempt could be made to define a distinction between the employee witness who is only
898 an actor or viewer of events in suit and the "hybrid" employee witness who is both actor and viewer
899 and also a source of expert opinion testimony.

900 An immediate response was that as to privilege and work product, the same rules should
901 apply to the disclosure report and to deposition. And the rules should protect privilege and work
902 product, particularly as to the "hybrid" employee witness who may be exposed to protected
903 information during the course of ordinary work duties.

904 The prospect that the rules might be narrowed back to information "relied upon" by the
905 expert was questioned by observing that the "rely upon" standard provoked frequent disputes when
906 it was the standard. Is the risk of still further disputes of this sort a reason to stay with information
907 "considered"? One member responded that anything considered should be fair game, but that it
908 would help to find out — perhaps by comment on a published proposal — whether the bar generally
909 shares this view.

910 The "other information" words prompted a statement that the Committee that prepared the
911 1993 amendments would have been surprised by the expansive meaning given these words. They
912 were thinking of hard fact information, not theories. It also was pointed out that the 1993
913 amendments were crafted, and were almost on the point of taking effect, before the Daubert case was
914 decided. The Daubert approach to expert testimony was not considered.

915 It was also observed that the present rules create an uneven playing field when one side can
916 afford to retain both consulting experts shielded from discovery and trial-expert witnesses whose
917 education by counsel is focused so as to minimize discovery.

918 The desire for empirical information about the working of the state-court rules in Texas, New
919 Jersey, and Massachusetts was dampened by the statement that it is difficult to get at such
920 information. Practice "takes place behind a curtain" that is not easily penetrated. Survey research
921 is about all that is possible, and it is very difficult to get hard information that way. But one form
922 of empirical information may be available in the form of agreements among lawyers. Agreements
923 may be that the lawyers will produce what the expert witness relied on, leaving it fair at deposition
924 to inquire into what the witness considered. The result is to avoid disputes about what was
925 "considered" but not disclosed; absent agreement, such disputes are all too common. A variation
926 on this practice was noted in the form of an agreement to list everything shown to an expert witness
927 but to reserve the right to assert privilege against a demand to produce. But diffidence was
928 expressed about relying on this practice without a better sense of how general it is. It may be

929 familiar to highly accomplished lawyers who trust each other, but may not work as well as a general
930 practice.

931 Protection against discovery of draft reports was urged again, with the suggestion that the
932 protection both for draft reports and for communications with counsel might be subject to the escape
933 provided in Rule 26(b)(4)(B). Discovery would be allowed "upon a showing of exceptional
934 circumstances under which it is impracticable for the party seeking discovery to obtain facts or
935 opinions on the same subject by other means," or under an adaptation that focuses on the
936 impracticability of effectively testing the expert testimony by other means. This standard is
937 "extraordinarily protective" and may require the adaptation.

938 In response to a question, it was reported that in Texas state practice there is not much law
939 on discovery of draft reports. "I understand they are not produced." The feeling seems to be that
940 "you just have to stop somewhere," especially in light of the opportunities for costly and intrusive
941 computer forensic searches. There also is concern about encouraging experts to play games with
942 what they do or do not preserve. As to communications between attorney and expert trial witnesses,
943 however, the practice is that everything shown to an expert is fair game for discovery. There is no
944 desire to be forced into distinguishing between information considered and information relied upon.
945 But it is not clear what would be done about discovering notes an expert makes of conversations
946 with an attorney.

947 Discussion concluded by reflecting on the opportunities that may be available to ask bar
948 groups for further information. The ABA resolution reflects careful and hard work. Other groups
949 could be consulted — remember that the 2000 report of the New York State Bar Association
950 Committee on Federal Procedure of the Commercial and Federal Litigation Section advanced
951 recommendations different from the ABA recommendations. Several other bar groups have been
952 helpful in past discovery work. Those who made comments on the e-discovery proposals were
953 asked to comment on the Rule 30(b)(6) study and provided helpful comments. There is room for
954 concern, however, about imposing too many burdens too often on groups that have been valuable
955 resources and whose good will should be encouraged. Perhaps the subjects will prove so complex
956 in relation to actual practice needs that it will be helpful to stage a conference on the model of earlier
957 discovery conferences.

958 Many possibilities remain open for study. The Discovery Subcommittee will continue its
959 work.

960 ***Rule 12(e)***

961 The agenda materials include drafts illustrating the ways in which Rule 12(e) could be
962 expanded to provide more frequent use of orders for more definite pleadings. These drafts represent
963 the current focus of the broader inquiry into notice pleading. A number of more direct alternatives
964 have been put aside for the time being. There is no present disposition to recommend that notice
965 pleading be abandoned or somehow redefined and tightened. Nor is there any enthusiasm for
966 defining more particularized pleading requirements for specific types of cases. At the same time,
967 there is concern that current pleading rules and practices mean that some cases endure longer, at
968 greater cost, than should be. In rejecting ad hoc judicial development of heightened pleading
969 requirements for some cases, the Supreme Court has noted that more demanding pleading standards
970 should be adopted in the rulemaking process. The question remains whether some form of response
971 can be found.

972 Part of the impetus for the overall pleading inquiries and for this more specific set of
973 proposals is the sense that in practice lower courts often enforce pleading standards higher than

974 general concepts of notice pleading. Persisting desires for more detail may reflect a genuine need
975 that can be better addressed by bringing it out into the open and regularizing it.

976 The focus of the Rule 12(e) proposals is on developing a tool that is available to the court
977 in cases that may be advanced by more precise initial pleading. There is no thought of going back
978 to the bill of particulars practice that was carried forward in the original 1938 rules and abandoned
979 in 1948. Instead the hope is that there may be a way to use pleading, perhaps in conjunction with
980 focused and limited initial discovery, to identify cases that do not warrant the cost and delay of full
981 discovery and summary-judgment practice. The procedure would provide case-specific authority
982 to raise pleading standards without attempting to impose more demanding standards in all cases and
983 without attempting to define substantive categories to be held to higher standards.

984 The drafts suggest different approaches. The first would expand the more definite statement
985 to support disposition on the pleadings by motions under Style Rule 12(b), (c), perhaps (d), and (f).
986 This focus on pleading disposition would likely be the least expansive. It would make most sense
987 when the pleader is likely to have access to reliable fact information sufficient to resolve the dispute
988 without need for discovery. It might also work in cases that are susceptible of disposition after
989 limited discovery enables a party to plead confidently the most favorable version of facts it is willing
990 to attempt to prove, but that situation may prove rare.

991 Other drafts focus more directly on all aspects of pretrial management. One would authorize
992 an order for a more definite statement if that would "facilitate management of the action." A
993 variation would ask whether "a more particular pleading would enable the parties and the court to
994 conduct and manage discovery and to present and resolve dispositive motions." This approach looks
995 for a more complex, and more likely staged, integration of pleading with discovery and summary
996 judgment.

997 An initial observation was that some such expansion of Rule 12(e) should be encouraged.
998 There are too many cases with enormous waste pretrial activity. The link to case management
999 reflects expanded Rule 16 practices that have evolved since the initial adoption of notice pleading
1000 in 1938 and the abolition of bills of particulars in 1948. The integration of pleading and pretrial
1001 management could be a good thing.

1002 A specific illustration was offered. The complaint in an action for negligent
1003 misrepresentation may be sufficiently definite to support a responsive pleading. It is outside present
1004 Rule 12e). But it is not possible to tell whether there is complete ERISA preemption, supporting
1005 federal-question jurisdiction, or only conflict preemption, presenting a defense to a state-law claim
1006 that does not support federal-question jurisdiction. The answer will turn on what was said to support
1007 the claim.

1008 A judge offered quite a different response. Parties often "throw up roadblocks." Many Rule
1009 12(b)(6) motions are premature summary-judgment motions. Rule 12(e) motions for a more definite
1010 statement are an effort at discovery. We should be concerned about creating new opportunities for
1011 obstruction. The proposed new tool is unnecessary in almost all cases.

1012 A different response was that any expanded rule should address all pleadings, not only the
1013 complaint. The drafts are written that way, recognizing that more definite pleading of an answer,
1014 a reply, and other pleadings can be helpful.

1015 A different concern was expressed. Recognizing the merit of some such proposal, the project
1016 may be perceived as an effort to deter disfavored claims, "as barring the right to pay $250 and start
1017 discovery." Perhaps it would be better to provide for a "contention statement" after preliminary

1018 discovery? Present practice produces many cases in which the court does not know what the
1019 plaintiff's theory is until the plaintiff replies to a motion for summary judgment. A similar concern
1020 was expressed — the idea may be good, but "it sends up red flags."

1021 Yet another judge expressed the same concerns. A pro se case may present a complaint that
1022 reads like a book, and is nearly as long. Knowing nothing else, the plaintiff presents a narrative of
1023 the sense of grievance. Expanding Rule 12(e) will lead to more motions — too many motions.

1024 Still another judge stated that we should not go back to the bill of particulars. The Northern
1025 District of Texas had a local rule, only recently repealed, that barred 12(e) motions seeking
1026 information that can be got by discovery. It still has a rule that requires court permission to file
1027 more than one summary-judgment motion. The result is to encourage motions to dismiss under Rule
1028 12(b)(6). If Rule 12(e) is expanded, the summary-judgment limit will likewise encourage Rule 12(e)
1029 motions.

1030 A lawyer responded to these concerns by doubting the danger that ill-founded motions would
1031 be encouraged. Some lawyers, to be sure, like to file motions. But many good lawyers recognize
1032 the importance of filing only well-founded motions. The tone set by a mediocre motion is likely to
1033 resonate throughout all later stages of the action. The draft that focuses on enabling the court and
1034 parties to conduct and manage discovery and to present and resolve dispositive motions is the most
1035 attractive. And it should send a message inviting more rigorous initial pleading.

1036 A possible part-way approach through Form 35 was suggested as an alternative. Form 35
1037 could be amended to suggest that the parties' report on the Rule 26(f) conference include pleading
1038 issues in addition to the time limit on amendments already noted.

1039 In a different direction, it was asked what would be provided by expanding more definite
1040 statement practice that could not be achieved under present rules. In a case presenting inscrutable
1041 possibilities of ERISA preemption, for example, focused discovery can be limited to the facts that
1042 will support an informed decision on jurisdiction. Case management under Rule 16 may be better
1043 than elaborating on pleading practice.

1044 This discussion was summarized by observing that the judges seemed to be reflecting
1045 experiences different from the experiences of the lawyers. The lawyers represented careful,
1046 thoughtful, desirable practice. They can understand the potential good uses of case-specific pleading
1047 orders as means to more efficient identification of the issues, control of discovery, and perhaps
1048 resolution by dispositive motion. The judges confront lawyers who do not practice to these
1049 standards, and fear misuses that will add to delay and impose burdens on the court that are not
1050 sufficiently alleviated by simply denying the ill-founded motions. The many tools available to shape
1051 discovery and to manage an action more generally may counsel that nothing be done. The idea still
1052 may deserve development, but great care will be required.

1053 Because of the tie between pleading and summary judgment, it may be possible to ask the
1054 Rule 56 Subcommittee to add consideration of the Rule 12(e) proposals to its chores.

1055 ***Rule 56***

1056 Judge Baylson introduced the Rule 56 Subcommittee report.

1057 The first part of the report proposes substantial changes in the time for making and
1058 responding to summary-judgment motions. Those changes were reviewed and acted on as part of
1059 the Time-Computation Project earlier in this meeting.

1060 Apart from time, the proposals focus on the procedure of summary judgment, not the
1061 standards that govern grant or denial.

1062 One proposal is to require both motion and response to provide a statement of undisputed
1063 facts, supported by citations to the record.

1064 A second set of proposals seeks to clarify the court's responsibility when there is no response
1065 to a summary-judgment motion, and also when a response is made in a form that does not comply
1066 with the rule.

1067 A third proposal explicitly states the court's authority to initiate summary judgment on its
1068 own.

1069 A fourth proposal would adopt into Rule 56 the "partial summary judgment" terminology
1070 widely employed in practice, and offer guidance on the court's responsibilities when it is not
1071 appropriate to dispose of an entire case by summary judgment.

1072 A fifth proposal is more a question — is it useful to carry forward present Rule 56(g) as a
1073 largely redundant and little-used sanction for filing affidavits in bad faith?

1074 In addressing these and other questions, it will be helpful to seek as much guidance as the
1075 Federal Judicial Center can provide in updating its regular study of Rule 56.

1076 Joe Cecil reported that the FJC launched studies of Rule 56 to support the Committee's work
1077 in the 1980s and has carried the work forward after the 1992 termination of the Committee work
1078 without any Rule 56 amendments. A summary of recent work has been made available for this
1079 meeting. It shows remarkable variations in summary-judgment activity across courts. The next step,
1080 if the Committee is interested in developing the work, will be to investigate CM/ECF data. These
1081 data will support consideration not only of Rule 56 activity but also of other dispositive motions,
1082 such as judgment as a matter of law under Rule 50, and even pleading. It is much more efficient to
1083 expand beyond Rule 56 into these related topics during one search process.

1084 The Committee agreed that further FJC study will be important, and invited as much work
1085 as can be accomplished within available resources and within a time frame matched to the progress
1086 of Committee work on Rule 56. A specific question was noted for possible inclusion in the study
1087 if feasible. This question would test the observation that some lawyers seem to be using Rule
1088 16(c)(1), which looks to the formulation and simplification of the issues, including the elimination
1089 of frivolous claims or defenses, as a substitute for summary judgment. This practice may reflect an
1090 attempt to focus the case on an issue the party finds comfortable.

1091 Discussion opened by observing that the many local rules addressing summary judgment
1092 provide the inspiration for reconsidering Rule 56. They also provide an abundant source of ideas.
1093 As one example, many courts require detailed statements of the facts claimed to be established
1094 beyond genuine issue, supported by specific references to supporting materials. These rules are
1095 distilled into several paragraphs of the agenda draft Rule 56(c). This is a matter of summary-
1096 judgment procedure, not the standards for grant or denial.

1097 The statement of "undisputed facts" provisions in the draft, subdivision (c), are adapted not
1098 only from local rules but also from the proposed amendments that ultimately failed of approval by
1099 the Judicial Conference in 1992. They separate the motion from argument, explicitly requiring that
1100 the motion and response be "without argument." Contentions as to the law and the evidence
1101 respecting the facts are to be made in a separate memorandum. The draft does not now provide for

1102 a movant's reply to new facts asserted in a response, but a paragraph can easily be added to address
1103 that need.

1104 The motion and response provisions in draft subdivision (c) include a provision, (2)(B)(ii),
1105 that expressly states that if the nonmoving party does not have the trial burden on a fact the response
1106 may simply state that the record does not support a fact asserted in the motion. It was suggested that
1107 this provision comes too close to bringing part of the Celotex decision into rule text. It would be
1108 better to leave this thought to the Committee Note.

1109 Concerns were addressed to the rule text stating that the motion should recite "the specific
1110 facts that are not genuinely in dispute." These words might invite the colossal waste of listing every
1111 fact thought to be undisputed. The motion should focus only on material facts, and may properly
1112 be limited to one or more facts that would make other facts — whether not genuinely in dispute —
1113 not material. A motion is more likely to be made by a party who does not have the trial burden, and
1114 may properly focus on a single dispositive fact — it was not the defendant who drove the vehicle
1115 involved in the accident. This problem may prove particularly important in employment
1116 discrimination cases because of the intrusion of the "prima facie" case that shifts a burden of
1117 explanation but not of proof. Although the draft was not intended to require a statement of all
1118 undisputed facts, the reference to "*the* specific facts that are not genuinely in dispute" may invite
1119 that reading. Further work on the language is indicated. It will be important, however, to take care
1120 in deciding whether to refer to "material" facts at this point in the rule.

1121 Reliance on local rules in drafting subdivision (c) prompted the further observation that many
1122 districts have local Rules 56. We should be careful to fix the many problems in present Rule 56
1123 without doing anything that would invalidate the local rules. The local rules reflect local culture.
1124 Not every good practice can be added to the national rule. For example, the draft requires citation
1125 to the pages of affidavits, deposition transcripts, and the like. The local rule in the Northern District
1126 of Texas instead requires that the motion be supported by an appendix and that citations be to the
1127 appendix. The local rule could be reconciled with the national rule draft, but such potential
1128 collisions should be considered. This plea was seconded by recalling that the Local Rules Project
1129 uncovered many rules that seemed inconsistent with Rule 56, but left them alone because they
1130 seemed better than Rule 56.

1131 The draft direction to recite specific facts not genuinely in dispute requires citation of
1132 "materials supporting the facts." How do these words apply when the motion is made by a party
1133 who does not have the trial burdens and who, under Celotex, says only that "there is no evidence that
1134 the defendant did any wrong"? This question points to drafting difficulties that are hard to resolve.
1135 One illustration of the difficulty is W.D.Tenn. Rule 7.2(d)(2):

1136 If the proponent contends that the opponent of the motion cannot produce evidence
1137 to create a genuine issue of material fact, the proponent shall affix to the
1138 memorandum copies of the precise portions of the record relied upon as evidence of
1139 this assertion.

1140 A quite different illustration is provided by the effort in the failed 1992 Rule 56 proposal:

1141 A fact is not genuinely in dispute if it is stipulated or admitted by the parties who
1142 may be adversely affected thereby or if, on the basis of the evidence shown to be
1143 available for use at a trial, or the demonstrated lack thereof, and the burden of
1144 production or persuasion and standards applicable thereto, a party would be entitled
1145 at trial to a favorable judgment or determination with respect thereto as a matter of
1146 law under Rule 50.

1147 How does a party point to precise portions of the record that show there is nothing? Demonstrate
1148 the lack of evidence available for use by the other party at trial? The trick is to develop a procedure
1149 and, perhaps more difficult, a statement of the procedure that avoid the need to incorporate the
1150 Celotex distinctions in rule text. But perhaps that is not a desirable trick after all. It was suggested
1151 that the Evidence Rules incorporated the Daubert decision; why not incorporate Celotex in Rule 56?
1152 A draft effort is included in the agenda materials, but drew little comment. The difference from
1153 Daubert may be that the Evidence Rules were revised to synthesize emerging case-law insights,
1154 while practice has developed for 20 years under Celotex. Evidence Rule 702, further, was drafted
1155 in response to proposals for legislation that might have displaced the rulemaking process to
1156 questionable effect. Practice in at least one court seems to be that a movant who does not have the
1157 trial burden says either "there is no evidence of," or "we deposed [or put interrogatories to] the
1158 plaintiff, who produced no evidence of * * *." Another alternative is to allow a movant to state the
1159 facts it views as established beyond genuine issue without requiring that it point to support in the
1160 record. The nonmovant remains free to respond by pointing to record materials that do establish a
1161 genuine issue.

1162 This discussion continued with an illustration. A defendant moves for summary judgment,
1163 asserting that the plaintiff cannot prove causation. It is not necessary to require the defendant to
1164 identify all of the record evidence on causation and explain why it does not generate a genuine issue.
1165 The focus should be to elicit a statement of the grounds for claiming victory by summary judgment,
1166 leaving it to the party who has the trial burden to point to the evidence that defeats summary
1167 judgment. In many cases the summary-judgment motion is made for the purpose of forcing the
1168 nonmovant to come forward to show the best case. But it remains necessary to direct the nonmovant
1169 to point to the record. Some pressure must be provided in the form of warning about the effects of
1170 failure to do so. That question is addressed with several variations in draft subdivision (c)(6).

1171 Another strategy may be to ask the parties to submit a joint statement of undisputed facts.
1172 The draft reference to "stipulations <including those made for purposes of the motion only>" reflects
1173 this possibility. But a court request may fit better in the pretrial order context than in addressing
1174 summary judgment. If the lawyers are meeting and conferring about the case, however, there is
1175 room for joint statements of uncontested facts.

1176 "Partial summary judgment" became the next focus of discussion. The label is commonly
1177 used in practice, and might well be incorporated in the rule. But that leads to the question how far
1178 the rule should direct the court to dispose of specific facts when it is not appropriate to dispose of
1179 the whole case by summary judgment. Present Rule 56(d) says that the court "shall if practicable
1180 determine what material facts exist without substantial controversy and what material facts are
1181 actually and in good faith controverted." Style Rule 56(d) relaxes this a bit, directing that the court
1182 "should, to the extent practicable, determine what material facts are not genuinely at issue." The
1183 agenda draft, subdivision (g), expands discretion by providing that if summary judgment is not
1184 rendered on the whole action, the court "may enter an order specifying any material fact * * * that
1185 is not genuinely at issue," and "may specify facts that are genuinely at issue." How far should
1186 discretion extend? One judge observed that ordinarily the litigants know more about the case than
1187 the judge; it is better to rely on them to frame a pretrial order setting out what facts are at issue.
1188 Another comment noted that it is useful to use summary judgment to dispose of separate claims or
1189 defenses, and at times to enter final judgment under Rule 54(b). But using summary judgment to
1190 dispose of some issues on a single claim or defense, while useful as a case-management tool, is
1191 chancier. The need to try related issues may suggest that it is better to forgo an effort to fence off
1192 some issues that would not complicate the trial in any event. The burden of sorting through
1193 individual issues may be too great to be justified.

1194 A related question is presented by both subdivisions (f) and (g) of the agenda draft.
1195 Subdivision (f) includes a bracketed sentence directing that an order rendering summary judgment
1196 must specify material facts that are not genuinely at issue and that require judgment as a matter of
1197 law. This provision would enable parties and an appellate court to understand the ruling and
1198 evaluate it more readily. Subdivision (g), on the other hand, provides only that when summary
1199 judgment is not rendered on the whole action the court may specify facts that are genuinely at issue.
1200 Courts of appeals frequently observe that in cases that permit interlocutory appeal from a denial of
1201 summary judgment — most frequently on official immunity defenses — a statement of the fact
1202 issues that defeat summary judgment is highly desirable. It was observed that if a court grants a
1203 motion in part and denies it in part, the situation compels some explanation — the parties must be
1204 told what matters remain open for further proceedings, what matters are finally disposed of. If a
1205 plaintiff claims both discrimination and retaliation for complaining of the discrimination, the parties
1206 must be told if the summary-judgment ruling is that the discrimination claim is unsustainable while
1207 the retaliation claim survives for trial. But that need not be extended to require a statement of what
1208 fact issues remain open for trial on the retaliation claim.

1209 This view was reinforced. It is dangerous to require specification of facts or issues still to
1210 be tried. Summary-judgment rulings may be made before discovery is completed; indeed the case
1211 may be managed in stages to ensure the opportunity for early disposition of some issues that will
1212 direct development in later stages. Explanation of the ruling is useful, but it may be better to avoid
1213 asking the judge to specify the issues that remain.

1214 It was suggested that the subdivision addressing partial summary judgment might better
1215 speak of "issues" than of "facts." The distinction may be between identifying "facts" that are found
1216 established without genuine issue and "issues" that remain open for further proceedings. The
1217 standard for granting summary judgment has always referred to facts, at least in part because of the
1218 direct link to the Seventh Amendment theories that identify the jury as responsible for factfinding.
1219 If facts remain to be tried, however, it may be safer to identify the issues that arise from the facts
1220 rather than the facts themselves.

1221 An observer suggested that explanation by the judge is very important. A summary-
1222 judgment motion is very expensive. The judge's view of the case after considering the motion is
1223 very helpful, both in moving toward settlement and in preparing for trial. A response was that an
1224 explanation should be required for an order granting summary judgment, but the court should not
1225 be required to specify the issues or facts that remain for trial. Explanation may be useful as to other
1226 issues even if the whole case is resolved by summary judgment on one ground. "The plaintiff has
1227 no evidence that the defendant was driving the car. Summary judgment is granted for the defendant.
1228 But if that is wrong, there is [not] sufficient evidence for trial on the driver's negligence."

1229 The need for clarity that will tell the parties where they stand and how to go forward with
1230 the case may be addressed by further pretrial conferences rather than by the terms of the summary-
1231 judgment order. This opportunity is another reason to establish discretion as to the extent of detailed
1232 explanations in denying summary judgment.

1233 This discussion was concluded with the observation that "may" probably is the better choice.
1234 Substantial time may be required to explain why there is a genuine issue, and the explanation may
1235 not be complete. Denial may rest not so much on a firm conclusion that there is a genuine issue as
1236 on the conclusion that eliminating a particular element will not change the nature or length of the
1237 trial; it is safer to carry it forward for trial. Or denial may rest on the discretionary preference for
1238 trial even though the summary-judgment record shows no genuine issue. Trial may provide a more
1239 certain basis for judgment as a matter of law, or important issues of law or public interest may

1240 benefit from the illumination of a full trial record, or it may actually be more efficient to hold a
1241 relatively brief trial than to struggle through a difficult and uncertain summary-judgment ruling. An
1242 alternative might be to say nothing in the rule, omitting the complicated variations set out in present
1243 Rule 56(d).

1244 Subdivision (c)(6) focuses on the problems that arise when a nonmovant fails to respond at
1245 all to a motion for summary judgment or else responds in a fashion that does not satisfy the
1246 requirements for a proper response. It offers several variations that reflect the disparate responses
1247 identified by local rules. An illustration was offered to test the variations: A prisoner plaintiff claims
1248 that guards beat him severely without provocation or reason. The guards assert that they used only
1249 moderate force necessary to restrain the plaintiff. Depositions are taken. The defendants move for
1250 summary judgment. On the record it is clear that credibility issues defeat summary judgment. But
1251 the plaintiff fails to respond to the motion. Should the motion be granted by default? Even if it is
1252 defective on its face? Should the court have discretion to choose between granting the motion by
1253 default or denying it if examination shows it fails to meet the summary judgment standard? Or
1254 should the court be required to evaluate the motion and the materials cited to support it, granting the
1255 motion only if the movant has carried the summary-judgment burden?

1256 Local rules seem to adopt all of these approaches. The dominant view, however, seems to
1257 be that the court is obliged to review the motion and supporting materials and to grant it only if the
1258 summary-judgment burden is carried. That view can be changed by rule. A total failure to respond,
1259 for example, might be viewed as akin to default of answer or akin to a failure to prosecute. But once
1260 a defendant has appeared to defend on the merits, disputing the plaintiff's claims — the clear
1261 analogy to a pleading default — at least some cases express a tradition that the defendant is entitled
1262 to put the plaintiff to proof, whether by summary judgment or trial. On this view, the court should
1263 be required to evaluate the motion. This approach is suggested most clearly in the draft (c)(6)
1264 version 2, alternative b: the motion may be granted "if the motion and supporting materials show
1265 that there is no genuine issue as to any material fact and that the movant is entitled to judgment as
1266 a matter of law." (Alternative c expresses the same thought without repeating the full text of the
1267 summary-judgment standard.) Support was expressed for this approach as the least disruptive.

1268 Each of the variations of (c)(6) include an express statement that the court "is not required
1269 to consider materials outside those called to its attention" by the parties. Although several appellate
1270 opinions and local rules say as much, it was thought helpful to include this express statement in Rule
1271 56.

1272 Related questions were explored briefly, more as possible topics for a Committee Note than
1273 as suggestions for rule text. If there are successive motions for summary judgment, the Note might
1274 comment on the court's authority to review the record on both motions. If the court does start to
1275 explore the record on its own, is it obliged to canvass the entire record? Or can it look selectively,
1276 perhaps distorting rather than improving the picture sketched by an inadequate response? What
1277 happens if on appeal from summary judgment a party points to record materials not pointed out to
1278 the district court?

1279 The final Rule 56 question was whether the bad-faith affidavit provision of present Rule
1280 56(g) serves any continuing purpose. Many cases reflect the "sham affidavit" problem arising when
1281 a party seeks to defeat summary judgment by submitting a self-serving affidavit that contradicts the
1282 party's own self-defeating deposition testimony. Courts generally agree that the affidavit can be
1283 disregarded unless a persuasive explanation is offered for changing the earlier position. But there
1284 is no indication that they go further by invoking Rule 56(g) sanctions. Although Rule 56(g) includes
1285 contempt as a sanction, going beyond Rule 11, there is no apparent reason to believe that this

sanction either is much used or is necessary for deterrence. Rule 11, perhaps supplemented by 28 U.S.C. § 1927, may suffice.

Judge Rosenthal congratulated and thanked the Rule 56 Subcommittee for its progress.

Rule 62.1

At the May meeting the Committee approved a recommendation to publish a new rule 62.1. Rather than seek publication of any rule proposals in 2006, however, it was determined that it would be better to defer this and other proposals for publication in 2007. The bench and bar will confront many important rule changes on December 1, 2006, including the e-discovery amendments, and the next year will confront the full Style package. A break for a year, deferring the next set of rules changes to December 1, 2009, seems desirable. Rule 62.1 was introduced to the Standing Committee at the June meeting nonetheless, to give advance notice and to elicit any interim suggestions that might be offered. Two questions were raised: is the rule best located between Rules 62 and 63, or would another location be better? And can a better caption be found — "Indicative Rulings" will not be familiar to many lawyers.

Location is influenced by the occasions for invoking Rule 62.1. Rule 62.1 describes the options available to a district court when a pending appeal ousts its "jurisdiction" to grant relief affecting the judgment on appeal. One of the draft versions was limited to motions for relief under Rule 60, and was framed as an amendment of Rule 60. But the Committee thought it better to address all situations in which an appeal cuts off district-court authority. The broader rule seems better situated between Rules 62 and 63 than anywhere else. There is a reasonably logical sequence. Rule 59 addresses post-trial relief, by new trial or altering the judgment. Rule 60 addresses post-final-judgment relief by motion to vacate. Rule 61 expresses a harmless error rule that covers both Rule 59 and Rule 60 motions. Rule 62 deals with stays of enforcement, a common form of action on a judgment pending appeal. Rule 63 swings off in a different direction entirely, dealing with inability of a judge to proceed. Rule 62.1 seems to fit best within the chapter, Rules 54 to 63, captioned "judgments." And there is no better place than between Rules 62 and 63.

Choosing a caption proved more difficult. "Indicative Rulings" reflects terminology familiar to appellate lawyers, arising from the common approach that allows a district court that cannot grant relief to "indicate" that it would grant relief if the court of appeals were to remand for that purpose. The terminology is not likely to prove familiar to all lawyers. One possible alternative would be to bring up the tag line for subdivision (a): "Relief Pending Appeal." Then a new line would be needed for subdivision (a) — perhaps "Relief Available," or "Action on Motion." The Rule title might be made longer: "Relief From Judgment Pending Appeal: Indicative Rulings." The Style Project has favored long titles as a useful index device, and this might not be too much. The Committee concluded that it will be appropriate to adopt whatever title is agreeable to the Standing Committee.

Rule 68

The Second Circuit in a recent opinion suggested that the Committee should explore amending Rule 68 to establish standards for comparing the judgment with an offer for judgment in cases that involve both money damages and specific relief. The case is a good illustration of the question. The plaintiff demanded damages and an injunction restoring him to his previous job. The defendant's Rule 68 offer was $20,001 without any mention of injunctive relief. The jury awarded $140,000 in compensatory damages, but the plaintiff accepted a remittitur to $10,000. As to money alone, the judgment was $10,001 less favorable than the offer. But the court also awarded an injunction restoring the plaintiff to his former job. The court of appeals resolved the Rule 68

1330 comparison by asking whether the injunction was worth at least $10,001. On the fats of the case the
1331 injunction clearly was worth more than that; the judgment was more favorable than the offer.

1332 It is easy to understand the Second Circuit concern with the difficulty of comparing a
1333 judgment to a Rule 68 offer in a case that involves specific relief. The differences between the
1334 plaintiff's original job and new job in responsibilities, prestige, and opportunities for
1335 accomplishment were manifest and great. Other cases will present much more difficult
1336 comparisons. Comparisons often will be difficult when the focus is on specific relief alone. In an
1337 action to enforce a covenant not to compete, for example, the defendant might offer to submit to an
1338 injunction enjoining sale of five products in one state for two years. The injunction might cover four
1339 of the five products, add two others, and extend to two states for two years. Which is more
1340 favorable? Or if it is easy to say that offer or judgment is more favorable — the offer is for a one-
1341 year injunction and the judgment is for six months or two years — how can that be compared to an
1342 offsetting difference in damages?

1343 When Rule 68 was last considered in depth, the draft required separate comparisons of
1344 damages to damages and of specific relief to specific relief. As to specific relief, a judgment would
1345 be more favorable than the offer only if the judgment included all of the nonmonetary relief offered
1346 "or substantially all the nonmonetary relief offered and additional relief." The draft Committee Note
1347 concluded: "Gains in one dimension cannot be compared to losses in another dimension." That
1348 approach is quite different from the path followed by the Second Circuit, and should be easier to
1349 administer. That does not ensure that it is better.

1350 The decision whether to take up the Second Circuit's suggestion is tied to broader Rule 68
1351 questions. Suggestions to revise Rule 68 are made periodically by various sources. Usually the
1352 suggestions focus on a desire to add more effective sanctions so that Rule 68 offers will become
1353 more common. The hopes are to achieve earlier settlements and more settlements. Another hope
1354 is to encourage plaintiffs to bring small but strong claims, relying on an offer of judgment to
1355 recapture litigation costs that would include attorney fees. The Committee has twice developed
1356 elaborate proposals along these lines, once in the early 1980s and again in the early 1990s. Both
1357 times the projects were abandoned. The 1980s project proceeded to a point that generated
1358 substantial opposition. The 1990s project faltered in the face of ever-growing complexity, doubts
1359 whether attorney-fee sanctions fit comfortably within Enabling Act limits, and concerns about the
1360 impact of Rule 68 in the one area — claims that support statutory fee awards — where it is now used
1361 with some frequency.

1362 It would be possible to limit a Rule 68 project to the narrow confines of the Second Circuit's
1363 suggestion. But there are so many causes for dissatisfaction with some of its present incidents that
1364 it might prove difficult to justify any project that passes by clear problems while responding to one
1365 particular issue.

1366 It was noted that in Texas, at the insistence of the legislature, the Supreme Court wrote an
1367 offer-of-judgment rule. The project demanded serious effort. The result was meant to be a balanced
1368 rule, favoring neither plaintiffs nor defendants. It allows a 20% margin between judgment and offer
1369 before sanctions are imposed; that figure itself was much debated. It includes such provisions as
1370 one allowing retraction and subsequent renewal of an offer. As near as appears, the rule is not used
1371 at all.

1372 Some help may be on the way. Professors Thomas A. Eaton and Harold S. Lewis, Jr., are
1373 completing work on proposals to amend Rule 68 for statutory fee-shifting cases. The proposals
1374 draw from information gained in intensive interviews with plaintiff and defense attorneys in many

different states, focusing on employment discrimination and civil rights cases. The empirical foundations for their work could prove valuable in deciding whether to return once again to Rule 68.

The Committee agreed to defer further consideration of Rule 68. One participant, drawing from the Minutes reporting on deliberations in 1993 and 1994, reminded the Committee that one option may be abrogation.

Supplemental Rule C(6)(a)

Adoption of Supplemental Rule G led to several conforming amendments that withdrew provisions of civil asset forfeiture proceedings from other Supplemental Rules. An unintended omission failed to capitalize the first word in Rule C(6)(a)(i). One cure would be simply to capitalize "A." But a better parallel to subdivisions (1), (2), and (5) might be achieved by adding a few words:

(6) Responsive Pleading; Interrogatories.

(a) ~~**Maritime Arrests and Other Proceedings**~~ ***Statement of Interest; Answer***. In an action in rem:

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

The Committee agreed to recommend that the Standing Committee approve this revision for adoption without publication as an entirely technical amendment.

Federal Judicial Center Report

Thomas Willging reported on the Federal Judicial Center study of the Class Action Fairness Act. The study is aimed at measuring the impact of CAFA on federal-court resources. Since the report at the May meeting the study has expanded to include all 85 of the federal districts that will be studied. The period covered runs from July 2001 to June 30, 1005. That gives barely more than four months of experience with CAFA. Data will be added as the study goes on. But already, surprisingly, it has been possible to note an immediate impact on filings and removals. The rate of filing class actions has increased from 10.5 per day to 12 per day. Not all new class actions are related to CAFA. But there are significant increases in contract, tort, and "other" actions of the sort expected to be CAFA cases. The increase in labor cases, on the other hand, reflects Fair Labor Standards Act cases, not attributable to CAFA; this increase appears to be part of a long-term trend. The percentage of class actions based on diversity jurisdiction has increased from 13% to 19%. And cases removed rose from 18% of all class actions in federal court to 23%. Further work will provide more information about long-term trends, and also will reveal geographic patterns.

Judge Rosenthal expressed appreciation for the amount of work already done, and noted that this study will be very helpful in discharging the duty to report to Congress under CAFA.

New Topics

During the discussion of state holidays for the Time-Computation Project, the definition of "state" in Rule 81 was addressed. It was suggested that the Committee should consider adding territories to the definition. The topic will be put on the agenda.

1415 Discussion of Rule 23(h)(1) suggested that the Committee may want to give further thought
1416 to the need for clear expression of the relationship to Rule 54(d)(2), and also to the possibility that
1417 it would be better to set a fixed time for fee motions in class actions.

1418 At some point the Committee may want to study the discrepancy between Style Rule
1419 41(a)(1)(A)(i), which cuts off a plaintiff's right to dismiss an action by service of an answer or a
1420 motion for summary judgment, and Style Rule 41(c)(1), which cuts off dismissal of other claims
1421 only on service of a responsive pleading. It has been said that the difference reflects a mere
1422 oversight in 1948 amendments.

1423 ***Next Meeting***

1424 The most likely dates for the next meeting will be either April 12-13, 2007, or April 19-20,
depending on reconciliation of all competing schedules.

Respectfully submitted,

Edward H. Cooper
Reporter