ADVISORY COMMITTEE
ON
CIVIL RULES

Santa Rosa, CA
October 27-28, 2005

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
OCTOBER 27-28, 2005

1. Report on Judicial Conference session and chair's introductory remarks

   A. Judicial Conference approval of proposed rules amendments
   B. Minutes of June 15-16, 2005, Standing Rules Committee meeting (to be distributed in separate mailing)

2. **ACTION** — Approving minutes of April 14-15, 2005, Committee meeting

3. Overview of topics under consideration

4. **ACTION** — Review of suggested rules amendments submitted from bench and bar on Committee's docket

5. Relatively discrete proposals for consideration

   A. Rule 8: a smaller question
   B. Rule 15 — relation-back amendments
   C. Rule 26(a)(2)(B): expert reports from employees designated as testifying experts
   D. Rule 30(b)(6): notice or subpoena directed to an organization
   E. Rules 33 and 36: who signs answers to discovery responses
   F. Rule 48: polling the jury
   G. Rule 54(d) and Rule 58(c): motions for attorney's fees and the time to appeal
   H. Rule 60: indicative rulings

6. Broader projects

   A. Time computation project — in general
      i. Time periods within rules grouped
      ii. Draft time-period template under consideration by Standing Committee's Time-Computation Subcommittee
   B. Rule 56: summary judgment
   C. Notice pleading reconsidered

7. Style process protocol

8. Next meeting: to be determined

ADVISORY COMMITTEE ON CIVIL RULES

October 2005

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WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 20, 2005

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

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At its September 20, 2005 session, the Judicial Conference of the United States:

Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2005.

Committee on the Administration of the Bankruptcy System

Approved with respect to certain bankruptcy judgeships the fixing and transfer of official duty stations and designation of additional places of holding court requested by the circuit judicial councils and recommended by the Director.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Approved adoption of the Director's Interim Guidance Regarding Tax Information Under 11 U.S.C. § 521.

Committee on the Budget

Approved the Budget Committee's budget request for fiscal year 2007, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Committee on Rules of Practice and Procedure

Approved proposed amendments to Appellate Rule 25(a)(2)(D), Bankruptcy Rule 5005(a)(2), and Civil Rule 5(e) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed new Appellate Rule 32.1 with the condition that the rule would apply only to judicial dispositions entered on or after January 1, 2007, and agreed to transmit the proposed rule to the Supreme Court for its consideration with a recommendation that the rule be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 1009, 5005(c), and 7004 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Civil Rules 16, 26(a), 26(b)(2), 26(b)(5), 26(f), 33, 34, 37(f), 45, and 50 and Form 35 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Supplemental Rules A, C, and E, new Supplemental Rule G, and conforming amendments to Civil Rules 9, 14, 26(a)(1)(E), and 65.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rules 404, 408, 606, and 609 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Committee on Security and Facilities

With regard to the *U.S. Courts Design Guide*:

a. Endorsed *U.S. Courts Design Guide* Phase I revisions 9 through 18 and recommitted revisions 1 though 8 for further consideration;

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 14-15, 2005

The Civil Rules Advisory Committee met on April 14 and 15, 2005, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge Jose A. Cabranes; Frank Cicero, Jr., Esq.; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Dean John C. Jeffries, Jr.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; 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, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Chief Judge Anthony J. Scirica, former Chair of the Standing Committee, also was present. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Professor Daniel J. Capra, Reporter for the Evidence Rules Committee, attended the discussion of draft Civil Rule 5.2 by telephone as Lead Reporter for the E-Government Act Subcommittee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeff Barr represented the Administrative Office; Robert Deyling also attended. Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Elizabeth Shapiro, Esq., and Stefan Cassella, Esq., Department of Justice, were present. Brooke D. Coleman, Esq., attended as Rules Law Clerk for Judge Levi. Observers included Jeffrey Greenbaum, Esq. (ABA Litigation Section Liaison); Alfred W. Cortese, Jr., Esq.; and Anne E. Kershaw.

Judge Rosenthal opened the meeting by asking all participants and observers to identify themselves. New members Baylson and Varner were introduced. Judge McKnight's passing was noted with deep sadness. He contributed to the Committee's work in many valuable ways, including his service as chair of the subcommittee that worked so vigorously to develop the Supplemental Rule G proposal on the present agenda to recommend for adoption. He will be greatly missed. The impending conclusions of the terms of service of members Jeffries and Scheindlin also were noted, with the hope that they would attend the fall meeting immediately after completion of their formal duties.

Judge Rosenthal further noted that the Supreme Court has approved and transmitted to Congress proposed amendments to Rules 6, 27, and 45, as well as Supplemental Rules B and C. The Judicial Conference approved the proposed new Rule 5.1 at its March meeting, and sent the rule to the Supreme Court. Congress, meanwhile, has enacted the Class Action Fairness Act. The Committee will work with the Federal Judicial Center to monitor the short- and long-term effects this new law may have on the numbers and types of class-action cases brought to the federal courts.

The Style Project has been posted on the web and published. In these early days there have been 70 "hits" on the Style page, and 90 on the style-substance page. Work is going on with the Forms. The consultants have collaborated on a first draft that has been reviewed by the Reporter and is now being studied by Professor Rowe as consultant. If possible, it will be useful to ready the Forms for presentation to the Standing Committee on a schedule that would enable publication at a time that would correspond with completion of work on the Rules. Advisory Committee members should expect to become involved in this work soon. There is a lot of work to do, both in details and in the big questions. It will be important to avoid entanglement in the charms of detail. If the central issues can be addressed promptly, some of the details may properly be deferred for further work during the comment period.

John Rabiej delivered a legislation report. The current focus is on bills that would directly amend Rule 11 to undo the 1993 revision of the 1983 amendments. The safe harbor added in 1993 would be eliminated. Mandatory sanctions would be restored. Similar bills have been introduced in every Congress since 1995. The House passed such a bill in 2004. Now the proposal is back.

The Federal Judicial Center has undertaken a new survey of judges. The survey responses show an astonishingly high level of support for the 1993 rule, and resistance to amendments that would revert to the 1983 rule. The report is being transmitted to Congress.

Judge Rosenthal noted that the agenda materials have grown out of months of hearings, hundreds of written comments, and intense work by Committee members. She thanked everyone who participated in this arduous process.

October 2004 Minutes

The draft minutes for the October 2004 meeting were approved, subject to correction of minor errors.

I PUBLISHED RULES REVIEWED FOR ADOPTION

(A) Rule 5(e)

In November 2004 the Standing Committee published for comment rules that would authorize adoption of local district rules that require electronic filing. The Civil Rule version proposed a simple amendment of Rule 5(e):

> * * * A court may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.

The published Committee Note observed that the courts that already have adopted local rules that mandate electronic filing "recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general 'good cause' exceptions." The Note went on to suggest that experience with these local rules would facilitate gradual convergence on uniform exceptions.

There were not a great number of comments. The comments, however, suggested in many ways that the national rule should not rely on mere comment in a Committee Note to ensure that local rules will make sufficient accommodation for the needs of those who are unduly challenged by electronic filing. The Bankruptcy Rules Committee voted to include a new sentence: "Courts requiring electronic filing shall reasonably accommodate parties who cannot feasibly comply with the mandatory electronic filing." The Appellate Rules Committee, scheduled to meet three days after conclusion of the Civil Rules Committee meeting, also is considering alternative rule text provisions that would require local rules to recognize the need for exceptions.

Discussion began by agreeing to follow the lead of the other advisory committees. It is difficult to find any concern unique to civil practice that distinguishes the Civil Rules from the Bankruptcy or Appellate Rules in this respect, nor for that matter any concern unique to criminal procedure that might suggest that because the Criminal Rules incorporate the Civil Rules filing provision the Civil Rules should depart from the other rules. Uniformity should be pursued under the leadership of the Standing Committee.

Drafting the exception was discussed briefly. Several alternatives were set out in the agenda book. One concern is that Rule 5(e) and the parallel rules authorize local rules, so that it may be better to speak to what a local rule may do rather than to what a court may do. A second concern was that "reasonably accommodate" has overtones of disability discrimination law and might complicate, by inapt analogies, disputes over the drafting and application of local rules exceptions. A third concern was that although the comments emphasized the challenges that face pro se litigants,

including those lodged in prison facilities without ready access to Internet communication, it would be unwise to direct that pro se litigants must always be exempt from a mandatory e-filing requirement. Some courts are willing and able to support electronic filing by use of courthouse equipment, and both courts and the parties may benefit from it.

Responding to these concerns, one of the agenda book variations read: "may by local rule permit or — if exceptions are allowed for good cause — require papers to be filed, signed, or verified by electronic means." This formulation met the objection that "good cause" seems to call for individualized determinations on a case-by-case basis. On this view, it would be unwise to require that local rules provide for exceptions in terms that require a specific determination based on the circumstances of each litigant who requests paper filing.

A tentative variation was proposed and approved for further consideration as the several advisory committees work together to achieve a uniform provision mandating that local e-filing rules allow some exceptions from mandatory electronic filing:

> may by local rule permit or — if reasonable exceptions are allowed — require papers to be filed, signed, or verified by electronic means.

A second question was raised in reaction to the Appellate Rules Committee agenda. The Appellate Rules Committee has been asked to recognize that a court that requires electronic filing may also require that duplicate paper copies be filed. The request reflects the special concern that appellate judges want paper briefs. There may be similar concerns with respect to some civil filings, particularly briefs. It was noted that the cost of printing extensive papers is a serious drain on district-court budgets. After brief discussion, it was concluded that the circumstances of civil-action filings are so variable that the Civil Rules are properly distinguishable from whatever better-focused needs may arise with appellate practice. Neither Rule 5(e) nor the Committee Note need say anything about the prospect that a local rule may require duplicate electronic and paper filings. A different approach in the Appellate Rules — if one is taken — does not require uniformity.

B. Rule 50(b)

The August 2004 proposals included revisions of Rule 50(a) to conform to current Style conventions, and two substantive revisions of Rule 50(b). The first Rule 50(b) revision would permit renewal after submission to the jury of any motion for judgment as a matter of law made during trial. This would soften the current approach, which on the face of the rule permits a post-submission motion only to renew a motion that was made at the close of all the evidence. Numerous appellate decisions have begun to soften the present rule at the margins, and it has seemed time to substitute a new and clear provision. The second revision would restore a feature present in Rule 50(b) until an unexplained disappearance in 1991, setting a time limit for renewing a pre-submission motion after a jury has failed to agree.

Comments on the published rule generally were favorable, noting that despite nearly 70 years of familiarity the close-of-all-the-evidence requirement remains a trap for the unwary and does not serve any purposes that cannot be served by a motion made during trial. On the other hand, parts of a few comments suggested that it is not too much to expect lawyers to be "wary of and follow the rules."

The published rule text was approved with modest revisions. In Rule 50(a)(1)(A), a late Style Project change was adopted: "(A) ~~determine~~ resolve the issue * * *." Also in keeping with a

Style Project volte face, "considered" was restored to its position in present Rule 50(b): "the court is considered ~~deemed~~ to have submitted the action to the jury * * *." And at the suggestion of the Style Consultant, a comma will be removed: "no later than 10 days after the entry of judgment; or — if the motion addresses a jury issue * * *."

It was agreed that the Committee Note would be revised in one sentence to track the language of the 1991 Committee Note:

> Because the Rule 50(b) motion is only a renewal of the ~~earlier~~ pre-verdict motion, ~~it can be supported only by arguments made in support of the earlier motion~~ it can be granted only on grounds advanced in the pre-verdict motion.

C. Supplemental Rule G (with A, C, E, 9(h), 14, 26(a))

Supplemental Rule G was published in August 2004 to bring together in a single rule almost all of the Supplemental Rule provisions dealing with civil forfeiture. Many new provisions are added as well, to reflect developments in legislation, constitutional principles, and decisional law. The proposal was hammered out in subcommittee and Committee discussions that spanned a long period, and involved close cooperation with the Department of Justice and representatives of the National Association of Criminal Defense Lawyers. Perhaps because of this lengthy development, the published proposal drew few comments. But continuing review has pointed to several minor revisions that are described in the agenda materials. Most of these revisions were approved without further discussion, but several questions remained.

The first question went to the revised title for the Supplemental Rules. The agenda materials picked up a suggestion that "Maritime" be deleted from the title on the theory that no one any longer pays any attention to whatever technical distinctions may once have been drawn between "admiralty" and "maritime" matters. Further consideration has suggested that this change not be made. Many of the Civil Rules refer to the Supplemental Rules or otherwise refer to admiralty or maritime claims. So too do statutes. 28 U.S.C. § 1333 establishes original jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction," reflecting the Article III § 2 definition of the judicial power as extending to "all Cases of admiralty and maritime jurisdiction." It was agreed that the title should become:

> Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Cases.

The next subject of discussion was Rule G(6)(a), which as published provides: "The government may serve special interrogatories *under Rule 33* * * *." The cross-reference to Rule 33 was included to reflect a deliberate decision that these special interrogatories should count against the presumptive 25-interrogatory limit established by Rule 33. The government, however, believes that some cases present such complex standing issues that the special interrogatories directed to standing may push it too close to the limit. The paths of ownership and the claimant's relationship to the property may be very complex.

Discussion began by noting that generally the Committee has resisted making special exceptions from rules that provide presumptive limits. The Committee Note could refer to the need to get permission to exceed the 25-interrogatory limit in light of the occasional need to devote several interrogatories to preliminary claim-standing issues. But it was responded that the government is the only party doing discovery on standing. A typical example of the complex cases would be that Corporation A is owned by Corporation B; Corporation B's owners have transferred ownership to others, some of whom are fugitives. Working through the relationships to the defendant property that may support or defeat claim standing can require elaborate inquiry.

Sympathy was expressed for this view, with a suggestion that the rule text should be revised to retain the incorporation of Rule 33, but to add an express exemption of these special interrogatories from the numerical limit. An express rule provision seems better than retaining the published text and attempting to effect a release from the numerical limit solely by observations in the Committee Note.

An alternative was suggested: the rule text incorporation of Rule 33 could be deleted, while the Committee Note could observe that the Rule 33 numerical limit does not apply to Rule G(6) special interrogatories, while Rule 33 otherwise applies to special interrogatories as well as all others.

Both suggestions were resisted on the ground that a court will readily grant relief from the 25-interrogatory limit in cases that require a large number of special interrogatories.

On motion, the Committee voted, with one dissent, to strike "under Rule 33" from the rule text. The Committee Note will observe that the special interrogatories do not count against the presumptive limit to 25-interrogatories, but that Rule 33 procedures otherwise do apply.

The next question addressed revisions proposed for Rule G(8)(c). The revisions serve two purposes. One is to correct a misleading implication in published (8)(c)(iii) that a motion on the pleadings involves disputes of material fact. The other and more general purpose is to make it clear that the government can use each of three different procedures, successively or in combination, to raise the questions covered by (8)(c): motions addressed to the pleadings, summary judgment, or a hearing. The Committee approved this revision:

(c) Motion to Strike a Claim or Answer.

(i) At any time before trial, the government may move to strike a claim or answer:

(A) for failing to comply with Rule G(5) or (6), or

(B) because the claimant lacks standing ~~to contest the forfeiture~~.

(ii) The ~~government's~~ motion:

(A) must be decided before any motion by the claimant to dismiss the action:; and

~~**(iii)** If, because material facts are in dispute, a motion under (i)(B) cannot be resolved on the pleadings, the court must conduct a hearing. The claimant has~~

(B) may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the claimant can carry the burden of establishing standing ~~based on~~ by a preponderance of the evidence.

It was pointed out that under Style Project conventions, the three alternatives described in item (B) are independent; the government can pursue any or all of them.

The next question went to the Committee Note discussion of subdivision (4). The third paragraph of the published Note, appearing at page 24 of the agenda materials, addressed the choice

among alternative means of publishing notice of a forfeiture proceeding in these words: "A reasonable choice of the means likely to reach potential claimants at a cost reasonable in the circumstances suffices." The government has suggested that the Note should be revised to reflect the rule text: "The government should choose from among these means a method that is reasonably ~~A reasonable choice of the means~~ likely to reach potential claimants at a cost reasonable in the circumstances ~~suffices~~." This change was recommended by the agenda memorandum, subject to discussion whether both the published version and the revised version are unduly favorable to the government's interest in saving publication costs.

Discussion began by noting that the subcommittee encountered difficulty with this question. It was worried that the government might make arguments that weigh cost too heavily in the competition between cost and effective notice. But it was responded that the rule requires that any means chosen be reasonably likely to reach claimants. The reference to costs helps to reduce post-forfeiture squabbles by late-appearing claimants that a different and more expensive means of notice might have been more effective. It must be remembered that the published notice provisions of Rule G(4)(a) are supplemented by the first-ever provisions in Rule G(4)(b) that require direct notice to any person who reasonably appears to be a potential claimant on the facts known to the government. The Committee approved the proposed revised language.

The next topic explored the published Committee Note discussion of subdivision (4)(b)(iii)(B), which provides that notice to a potential claimant may be sent to "the attorney representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case." The published Note advised that "[t]his provision should be used only when notice to counsel reasonably appears to be the most reliable means of notice." The Department of Justice commented that this advice is contrary to the rule text, and invites endless disputes. In response to this comment, the agenda materials proposed a revised version: "Notice to counsel provides a desirable safety net when notice also is sent to the potential claimant, adding protection against the risk that notice to the claimant may miscarry. But this provision should be used to substitute for notice to a potential claimant only when notice to counsel reasonably appears to be the most reliable means of notice." A footnote observed that the Department of Justice would like one more sentence: "If notice is directed to the claimant but miscarries, notice to counsel satisfies this rule."

Discussion began with the statement that the Department of Justice routinely sends notice both to the potential claimant and to counsel. Typically counsel represents the claimant in a prosecution related to the civil forfeiture. Notice to the claimant may fail — a common reason is because, unknown to the Department, the claimant has been transferred from one jail to another. Due process should be satisfied by notice to counsel. The Committee Note could provide reassurance.

It was asked whether the better resolution of these questions might be to strike all of the attempt to explain, reducing this Note paragraph to a simple statement that notice may be directed to a potential claimant through counsel.

The first response was an observation that the attorney "may be long out of the case" when the civil-forfeiture notice is sent. The attorney may have undertaken a limited representation. Why should the attorney be subjected to additional obligations? Any provision for notice to the attorney is a matter for concern.

A similar response observed that many lawyers believe they are no longer involved after a conviction.

It was responded that Rule G(4)(b)(iii)(B) allows notice to the attorney "representing" the potential claimant — it is satisfied only if there is a current representation. The civil forfeiture complaint, moreover, typically comes before the criminal prosecution. This observation was picked up with the suggestion that the rule text might be amended to refer to the attorney "then representing" the potential claimant. But this suggestion was resisted on the ground that it would lead to arguments based on the precise timing of the representation.

A Committee member noted that in his experience forfeiture is routinely sought in the criminal prosecution. When it is not, the criminal defense lawyer often does not think that the representation extends to civil forfeiture proceedings.

The rule was defended on the ground that the only obligation it imposes on the attorney is to transmit the notice.

A motion was made to delete the last two sentences in the Committee Note paragraph running from page 26 to page 27 of the agenda materials, so it would read:

> Notice may be directed to a potential claimant through counsel, but only to counsel already representing the claimant with respect to the seizure of the property, or in a related investigation.

Discussion of the motion began with an expression of dissatisfaction with the rule itself. An attorney who fails to forward the notice may later face a claim by the potential claimant for the failure. This view was supported with the suggestion that Rule G(4)(b)(iii)(B) should be changed.

The rule text was defended on the ground that current law accepts notice to counsel as satisfying due process. But it was recognized that the speaker was not sure whether notice to counsel representing a potential claimant in a related investigation satisfies due process.

Those who questioned the rule itself recognized that notice to the attorney seems appropriate if the attorney is representing the claimant with respect to the seizure of the defendant property. And those who supported the rule agreed that it is important that the attorney's representation be in an investigation, administrative forfeiture proceeding, or criminal case that is related to the seizure of the property. An attorney providing representation in a matter of family law, estate planning, or other separate matters should not be addressed with the notice. But it was asked whether representation in an investigation or the like is "related" if the representation does not address the seizure? There are clear cases — the attorney may represent the potential claimant in a prosecution for the offense that gives rise to the forfeiture. But, it was protested, "related" is a potentially expansive word and is "not all that clear."

The rule was further challenged directly. An attorney who represents the potential claimant in the drug prosecution, which certainly looks like a related criminal case, does not want the obligation to forward notice of the civil forfeiture proceeding.

The rule was defended on the ground that it deals with the client, seeking to defuse a post-forfeiture challenge on the ground that there was no individual notice of the forfeiture proceeding. But this defense was attacked as an effort to convert the government's problem into the attorney's problem. And it was noted that the rule text may afford the government a choice among attorneys when the potential claimant has different attorneys providing representation in a number of different related proceedings.

A rule-friendly question asked how difficult is it for the attorney who gets notice to connect the notice with the client? The government is able to identify the attorney only because there is in

fact a representation in a related proceeding of some sort. But the doubters renewed the question whether "related" is too elastic.

A suggestion was ventured that the rule might require notice "to the potential claimant ~~or~~ and to the attorney representing the potential claimant," etc. But this suggestion was promptly rejected. At the least, notice to the potential claimant should suffice. The government may not yet know the identity of the attorney, nor whether the potential claimant yet has an attorney.

Discussion turned back to the sentence that appeared in the published Committee Note: "This provision should be used only when notice to counsel reasonably appears to be the most reliable means of notice." It was suggested that this sentence was inconsistent with the rule text, which simply provides an option to notify the potential claimant or the attorney. Rule G(4)(b)(iii)(A) does require that the notice be sent by means reasonably calculated to reach the potential claimant, but does not require the most reliable means.

The motion to delete all but the first sentence of the Committee Note paragraph describing notice to counsel for the potential claimant passed, 7 Yes and 4 No.

A later question asked whether the Committee Note might still be expanded to state that if notice is sent to a potential claimant but miscarries, notice received by an attorney representing the potential claimant satisfies the rule. This question will be noted in the final version of Rule G that will be circulated to the Committee before submission to the Standing Committee.

Going back to the rule text, a question was raised about Rule G(5)(a)(iii). The published text says simply: "A claim filed by a person asserting an interest as a bailee must identify the bailor." The government is concerned that the rule should impose a more specific requirement that a bailee specify whether the claim is for the bailee's own interest, is on behalf of the bailor, or both. A common illustration arises when cash is seized from a courier and claims are filed both by the courier and by another person who asserts an interest as owner-bailor. It is possible that a bailee can have a claim to protect its own possessory interest, while the bailor also has a claim. But the bailee may be innocent, while the bailor is not. It was agreed that (5)(a)(iii) would be revised to read:

> A claim filed by a person asserting an interest as a bailee must identify the bailor and, if filed on the bailor's behalf, must state the authority to do so.

The Committee further approved a number of minor changes that were described and explained in the agenda materials.

The Committee then voted to send the revised Rule G to the Standing Committee with a recommendation that it be transmitted to the Judicial Conference for adoption. This action included the published amendments to Supplemental Rules A, C, and E to conform to adoption of Rule G, and also the published amendment of Civil Rule 26(a)(1)(E) that adds to the exemptions from initial disclosure requirements "a forfeiture action in rem arising from a federal statute."

In addition, the approval of Rule G for adoption included two conforming amendments recommended for adoption without publication. The first amends Rule 9(h) to reflect the changed Supplemental Rules Title:

> A pleading * * * may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for ~~Certain~~ Admiralty ~~and~~ or Maritime and Asset Forfeiture Cases. * * *

The second amends Rules 14(a) and (c) to correct the cross-reference to Supplemental Rule C to correspond with the new designation as Rule C(6)(~~b~~a)(1).

D. Electronic Discovery: Rules 16, 26, 33, 34, 37, 45

A package of proposals dealing with discovery of electronically stored information was published in August 2004. Amendments were proposed for Rules 16, 26, 33, 34, 37, and 45. More than 250 requests to testify and written comments were received, and testimony was taken from many witnesses at more than three days of public hearings.

Judge Rosenthal introduced discussion the proposals by noting that the agenda book puts the materials on context. For each rule, the materials propose changes from the published proposals and frame the issues raised by the proposals and changes. The suggested changes have emerged as Committee members have responded individually and in groups to the public comments, and have continued to be made after the agenda book was distributed. The public comments provided "the best CLE we've ever had." The comments and testimony provided a great deal of helpful and sophisticated advice.

In 1999, Judge Paul Niemeyer, then Committee Chair, said that the Committee must address the need to devise methods that will achieve full disclosure without imposing undue discovery burdens in an era of almost unlimited access to information. The 2000 discovery rule amendments set the stage for the work that followed. Now we have specific proposals and detailed reactions to them. The next task is to evaluate the proposals in light of the reactions and — if possible — to forge a final package that can be recommended for adoption.

Rule 33

The published proposal would add words to Rule 33(d) to make it clear that a party may respond to an interrogatory by making available electronically stored information that enables the requesting party to search for the information itself. The Committee Note describes the steps that may be necessary to satisfy the existing Rule 33(d) requirements that the burden of deriving the answer must be substantially the same for the requesting party as for the responding party, and that the responding party specify the sources of information in a way that enables the requesting party to identify the sources "as readily as can the [responding] party."

It was agreed that no reason had emerged to make any change in the published rule text. Changes in the Committee Note, identified at footnotes 4, 5, and 6 on pages 4-5 of the agenda book materials, were approved.

Rule 34(a)

One part of the changes proposed for Rule 34(a) is independent of the electronically stored information issues. These changes make it clear that a party may ask to test or sample documents or electronically stored information, just as it may ask to test or sample tangible things. The only question raised during the comment period was whether this change might allow a party to demand direct access to another party's electronic information storage system. Changes in the Committee Note are recommended to address this concern. The changes say that the right of testing and sampling "is not meant to create a routine right of direct access to a party's electronic information system," and that courts should guard against undue intrusion through inspecting or testing such systems. The Committee approved Rule 34(a) and the changes in the Committee Note.

A second question raised by the Rule 34(a) proposals is whether electronically stored information should be defined in parallel with the definition of "documents," or whether electronically stored information should be included within the parenthetical that identifies many categories of information as subsets of "documents." This question was presented by alternative drafts. Alternative 1 carries forward the published proposal, defining electronically stored information in parallel with documents. Alternative 2 presents a "definition" or exemplification of "documents" that includes electronically stored information.

Discussion began with the observation that one purpose in adding electronically stored information to Rule 34(a) is to support drafting of the other rules provisions that address discovery of such information. No set of words perfectly describes the phenomenon, but "electronically stored information" seemed to do the job better than anything else. It seems broad enough to describe both present storage techniques and future developments. If indeed technology finds ways to store and retrieve information by means better described as chemical or biologic, language carried forward from present Rule 34(a) will cover the new technology, either as a subset of documents or as a subset of electronically stored information. Treatment as a subset of electronically stored information will likely work better if the issues of storage and retrieval resemble current computer technology more closely than traditional paper storage.

Alternative 1 "gives a touchstone that can be used in other rules." It recognizes that now, or in the near future, most discovery will seek electronically stored information. Many practicing lawyers have raised an objection that the bar has conducted discovery since 1970 under a Rule 34(a) that clearly defines computer-based information within the category of documents, and should not now be forced to make separate demands for production of "documents" and for production of "electronically stored information." This minor adjustment of discovery requests, however, does not seem to impose a significant burden. And over the years it has become increasingly awkward to describe the more complex and constantly evolving forms of computer-based information as "documents." Dynamic data bases are frequently cited as examples. The American College of Trial Lawyers suggested that Rule 34(a) might instead be revised to refer to "information," but that term is so broad as to require complicated qualifications.

Alternative 2 presents a different choice that is essentially a matter of rules architecture. By including electronically stored information as one species of document, it makes it clear that a request for documents includes electronically stored information. But that clarity is suggested as well by the Committee Note for Alternative 1. This alternative may present a risk that other rules drafted for electronically stored information do not have their intended meaning. A request for a digital photograph, for example, might be met by the argument that it is a document, not electronically stored information.

A motion to adopt the first alternative was supported with the observation that there is a tendency for the Civil Rules to become archaic because they are so seldom changed. "Document" does not easily describe dynamic data bases or other forms of computer-based information.

It was responded that "document" has long been a term of art. In daily practice, it is understood that it includes information from all sources. And it avoids strained arguments such as a contention that once electronically stored information has been printed it ceases to be electronically stored information but has become a document. There is no benefit from alternative 1. It is better to continue to use a single word — document — to describe all of these things.

A similar argument for Alternative 2 urged that neither approach is perfect. The rule aims at obtaining information or data. At trial, a foundation must be laid to introduce the information as

evidence. "Document" has become the descriptive word of art. The real object is "information or data in whatever form it is kept." It is better to stick with "document." So, for example, recordings have come to be called documents.

Alternative 1 was then championed on the ground that "electronically stored information" is becoming an accepted term in practice. It better reflects the dynamic character of such information as something that exists and mutates apart from a piece of paper. The practicing bar will focus on electronically stored information; there is no risk that discovery will fail because only documents are requested. Setting electronically stored information before "documents" and outside the exemplification of "documents" helps in drafting the other rules that address discovery of electronically stored information, particularly the "two-tier" provisions of Rule 26(b)(2).

Support for Alternative 1 was also expressed on the ground that "there is no real difference in practice." Alternative 1 corresponds with the published proposal, and is easier to adopt.

The suggestion that both Alternative 1 and Alternative 2 might be abandoned in favor of a simple reference to "information" was brought back. It was urged that the underlying idea is production of "media that retain information." It is important that the information be stored, not "transient" in the way of things held briefly during computer operations and then discarded. "Information" is not a desirable substitute.

Alternative 1 won further support on the ground that it supports the proposals to amend Rule 26(b). At the same time, it was asked whether we could abandon all of the material in the list of items that are documents: why not simply use the Committee Note to remind people that writings, drawings, graphs, and the rest are documents? Part of the response was that careful lawyers will continue to use all of these items in defining a request for documents, so it makes no real difference.

Ambivalence was expressed by another Committee member. The advantage of Alternative 1 is that it was published, and it does support the drafting of the other proposals. Apart from that concern, Alternative 2 is better. But we might as well adhere to Alternative 1.

Stronger support for Alternative 1 was expressed by suggesting that "Alternative 2 is too arcane. Alternative 1 is evolutionary — it's kind of where we are now." The visionary alternative would be "recorded information," but there is no need to adopt a visionary rule.

A motion to adopt Alternative 1 passed, 10 yes and zero no.

A related drafting issue was raised. Drawing from present Rule 34(a), the published proposal carries forward "other data or data compilations stored in any medium — from which information can be obtained, translated, if necessary by the respondent through detection devices into reasonably usable form * * *." It has been suggested that we should delete "through detection devices." This suggestion led back to the question whether the "list," described as long and complicated, is useful. But the list has been very useful historically; it may remain useful to illustrate the range of examples covered by Rule 34. And taking it out of the rule may have a practical effect, even if it is transferred to a Committee Note. The rule text will endure and command attention; the Committee Note will not.

Retention of most of the examples was further supported on the ground that the definition of electronically stored information should be broad and to some extent open-ended. As the proposal stands, the very same set of examples are used to "define" or exemplify both "documents" and "electronically stored information." But some things are inherently one or the other. A digital photograph seems more electronically stored information than document; a traditional negative or

print seem more a document than electronically stored information. The Committee has repeatedly heard that future computers may rely on chemical or biologic technologies; retaining "other data or data compilations stored in any medium" is important.

It was agreed to delete "through detection devices." These words, adopted cautiously in 1970, are now antiquated. The work of this rule segment is done by "translated, if necessary, by the respondent ~~through detection devices~~ into reasonably usable form." A motion was then made to drop all of the "translated" segment. It was protested that this would lose the allocation of the translation burden to the respondent. It may be that there is some redundancy between these words and the proposal to provide in Rule 34(b) that electronically stored information may be provided, absent contrary agreement or order, in a reasonably usable form. But it is useful to carry forward an expression that has endured in the rules for nearly 35 years. The question was deferred for possible further consideration during the discussion of Rule 34(b).

Finally, it was agreed that it is useful to add one word to the published proposal by referring to data or data compilations stored in any medium.

At the conclusion of the Rule 34(b) discussion, it was suggested that more words be deleted from Rule 34(a): "and other data or data compilations stored in any medium — from which information can be obtained, ~~translated, if necessary, by the respondent into reasonably usable form,~~ * * *." The suggestion was resisted. Again, it was observed that the Rule 34(b) provision for producing electronically stored information in reasonably usable form only states one of two alternative "default" forms of production to be invoked if the requesting party does not specify a form in the request and the responding party does not state a form in the response. The proposed new Rule 34(b) provisions, further, apply only to electronically stored information. If new non-electronic technologies emerge, this part of Rule 34(a) will continue to be the central provision for production in reasonably usable form. Finally, this provision may have some bearing on the problems that may arise if a responding party seeks to produce information in a form in which it is ordinarily maintained but that is not reasonably usable by the requesting party.

Rule 34(b)

Discussion of the proposed Rule 34(b) amendments began with some new drafting details. Rather than refer simply to the "form" of production, the revised draft refers to the "form or forms" of production. This change reflects the proposition that different forms of electronically stored information may best be produced in different forms. An image, for example, is likely to be produced in a form quite different from the form used for e-mail messages. Wordprocessing documents maintained in different programs may be best produced in different forms, and so on. It is recognized that a simple reference to the "form" of production is consistent with requesting or providing in different forms for different sets of information, but it seems useful to emphasize the point by this more expansive drafting. This proposition is further underscored by breaking out from part (ii) the provision now made a separate (iii), stating that a party need not produce the same electronically stored information in more than one form.

Other changes in the Rule 34(b) text were noted. The sentence appearing at lines 42 to 46 on page 20 of the agenda materials is presented as a conditional alternative to the proposal to add a new Rule 26(b)(2)(B) to address the problem of information that may be stored in sources that are difficult to access. If the 26(b)(2)(B) proposal is adopted, this sentence will be dropped from Rule 34(b).

New material is added to the sentence that appears at lines 46 to 49. The purpose is to require the responding party to state the form or forms it intends to use for production when the

requesting party has not specified a form in the request. This requirement will ensure that the requesting party understands what is intended and has an opportunity to request a different form before production is made. An alternative might be found in the comments suggesting that the rule require the requesting party to specify a form, but the requesting party may not know enough about the responding party's system to be able to make an intelligent request. It was asked why the rules at times refer to a responding party and at other times refer to a producing party. In this setting, "responding" seems appropriate because there has not yet been any production. Rule 34(b) itself describes the first step after a request to produce as a "written response."

Support was expressed for requiring that the response state the intended form of production, whether as an objection to a form specified in the request or as a statement when the request does not specify a form. To be sure, a lawyer not yet sophisticated in electronic discovery may not recognize the possibility that alternative forms of production may be possible. But the form of production is an important issue. The requesting party needs a form that has good search characteristics. The requesting party, moreover, may not know enough about the forms of storage used by the responding party to be able to specify a form. Often a party conference or discovery is needed to provide that information. This issue should be flushed out in the response to the request; there is no other logical time to set for the designation.

Additional support was expressed, with the caution that the rule should make it clear that the responding party "does not have the final word." The responding party states the form it "intends" to use. If that does not suit the requesting party's needs, the parties must negotiate; if negotiation fails, the court must resolve the matter.

It was asked whether a responding party might simply turn over the information without first making a response, and choose the form of production by the act of producing.

A different observation was that even the responding lawyer may not know at the time of the response — 30 days after the request is served — what forms the client has, or what forms make the best sense for production.

Discussion took a different tack with the suggestion that there is an ambiguity in "form or forms." The responding party, for example, may have information in a form searchable by a program that the requesting party is not licensed to use. The responding party may prefer to respond by transferring the information to a form searchable by a different program that the requesting party is licensed to use. The rule does not preclude response in that form. Indeed, it clearly allows the responding party to designate the program form it will use for production.

An adverse reaction suggested that the responding party should not be required to state a form of production if the requesting party does not specify a form. The responding party should be allowed to produce in its choice of form, leaving it to the requesting party to work things out later if need be.

This reaction led in turn to an observation that this provision is tied to the "default" provision in part (ii) that applies when the request does not specify a form of production. The responding party may produce in a form or forms that are reasonably usable by the requesting party. (This default provision was expanded in the later discussion.) This default provision will work better if the responding party must state the form of production before producing, so that the requesting party can determine whether the form is usable.

Drafting alternatives were discussed. It was suggested that the duty to state the form of production should be separated. The first provision should apply only when the requesting party

specifies a form of production and the responding party objects to the form. The second provision should be integrated with the part dealing with the default form of production when the request does not specify a form. It was objected that this separation may lead to unnecessary courtroom steps; it is better to get the statement in the response even if the request does not specify a form of production. The statement fits nicely with the response to the request. There is no procedural strait jacket here; if the responding party needs more than 30 days to state the form of production, it can get more time to respond. The party who simply produces without first responding acts at its own risk that the form it chooses, ignorant of the plaintiff's interests or needs, will not be reasonably usable.

The drafting debate continued after the observation that the only dispute seemed to involve drafting — everyone was agreed that the responding party should state the intended form of production before producing.

The argument to provide two statements of the responding party's duty to specify the form of production was renewed. A first provision when the request specifies a form; a second provision coupled to the default form rules in (ii), requiring a statement to be made before actually producing. And again it was asked just when the responding party is to provide its statement? The proponent suggested these words: "before producing the information the responding party must specify the form it intends to use."

This argument was again met by the counterargument that the question of form should be raised at the very outset of the discovery process. It is important to confront the question before a producing party can argue that it has invested in preparing to produce in one form and should not have to shoulder the burden of switching to production in a different form. In every case involving complex discovery, there will be initial deposition discovery directed at the form of production. It would be better to state the duty twice, if need be, rather than separate it so that the responding party's duty to state the form of production appears only in the default-form provisions.

A different compromise was suggested — the responding party's duty could be set out in (ii) when then request does not specify a form, but the rule would direct that the statement must be included in the written response to the discovery request.

It was agreed by several Committee members that the goal is to require that the responding party state the intended form of production in the response to the discovery request. (ii), on the other hand, addresses actual production. Stating the initial form fits well in the initial response, coupled to the duty to state the intended form of production when the responding party objects to a form specified in the request. If the responding party is not yet able to specify a form, the response likely will say something general — production will be made "in a form or forms to be determined in consultation with our technical experts." That response will do the job of focusing attention.

It was protested that providing that the responding party "must" state the form of production "seems strong." The Committee Note should reflect that the responding party may need more than 30 days to determine the form of production, and that it should not always be bound to adhere to the form initially stated. A response was that usually the request and response will occur after the Rule 26(f) conference; by that point the producing party ordinarily should be able to state a form or forms of production.

It was agreed that the duty to state the intended form of production should remain as proposed in lines 46 to 49. The Reporters will consider possible Note changes to reflect the concerns expressed in the discussion: a responding party who fails to specify a form in its response should not be forced to produce in whatever form the requesting party later demands. The 30 days allowed for

a response may not suffice to make an intelligent choice. And a party who produces without first making a response may be vulnerable to a demand that it produce in another form better suited to the requesting party's needs.

The default form of production then came on for direct discussion. The published proposal provided a default form of production to be used when the request does not specify a form and a form is not specified by party agreement or court order. The form could be either "a form in which it [the information] is ordinarily maintained, or in an electronically searchable form." Public comments suggested difficulties with each of these alternatives. The "ordinarily maintained" form seemed to suggest that production must include metadata and embedded data, information not apparent "on the screen" and often completely unknown to the person who generated the electronic file. Reviewing such information for relevance, responsiveness, and privilege and other grounds for protection can add significantly to discovery costs. There is no close analogue to such problems with paper discovery, and the burdens may not be appropriate. Some comments, moreover, suggested that production in "native format" generates problems of integrity — the information may be transformed after production, often unintentionally, both in the hands of the requesting party and in the hands of the producing party.

The alternative option to produce in an electronically searchable form also drew adverse comment. There are many degrees of searchability; a party might produce in a form that is marginally searchable rather than much more readily searchable forms that could be produced even more easily. Some forms of electronically stored information, moreover, may not be electronically searchable; "images" have been among the more frequently offered illustrations. This alternative was proposed in the expectation that it would benefit from vigorous comment. The comments suggest that it is not a workable provision.

The revised proposal presented in the agenda materials is that the default form of production must be "reasonably usable by the requesting party."

Two difficulties were immediately suggested. The requesting party may have idiosyncratic information systems that prevent reasonable use of most of the electronically stored information held by other parties. It should not be able to impose the costs of its peculiar system on others. And the responding party may have information in a form that is not reasonably usable by anyone, including the responding party. "Legacy" data stored in antiquated formats and perhaps readable only on museum hardware is an example.

The next observation was that the "default" provision is much more than a simple default. It will become the baseline for negotiating the form of production. The producing party may want to reduce functionality, searchability. "Reasonably usable" will encourage production in .pdf or similar unsearchable forms, or even in paper. The proposed Committee Note language suggests that usually electronically searchable form is required, but that may not fully reflect what is at stake.

"Reasonably usable" was defended as an attempt to reach the same goal as the published "electronically searchable," but in a way less vulnerable to objections. But account must be taken of the fear that the producing party will deliberately choose a form that degrades the searchable qualities of the information. That is part of what makes it important that the parties discuss the form of production at the Rule 26(f) conference, and that if the conference does not resolve the matter the responding party specify the intended form of production before it actually produces the information. The Committee Note revisions are designed to speak to these questions. The Note recognizes that the responding party may have information in a form that the responding party cannot search electronically, and accounts for that.

It was asked again whether the rule should say something about the need to limit production in a form that reduces functionality. A spreadsheet, for example, may be producible at low cost in a form that carries forward the full search capacities enjoyed by the responding party, or in a form — perhaps at higher cost to the responding party — that is much less easily searched. At the same time, it must be recognized that the processes that achieve an important "functionality" may themselves deserve protection as proprietary information; some reductions in searchability may be proper or even necessary. This topic is too important to be left to the Committee Note alone; it should be addressed in rule text. This is a "big deal in current practice."

One possibility might be to attempt to express the element of searchability in defining the form or forms of production. The first response was that although "electronically searchable" was one of the alternatives in the published proposal, there was no clearly focused approach to the question of maintaining or degrading the search functions. It was not meant to be "particularly aggressive." But it was protested that "electronically searchable" was not meant to allow the responding party to eliminate functional search characteristics that it is able to employ.

A different understanding of "electronically searchable" was expressed. This view was that it was a "scaling down" from production of information in the form in which it is ordinarily maintained. It contemplates a form that fits the requesting party's need for the information.

The proponent of addressing reduced search functions in the rule agreed that there must be an accommodation for good reasons to reduce functions.

Another view was that the default form of production should not be "a lot less useful" to the requesting party than it is to the responding party. But the rule should not require production in a form that enables the requesting party to do things that the responding party could not do with the form in which the information is ordinarily maintained. The producing party itself may not be reasonably able to access or use information that it "has" only in an extended sense. This issue is one that ties to the questions addressed by proposed Rule 26(b)(2)(B), which addresses discovery of information stored in sources that are not reasonably accessible. Rule 34(b) does not override the separate protection provided by 26(b)(2)(B). The Committee Note might say as much. But all of Rule 26 qualifies all of the remaining discovery provisions in Rules 30, 31, 33, 34, 35, and 36; perhaps there is no need for a redundant reminder. For that matter, the published rule did not require production in a reasonably usable form, nor in an electronically searchable form — the responding party could produce in the form in which the information is usually maintained.

The possibility of improved rule language was opened, but subordinated to possible guidance in an expanded Committee Note. "Reasonably usable" is flexible, and draws directly from the language of Rule 34(a) that calls for a responding party to translate data into reasonably usable form. The Committee Note can give guidance on application in specific contexts. It might, for example, say that a party who has information in a form that can be searched efficiently ordinarily should produce in that form or in an equally searchable form, unless limited by proprietary interests in the technology.

More directive Committee Note language was offered as an alternative. At a minimum, the Note might say that "in most circumstances" production must be in a form as easily searched as the form maintained by the responding party. It would be better to say that the responding party should not be allowed to degrade functionality absent extraordinary circumstances or a showing of prejudice. But the published proposal, requiring production either in the form ordinarily maintained or in an electronically searchable form, would better support the appropriate directions in the Committee Note.

Responding to a question whether a direction to produce in equally searchable form would raise proportionality concerns, the proponent suggested that usually production in such form will cost less. "Producing parties invest heavily to reduce functionality." Then the requesting party has to invest more to restore the functionality. "Searchability" can be maintained without providing the "full functionality" of the producing party's system.

With a passing note that the proposal says that the responding party "must," not "may" or "should," produce in a specified default form, it was suggested that going beyond "search" "is wholly uncharted waters."

A motion was made to adopt the proposed revised language to replace the published proposal:

> **(ii)** if a request ~~for electronically stored information~~ does not specify the form or forms for producing electronically stored information, ~~or production,~~ a responding party must produce the information in a form or forms that are reasonably usable by the requesting party ~~in which it is ordinarily maintained, or in an electronically searchable form~~.

The motion failed, 6 Yes and 7 No. The result was to strike the "reasonably usable" substitute and restore the alternative default forms in which ordinarily maintained or electronically searchable.

One of the members who voted "no" then suggested that the matter should be reconsidered. There continue to be good reasons to doubt the published version, particularly as to the alternative to produce "in an electronically searchable form." A one-vote margin of decision, moreover, suggests the need for further work.

It was suggested that it may be possible to combine elements of the published proposal and the newer substitute. "Reasonably usable" is better than "electronically searchable." A form may be electronically searchable but much less useful than the ordinarily maintained form. Beyond that, in many cases .pdf or similar formats are perfectly usable. And even today, it is common to find that all parties agree on production in paper form as sufficient to their needs.

The Committee was reminded that the comments expressed concern that a default calling for production in a form ordinarily maintained by the responding party might call for "native format" production, including metadata and embedded data. But it was noted that at least in many circumstances the alternative default form would remain available — the responding party could strip out the metadata and embedded data and still produce the information in a form that is electronically searchable or that is reasonably usable by the requesting party.

A different problem with "native format" production was again recalled. Several of the comments suggested that it is difficult to maintain the integrity of native format files. A "reasonably usable" form is a requirement the parties can live with and work out. The requesting party, after all, can specify a form it wants.

The analogy to paper records was invoked. With paper records, it is important to honor the Rule 34(b) command to produce them "as they are kept in the usual course of business," or else organized and labeled to correspond with the categories in the request. The present task is to adapt this concept to production of electronically stored information. We do not want the responding party to make it unnecessarily difficult for the requesting party to use the information.

A Committee member asked whether the rule need specify any default form at all. Why not just rely on the parties to work it out? An earlier observation was repeated — the "default" form specified in the rules will become the baseline for the parties' discussions and negotiations. "The battleground is not the bumpkin litigant." The problem lies in attempts to produce in a format that is not searchable. But the rejoining question asked why it is not enough that the rule will require the responding party to state the form of production before it produces — the requesting party then has an opportunity to negotiate for a different form, and to invoke the court's supervision if negotiations fail.

It was suggested that Rule 34(a) already provides a default of sorts in requiring that a party who produces "data or data compilations" must translate the data into reasonably usable form. Perhaps that provision is enough of itself? The published "electronically searchable" does not protect against production in degraded — less searchable — form. The central question may be the level of guidance to be provided in the Committee Note.

Greater guidance in the rule was urged. "Reasonably usable," particularly as it appears in Rule 34(a) — where it has appeared since 1970 — will always support arguments for production in .pdf, similar nonsearchable forms, or paper. If the Committee does not want that argument to be made in every case, Rule 34(b) should provide better guidance. And the Committee Note can say that if special circumstances require, the court can order production in a form that is not electronically searchable and that differs from the form ordinarily maintained.

A parallel observation was that the current draft Committee Note covers these points nicely. The default rule will have effect not in the big cases, but in the "less heavily staffed" cases.

"Reasonably usable" was supported by the argument that courts continually rely on tests expressed in terms of reasonableness. The words invite focus on the particular context. And that is what this rule should do. It is the antithesis of a Manual on Electronic Discovery, something no one wants the rule to become.

A motion was made to combine elements of the published proposal with elements of the agenda book proposal:

> **(ii)** if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or that are reasonably usable by the requesting party;

It was suggested that the Committee Note should be revised to provide stern warnings against relying on the "reasonably usable" alternative to produce in a form that degrades the functionality available to the responding party.

A related question asked whether, if the motion should pass, the Committee Note would take a clear position on the question whether production in the form ordinarily maintained includes embedded data and metadata? It is important to be clear, lest the question be litigated continually and with conflicting results. Discussion of this question observed that however it may be for wordprocessing programs, there are real problems with requiring production of embedded data and metadata for other programs. It was noted again that "native format" information may not be stable, and that a clear Committee Note statement that production in the form ordinarily maintained always prohibits deletion of embedded data and metadata will lead to deletion and production as a form "reasonably usable."

It was said again that the Committee must focus on preserving the search characteristics and "functionality" available to the responding party. Issues as to embedded data and metadata arise only if the responding party opts to produce in the form ordinarily maintained. They disappear if the responding party falls back on a "reasonably usable" form. The Committee Note should focus on search functionality.

Further agreement was expressed with the suggestion that the Committee Note should make clear the impact of the alternative default forms on producing embedded data and metadata. But a caution was raised: unless the Committee is quite confident of what it should say, "the less you say the better."

Harking back to the rule text, it was observed that many of the comments by technically adept lawyers and experts assume that production in the form ordinarily maintained includes embedded data and metadata; that the form ordinarily maintained is "native format." "Reasonably usable," on the other hand, does not have these connotations. It was protested that "reasonably usable" should not be embellished in the Committee Note with references to embedded data or metadata.

Support for retaining the "form ordinarily maintained" alternative was expressed by observing that some parties may prefer this as the simplest, lowest-cost alternative. If the form ordinarily maintained is not reasonably usable by the requesting party, the responding party should not be forced to bear the cost of converting the information to a form that is reasonably usable by the requesting party. The court, after all, retains power to specify a different form of production.

Other Committee members argued that it is not possible to draft a Committee Note that will provide "enough informed detail" about what "form ordinarily maintained" means. But the Note can say that "reasonably usable" means searchable.

The embedded data and metadata question was put again: should the Committee Note say that if the form ordinarily maintained includes such data, they must be produced under this alternative? Or should it say something else on the subject? The Committee Note now says very little. One occasional hint has been that metadata automatically generated by the computer are likely to have greater functional value in discovery, while embedded data may be more likely to raise privilege problems; it is unclear whether there is anything to this suggestion, nor what might be said in response.

The motion was restated: the rule text should adopt as default alternatives production in a form or forms in which the information is ordinarily maintained or that is reasonably usable by the requesting party, coupled with "non-Manual but increased detail in the Committee Note." The motion passed, 11 yes, 2 no.

It was suggested that consideration should be given to adding one word: "in a form or forms in which it is ordinarily maintained or [an] other reasonably usable form."

Brief discussion of possible Committee Note revisions began by suggesting that the "reasonably usable" form is important outside the default setting. If the requesting party specifies a form, the responding party's opportunity to object does not mean that the responding party can insist on production in a form that is not reasonably usable. But it was responded that this proposition is so obvious that it need not be stated in the Note. A further response was that the published Note included a statement that when an objection is made to a requested form of production the court is not limited to the form specified by the requesting party or the specified default forms. This language might be restored, perhaps with an additional statement the court also is not limited to the form stated by the responding party.

It was agreed that the Committee Note should be further revised, particularly to address the need for clarity on points that will recur frequently in practice.

Rule 26(a)

The August 2004 published proposals did not include any possible revision of Rule 26(a). But it may be desirable to amend Rule 26(a)(1), and perhaps also 26(a)(3), to conform to the changes recommended by the published proposals. No change in meaning is intended; to the contrary, the purpose is to avoid possible unintended confusions.

Present Rule 26(a)(1)(B) calls for initial disclosure of "documents, data compilations, and tangible things." Because the Committee has chosen to carry forward the published version of the Rule 34(a) amendments, "data compilations" is unnecessary and perhaps confusing. As Rule 34(a) would be adopted, "data compilations" often are both documents and electronically stored information. It is better to revise (a)(1)(B) to read:

> documents, electronically stored information, ~~data compilations,~~ and tangible things * * *

This change was approved as a conforming amendment, to be recommended to the Standing Committee for adoption without publication for comment.

The pretrial disclosure provisions of Rule 26(a)(3)(C) present a similar question, but in a context that may make a conforming amendment unnecessary. The revision would read:

> **(C)** an appropriate identification of each document, all electronically stored information, or other exhibits, including summaries of other evidence * * *

The inclusion of "all" was questioned, but defended on the ground that electronically stored information "does not come in pieces." But "all" might suggest disclosure even if the electronically stored information is not to be offered as a exhibit. The purpose of pretrial disclosure is to identify things that will be offered in evidence at trial. If electronically stored information is to be offered, it will be as an "exhibit"; the present rule requires disclosure without need for change. There should be no confusion. A motion to retain present 26(a)(3)(C) without change passed, 12 yes, zero no. But it was suggested that the Style Project may consider further the question whether "exhibit" is sufficiently broad to include "document." The best revision may be "identification of each exhibit, including * * *."

Rule 26(f)

The published proposals made three changes in Rule 26(f).

The first change appears in the initial unnumbered paragraph, adding to the directions for the Rule 26(f) conference that the parties are "to discuss any issues relating to preserving discoverable information." This provision applies to all forms of information, not only electronically stored information. The comments expressed concern that although this is indeed a desirable subject for discussion, explicit focus in the rule may invite profligate resort to preservation orders. Committee Note language was prepared to respond to this concern, suggesting a strictly parsimonious approach to preservation orders. The draft in the agenda materials included a statement that a preservation order should be entered over objections only if "there is a substantial risk that discoverable

information will become unavailable unless an order is entered." Concerns have been expressed about this advice as venturing too close to a statement of standards for preservation orders. It can be cut back to the opening observation that a protective order entered over objections "should be narrowly tailored." This reduction was supported on the ground that there is a body of decisional law on the appropriateness of preservation orders. The Committee is not proposing a rule that sets preservation-order standards. It is better not to intrude on the subject in the Committee Note.

A similar comment suggested that it is too broad to say that courts should not routinely issue protective orders. Proposed Rule 37(f) will make preservation orders important.

A motion was made to abbreviate this Committee Note paragraph to say: "A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in extraordinary circumstances."

It was said that "issuing an order is the easy way out. Courts are tempted to do it, hoping to reduce disputes." It was agreed that it is better that the parties work out these matters. The Note language is designed to reduce the reflexive tendency to go to court, and responds to real concerns expressed by the comments.

It was asked what are the arguments against routine preservation orders? The problem seems to be that judges often are poorly informed about the consequences. As to electronically stored information, many comments observed that overbroad orders can lead to paralysis of the information system, or to great preservation costs.

This comment led to the observation that the real concern is with overbroad orders. This is indeed a big issue. The parties sensibly negotiate narrower orders.

An added problem with overbroad orders is that they lead to "gotcha" litigation. Support was voiced for retaining the first sentence of the agenda-book paragraph: "Courts should not routinely issue preservation orders." Agreement for this view was added. The preservation order question ties to the "two-tier" discovery proposal of Rule 26(b)(2)(B) and the "safe harbor" proposal of Rule 37(f).

An alternative approach was suggested. The Committee Note responds to the concern that identifying preservation as a topic for discussion will lead to entry of overbroad protective orders. The Note need only say that making preservation a topic for discussion does not imply that a preservation order is appropriate. Something on the order of: "The rule encourages discussion, but does not imply that discussion should lead to a preservation order." There is no need to state the obvious — if an order is "overbroad," it is unwise.

The motion to strike the "Courts should not routinely" sentence was renewed. This led to a revised motion: This Committee Note paragraph should begin with the statement that encouraging discussion of preservation does not imply that a protective order should be entered. Then state that an order entered over objections should be narrowly tailored, and conclude with the statement that an order should be entered ex parte only in extraordinary circumstances.

A counter-motion to restore the statement that a preservation order should enter only on showing a substantial risk that discoverable information will become unavailable failed. Deleting these words will not change the law. And this statement goes beyond the published Committee Note into sensitive territory; it also goes beyond the published and proposed rule text.

The motion to restate this Committee Note paragraph was adopted, 12 Yes, zero No.

Rule 26(f)(4)

The published proposal added a new paragraph 26(f)(4), describing as an added subject for a proposed discovery plan:

> whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information;

The agenda book recommends deleting the final three words, "of privileged information," because what is protected is the right to assert privilege — the right to assert should not be limited to correct assertions.

The published proposals included a parallel provision in Rule 16(b)(6), adding to the elements that may be included in a scheduling order:

> **(6)** adoption of the parties' agreement for protection against waiving privilege;

This proposal fits with proposed Rule 26(b)(5)(B). Many comments, beginning before the e-discovery project was launched, emphasize the costs of guarding against inadvertent privilege waiver in the course of providing discovery of electronically stored information. But comments on the published proposal express concern that it may seem to promise more than it can deliver. The great concern is subject-matter waiver. Although the parties' agreement should protect against subject-matter waiver in the current litigation, a protection that is reinforced by adoption of the agreement in a court order, there is no guarantee that nonparties will be bound by the agreement or order in other litigation. This uncertainty is compounded by the fact that many privilege issues are governed by state law. The language of the published Committee Note has been revised to soften the possible appearance of uncertain assurance. It may be asked whether revisions should be made in the rule text to respond to the same concern. The references to a court order and to protecting might be dropped. Alternatives, dropping one or the other, are set out in the agenda book at footnote 8, page 18.

As published, Rule 26(f)(4) is intended to encourage parties to discuss agreement, without encouraging courts to exert pressure to reach an agreement so as to speed up discovery. There has been a gradual retreat from the more aggressive Committee Note suggestions that entry of an order affirming an agreement may enhance the agreement's protective effect by encouraging other courts to take the agreement and order into account in applying their own rules on waiver. It may be asked whether, as so reduced, the proposal accomplishes anything useful? It still may be that court approval of an agreement will influence other courts to protect against waiver, even in litigation involving persons who were not parties to the agreement or order.

Discussion began with an expression of support for the second alternative described in footnote 8: "(4) whether the court should enter an order confirming any agreement the parties reach regarding the right to assert a privilege after production of information to a party." This alternative contemplates a court order, but drops any reference to protecting a privilege. "Protecting" "gives a false appearance"; "confirming that parties' agreement " avoids the false promise, but does not encourage court action absent the parties' agreement.

A third alternative was proposed: "(4) any issues relating to assertion of privilege." There would be no more — no reference to party agreement, to court order, or to protecting the right to assert privilege. Indeed, this approach might be opened up by shortening it still further: "(4) any issues relating to privilege."

Picking up on these suggestions, it was argued that the proposal's reference to "the right to assert privilege" is too broad. In some courts, waiver follows from production without more; there is no longer any privilege to assert.

A motion was made to adopt "(4) any issues relating to assertion of privilege."

It was suggested that this form could be combined with some parts of the other variations, including such elements as entry of an order confirming the parties' agreement.

Another suggestion was that this provision should include work-product protection. Some courts and lawyers will assume that work-product protection is covered even if the rule refers only to "privilege"; it is not uncommon to refer to trial-preparation materials as protected by a qualified privilege.

The stripped-down version proposed by the motion was challenged on the ground that the rule should refer expressly to the opportunity to assert privilege after production. The purpose is to ease production in discovery by protecting against waiver by producing. The "confirming the parties' agreement" alternative is desirable.

A broad reminder was provided. The proposals related to privilege waiver began by wondering whether a rule could be crafted to provide full protection against all the world. But concerns were expressed that such a rule might be seen to "modify an evidentiary privilege" within the meaning of 28 U.S.C. § 2074(b), so that it could take effect only if approved by an Act of Congress. This question has not been resolved. Instead, it seemed better to avoid testing the limits imposed by § 2074(b). The published rules do, however, plant a seed. They are not clear on the extent to which court approval of the parties' agreement might expand the agreement's affects to nonparties. The path of caution could be followed further, adding "the right to assert privilege after production as against the other parties to the agreement." Without this limit, the published proposal invites the parties to adopt agreements that speak to third parties. Judges will be reluctant to enter orders confirming such agreements.

It was observed again that the problem is subject-matter waiver. Protecting against waiver can expedite discovery. The published proposal "is not aggressive." It well may be that § 2072 enables a more vigorous approach that, in order to facilitate civil discovery and govern the consequences of court-compelled disclosures, defeats waiver claims by anyone, party or nonparty. But the Committee has chosen not to test those possibilities.

Speaking of protection, as in the published proposal, was defended on the ground that this concept does no more than support an argument to other courts that their own privilege law should be developed to give effect to the nonwaiver agreement and order. The central focus is to get party agreement. It was protested, however, that this explanation "gives an argument, not protection." A partial response was that the proposal attempts to say that an agreement is helpful as among the parties to the agreement. The rule cannot promise protection elsewhere. If the Committee Note makes it clear that the rule cannot assure the outcome of waiver arguments made in other courts by persons not parties to the agreement, the rule text is not misleading.

The last observation was expanded by observing that the Committee has an institutional interest in being clear.

The motion was renewed to substitute: "(4) any issues relating to assertion of privilege." The motion failed, 5 Yes, 7 No.

An alternative was proposed. In its first form, it was: "(4) any issues relating to assertion of privilege, including whether on agreement the parties may request the court to confirm their agreement." This was met by a motion to adopt the second alternative on footnote 8, with a modest change:

> **(4)** any issues relating to assertion of privilege, including whether the court should enter an order confirming any agreement the parties reach regarding the ~~right to assert~~ assertion of privilege after production of information to a party.

This motion was approved, 9 Yes, zero no. It was agreed that the Committee Note and Rule 16(b)(6) would be conformed to this version. Consideration must be given to each place where the Committee Notes now refer to "protection." In this vein, support was voiced for the alternative sentence suggested at footnote 16, page 39 of the agenda materials: "Court adoption of the chosen procedure by order may advance enforcement of the parties' agreement."

At the close of the later discussion of Rule 26(b)(5), it was agreed that Rule 26(f)(4) should be amended in parallel with the Rule 26(b)(5) proposal by adding a reference to trial-preparation material. The result would be something like this:

> **(4)** any issues relating to assertion of privilege or protection of trial-preparation materials, including whether the court should enter an order confirming any agreement the parties reach regarding the assertion of privilege or trial-preparation protection after production of information to a party.

Rule 26(b)(5)(B)

Proposed Rule 26(b)(5)(B) would establish a procedure for a party who has produced information in discovery to assert privilege after production. The published proposal read:

> **(B)** When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

In response to the public testimony and comments, a revised version was prepared for consideration by the Committee. The version in the agenda materials read:

> **(B)** When a party produces information without intending to waive a ~~claim of~~ privilege claim, it may, within a reasonable time, notify any party that received the information of the basis for its privilege claim ~~of privilege~~. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies and may not disclose the information until the privilege claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the privilege claim. [If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.] The producing party must ~~comply with Rule 26(b)(5)(A) with regard to the information and~~ preserve ~~it~~ the information until the privilege claim is resolved ~~pending a ruling by the court~~.

Footnotes to the agenda book draft presented several drafting alternatives.

Judge Rosenthal opened discussion of the privilege-recapture procedure by observing that the revised version carries forward the basic form and scope of the published version. The changes are not basic, but respond to refinements suggested by the public comments. In part, the changes shift into rule text matters that were covered in the published Committee Note. Four of the changes were noted. The rule now describes the receiving party's opportunity to present the information to the court for a ruling on the questions whether it is privileged and whether any privilege has been waived; many comments suggested that the rule should recognize this opportunity, lest it be argued that any such effort is inconsistent with the obligation to return, sequester, or destroy. The producing party is required to state the basis for its privilege claim; this facilitates the receiving party's presentation of the claim to the court. The rule text now states, as in the published Committee Note, that the receiving party may not disclose the information after being notified of the privilege claim. And the bracketed material, if adopted, would require the receiving party to take reasonable steps to retrieve the information if it was disclosed to others before receiving notice of the privilege claim.

A few more changes were included in a text prepared in response to early comments on the agenda-book version, and presented at the beginning of the discussion:

> **(B)** *Information Produced.* When a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the privilege claim is resolved. A receiving party may [also] promptly present the information to the court under seal for a determination of the privilege claim. [If the receiving party disclosed the information before being notified, it must take reasonable steps to cooperate with the producing party's efforts to retrieve the information.] The party must preserve the information until the privilege claim is resolved.

Judge Rosenthal also noted that two important questions have not been reflected in these drafts, except in the footnote discussions. One is whether the "reasonable time" feature, which appears to be a functional limit on the opportunity to demand return, actually is misleading because it has no operating meaning. The other is whether the rule should be expanded to include claims to protect trial-preparation materials. If work-product materials are added here, the Committee should consider whether to add an explicit reference as well to proposed Rule 26(f)(4).

Professor Marcus described some of the footnote questions. One suggests a way to add work-product materials to the rule. A second asks whether the rule text should require that the producing party's notice to the receiving party be in writing; the Committee Note says that writing is important, but recognizes that it is not always possible. He also observed that the agenda-book version imposes a potentially heavy burden on the receiving party by requiring the receiving party to take reasonable steps to retrieve material disclosed to others before receiving notice. The alternative in the handout calls only for reasonable steps to cooperate with the producing party's efforts to retrieve the materials. That seems a lesser burden, but it may lead a producing party to argue that it has a right to do the retrieving and that the receiving party must disclose the persons who received the information, infringing on the receiving party's work-product interests.

Initial discussion of the work-product question noted that the pressures that led to proposal of 26(b)(5)(B) focus primarily on privileged material. The pressure is not as great with respect to

work-product material. But the framework can easily include work-product material; is there any good reason not to include it? It was agreed that the law of waiver with respect to the subject-matter of the disclosed information is not as troubling with respect to work-product materials as it is with respect to privileged materials, but waiver is still an issue. And although there are likely to be fewer circumstances in which it is difficult to recognize the work-product character of discovery materials, the problem can arise. Normal turn-over in a large corporate legal staff, for example, can easily mean that a lawyer responding to discovery may not recognize that the person who prepared five-year old materials was a lawyer. The practicing bar, moreover, thinks of privilege and work-product protection as linked together; they are often argued together as alternative bases for protection. The very caption of Rule 26(b)(5), further, refers to trial-preparation materials. A motion to add trial-preparation materials to 26(b)(5)(B) was made but deferred for action after discussion of other issues.

The "reasonable time" words became the focus of discussion. It was suggested that these words appear to be a limitation — a notice that is not given within a reasonable time is a nullity. But on closer examination, it is the words themselves that are null. A producing party will always send the notice, even if it recognizes that it has delayed unreasonably. And the underlying waiver law may encourage this — in California, for example, it is almost impossible to waive work-product protection by delay in requesting return after production. The receiving party, on getting notice, will understand that it is obliged to take the steps specified in (b)(5)(B). The party cannot use the material; must return, sequester, or destroy it; and must do something — what depends on which form of the proposal might be adopted — to retrieve the material from anyone to whom it has been disclosed. The only possible effect of the "reasonable time" words is to suggest a waiver rule, that unreasonable delay in giving notice waives the asserted privilege or protection. Yet the Committee has concluded that it is better not to attempt to address waiver. There have been vigorous discussions of the wisdom of addressing waiver, and some comments have suggested that a rule that directly affects the waiver determination can take effect only if approved by Congress under 28 U.S.C. § 2074(b).

These observations concluded by suggesting that the rule would remain effective if the reasonable-time words were removed. It still would establish a procedure for addressing privilege and waiver questions in an orderly way. The producing party is told to give notice, and notice of a certain quality. The receiving party is told how to respond to the notice, including the option to present the information to the court under seal for a ruling.

Agreement was expressed by noting that the published rule seems to leave it to the receiving party to ignore a notice it concludes was not given within a reasonable time. That is not what the rule should do.

It also was observed that the rules of professional responsibility address these issues. And those rules do not include time limits for giving notice.

A different perspective was taken in observing that "reasonable time" gives too much opportunity for delay. Practice is to give notice immediately on discovering the mistake. Either the rule should require that notice be given promptly or it should remove any time reference.

A familiar question was revived by asking "a reasonable time from what"? From production? Or from realizing the problem? Perhaps we should define reasonable time to run from production. And then we should determine whether we should use the same approach for work-product materials. In response, the discussion reviewed all the problems that have been noted with choosing among possible events to trigger the reasonable-time requirement. Setting the time from production

offers little benefit in relation to the purpose to facilitate discovery by ensuring a procedure to address waiver questions, unless perhaps the time is quite long. Setting the time from realization that privileged material was produced might allow the claim to be pursued at a time that seriously disrupts the receiving party's trial preparation or even trial presentation. Choice of a specific trigger also invites consideration of a specific time period, although the reference could be to a reasonable period. There even can be questions whether the time should run forward from a specific event, such as production or the close of discovery, or backward from an event, such as trial.

But, it was asked, why not require action promptly after the producing party actually learns of the privilege claim? We could require notice "promptly after learning that the material is subject to a claim of privilege." One response was that this allows undue delay; a producing party should have a continuing obligation to ensure that nothing privileged has been produced. At the same time, it is appropriate to preserve the "status quo" by requiring the receiving party to stop use for a brief period after getting notice.

The question was renewed — what difference does it make under the proposed rule if the notice is not given within a reasonable time? One answer was that we should not have an unlimited opportunity to give notice. Another response was that many courts consider delay in asserting privilege in determining whether the privilege has been waived.

But it was responded that under current practice a producing party can make the claim at any time. The rule should be the same.

This argument was countered by arguing that if the rule says nothing about timeliness of notice, it will raise concerns about undue delay. And there also may be confusion whether a rule that sets no time limit on notice implicitly suggests that delay does not enter the waiver determination.

A mid-discussion summary observed that the role of the reasonable-time element is difficult to articulate. As the discussion has evolved, many participants have attempted to reduce it to a purely hortatory behest. On this approach, (b)(5)(B) establishes a procedural framework for orderly presentation and disposition of the privilege and waiver issues. The "reasonable time" limit has no operating effect. The receiving party must comply with all the (b)(5)(B) requirements on receiving notice, no matter when it is given. But the cost of compliance is mollified by expressly recognizing that the receiving party can present the issues to the court. This presentation is facilitated by requiring that the notice state the basis for the privilege claim. Any delay in giving notice, no matter how measured, would be nothing more than one element in a waiver determination if the question arises under law that considers delay in the waiver calculus. But if that is the intent, it is better to omit "within a reasonable time." So long as it appears in the rule text, no matter what the Committee Note says, some lawyers and some courts will attempt to give it meaning. The meaning may be that a producing party is discouraged from giving notice for fear it has delayed unreasonably; it may be that a receiving party is encouraged to ignore a notice it thinks unreasonably delayed; it may be that a court believes that delay makes the notice ineffective and never addresses the privilege or waiver questions; it may be that a party or a court believes that the rule is intended to direct that a court find waiver if notice was not given within a reasonable time. On the other hand, if "within a reasonable time" is meant to have some meaning, it remains to decide just what that meaning might be.

Another member repeated the earlier suggestion that the rule should provide that a party may give a privilege-retrieval notice promptly after it discovers that it has produced material that it believes to be privileged. The notice would impose the stand-still requirements in the rule.

Separately, it was observed that the Committee Note should explain the relationship between (b)(5)(B) and any agreements the parties may make as to recapturing privileged materials. At least

in most circumstances, the agreement should prevail. If the parties agree that notice can be given at any time, that should control — unless, perhaps, the court finds that its own interests supersede the agreement, as if denying use of the material would impede an imminent or ongoing trial. If the parties agree that notice must be given by a specified time, the agreed deadline should control.

It also was suggested that if the rule requires notice within a reasonable time, or prompt notice, or sets some more specific time line, it should be made clear that failure to give notice as required does not of itself establish waiver. The rule is not designed to change the waiver rule in any way, whatever the waiver rule may be.

This observation was extended by the suggestion that the purpose of (b)(5)(B) is to facilitate expeditious discovery. The hope is that an explicit procedure to recapture privileged material will enable a producing party to expedite the screening process, weeding out the materials whose privilege status can be identified with reasonable effort but not attempting to examine the more esoteric privilege possibilities. This can prove workable because the materials subject to a non-obvious privilege protection are not likely to be important; production is feared because of subject-matter waiver, not because of the material's intrinsic importance. But it is difficult to do that. An attempt to extend privilege requires cooperation with the Evidence Rules Committee, and affirmative congressional approval. Even an attempt to affect waiver-by-production is likely to provoke similar protests, whether or not they are correct. So, it was suggested, the rule text could require notice promptly after discovering the privilege claim, while the Committee Note could explain the limited scope of the rule.

One member asked again what a party is to do if it gets notice but believes the notice was not given within a reasonable time, or was not prompt, or did not comply with whatever other timeliness requirement may be adopted. Again the response from another member was that the receiving party should be obliged to comply with the "hold" imposed by (b)(5)(B).

Fears that tardy notices will disrupt progress toward trial were addressed by noting that under most law, a delay in asserting privilege supports a waiver finding.

An opponent of "within a reasonable time" suggested that the rule be revised by striking out those words and imposing an absolute duty to give notice: "When a party produces information without intending to waive a claim of privilege, it ~~may,~~ must ~~within a reasonable time,~~ notify any party that received the information * * *." But "must" was resisted as "too strong." The producing party may prefer to ignore the issue — among other things, if the receiving party fails to perceive the possibility of privilege and waiver there is little risk of subject-matter waiver.

It was asked whether it would be simpler to require the producing party to file a motion, bypassing the notice step. The answer was that ordinarily these questions are resolved between the parties without a motion. Common practice is to return assertedly privileged materials immediately on being asked.

A different question addressed the foundation of (b)(5)(B) — the requirement that the information have been produced "without intending to waive a claim of privilege." It would be better to refer to producing information "that the producing party believes is subject to a claim of privilege." We do not want to focus on "intent" because that also is an element of the waiver determination in many courts.

Then it was asked whether the rule should be limited to privilege claims made by a party. A nonparty may, in discovery, produce information that a party believes is privileged; indeed there may be a conflict of interests. In an action against a corporation, for example, a former officer may

produce material that is protected by the corporation's privilege. Or the corporate party may produce material that the former officer believes is privileged. Rule 45 was brought into the discussion: it enables a nonparty who wishes to make a belated privilege claim to invoke a procedure adopted verbatim from 26(b)(5)(B). The analogue to 26(b)(5)(B) for example, is 45(d)(2)(B). All of the published proposals to amend Rule 45, indeed, will be revised to conform to the changes ultimately made in Rules 26 and 34.

It was suggested that the rule might begin:

> If information is produced in discovery that is subject to a claim of privilege, a party claiming privilege may notify any party who received the information of the basis for its claim * * *.

This proposal, which eliminates "within a reasonable time," was adopted without dissent.

Attention turned to some of the changes proposed in the version handed out at the meeting. One requires the receiving party to return, sequester, or destroy any copies "it has." The idea is that it would impose an undue burden to require that one of these alternatives be accomplished with respect to copies the receiving party no longer has. Another addition makes explicit a requirement that was implicit in the direction to return, sequester, or destroy: the receiving party may not use the information after being notified.

The next question addressed the bracketed language in the agenda-book proposal: "If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it." An alternative might be: "must take reasonable steps to cooperate with the producing party's efforts to retrieve the information." A concern was expressed in the opening discussion that a duty to cooperate might require the receiving party to identify recipients and thus reveal information about its trial-preparation efforts. This concern might be passed by. Or the Note could address it, perhaps saying that the receiving party need not reveal the identity of recipients if it undertakes to notify them and seek return of the information.

An alternative to cooperation in retrieval efforts might be a simple requirement that the receiving party notify the persons who received the information from it. The notice would direct them not to use or disclose the information.

Discussion of retrieval led to the observation that often the person receiving a document is outside the court's jurisdiction. Inevitably, the retrieving burden will fall on the producing party — it cannot rely on the receiving party for diligent efforts. For that matter, it may be asked whether it is fair to impose any significant retrieval burden on a party who innocently received information that the producing party failed to screen adequately in the first place. Even a duty to cooperate with the producing party is complicated. Perhaps the agenda-book proposal has it right: the receiving party is obliged to take reasonable steps, no more.

Electronic information and its dissemination will complicate any retrieval obligation. How do you actually get the information "back"? Sequestration, a prohibition on use, seems sufficient. Lawyers act honorably in these matters, and will observe a sequestration. Notice will stop further disclosure or use.

It was suggested that the rule should require the receiving party, after notice of the privilege claim, to "take reasonable steps to notify recipients of the information not to use or disseminate the information."

A motion was made to adopt the agenda-book proposal, at p. 14 lines 29-31:

If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.

The motion was adopted with 8 votes in favor; 4 votes were cast for the alternative that would require reasonable steps to notify recipients. It was agreed that the Note should not attempt to describe what may be entailed by "reasonable steps to retrieve."

It was asked whether a party can use a document that shows on its face that there is no alternative means of obtaining the same information. An answer was offered that the receiving party can present the information to the court under seal for a ruling. But that led to the question whether a seal should be required, pointing out that it may be possible to make a motion without revealing the information. The rule only says that the receiving party "may" "promptly present the information to the court under seal." If a motion can be made without presenting the information, the seal is not required. The Note could say that if the motion can be made without presenting the information, a seal is not required. It was agreed that the rule text should remain as proposed. The question whether the Note should discuss the possibility of moving without presenting the information was left open.

The question of addressing trial preparation materials to Rule 26(b)(5)(B) came next. It was agreed that "trial-preparation materials" is the better rule language because that is the language of the captions for Rule 26(b)(3) and (4); "work-product" is not rule language. Although the published proposal was framed in the belief that there is less need to establish a recapture procedure for trial-preparation materials, parallel treatment is justified because work-product and privilege issues are frequently joined. It was agreed by unanimous vote that 26(b)(5)(B) will be expanded:

> If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, a party [claiming privilege or protection] {making the claim} may notify any party who received the information of the basis for the claim * * *.

Rule 26(f)(4) will be considered for parallel revisions, perhaps to read:

> **(4)** whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege or protection of trial-preparation material after production;

(This language was further revised to conform to the revisions of Rule 26(f)(4) described above.)

During the comment period, suggestions were made that Rule 26(b)(5)(B) should require a receiving party to certify sequestration or destruction if it does not return the material, or to certify that all copies have been returned. It was agreed by consensus that certification should not be required.

A frequent suggestion during the public comment period was that the notice of privilege or work-product protection should be in writing. The published Committee Note says that writing is useful, but is not required. Establishing a writing requirement in the Rule text might be awkward in some circumstances; the familiar example is a privilege issue that is framed for the first time during a deposition. Lawyers will routinely provide a written memorial whenever that is possible. And it does not seem suitable to say in the rule text that written notice is required and then offer contradicting advice in the Committee Note that in some circumstances unwritten notice suffices. A motion to stick with the published "notify," without adding "in writing," passed 9 yes, 3 no.

Rule 26(b)(2)(B)

Judge Rosenthal introduced rule 26(b)(2)(B) by noting that for several weeks before the meeting there had been much discussion within the Committee and preparation of interim drafts. Further changes have been proposed since the agenda book was circulated. A new draft was distributed. In its initial form, it read:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible without undue burden or cost. On motion to compel discovery or for a protective order, the responding party must show that the information is not reasonably accessible without undue burden or cost. If that showing is made, the requesting party may obtain an order for discovery of the information by showing that it is consistent with Rule 26(b)(2)(C). The court may specify terms and conditions for such discovery.

As compared to the published version, this draft amplifies "not reasonably accessible" by pointing to cost and burden as the measures of reasonable access. Many participants in the public comment period expressed this understanding of reasonable accessibility. This draft also addresses another matter that provoked extensive comment. The "good cause" concept in the published version was viewed by many as an indirect invocation of the proportionality factors set out in current Rule 26(b)(2). This draft dispenses entirely with "good cause," aiming directly at these proportionality factors through the cross-reference to what would be redesignated as subparagraph (C).

Changes also have been made in the Committee Note. These changes reflect not only the revised rule text but also matters not touched in the rule text. Several comments express concern that a party's unilateral designation of material as not reasonably accessible will be thought to mean that it is not "discoverable" within the meaning of the safe-harbor provisions of proposed Rule 37(f), so that it need not be preserved. The revised Note observes that a Rule 26(b)(2)(B) designation does not of itself exempt the information from preservation. Preservation requirements are not addressed by the proposed e-discovery amendments, in this way or any other.

A closer description of this draft, and an alternative, followed.

The agenda book draft, as further revised, begins by referring to information "from sources" that are not reasonably accessible. This change responds to the objection that information cannot be identified by a party who does not know what the information is, nor even whether it actually exists. The point is to identify the sources that have not been searched. The draft also substitutes for a motion by the requesting party a motion either to compel discovery or for a protective order, recognizing that the party asked to produce information may wish to take the lead in clarifying its search responsibilities. The agenda book draft also included as a possible option an explicit suggestion that the court might order a requesting party to pay part or all of the reasonable costs of accessing the information as a condition of discovery. This option was deleted from the more recent draft; several Committee members had concurred in the recommendation that it is better to leave cost-sharing to the Committee Note as an illustration of the terms that may be imposed on ordering discovery.

The agenda book also includes an alternative draft that departs more dramatically from the published version. The departures all are matters of expression; the underlying concepts are the same as those expressed in the published draft as refined by work in response to public comments. The goal was to achieve a draft that could be recommended for adoption without republication, while speaking still more directly to the nature of the underlying practices. In clean form, this draft read:

> In responding to a discovery request, a party need not search sources of electronically stored information that may be responsive if the party identifies the sources and describes the substantial barriers that impede access to the information. On motion to compel discovery or for a protective order, the responding party must show the nature and extent of the barriers that impede access. If substantial barriers are shown, the court may order discovery of the information if the requesting party shows that discovery is consistent with Rule 26(b)(2)(C) and may specify terms and conditions for such discovery.

As compared to the drafts that hew closer to the published proposal, this draft makes several substitutions. (1) Rather than say that a party need not provide discovery, it looks directly to the underlying problem: the party need not search some sources. (2) The draft refers to sources of information "that may be responsive." No one would benefit from a requirement that the responding party name all of the sources of information that are difficult to search; the only matter of interest is sources that may include information responsive to the request. (3) Rather than refer to reasonable accessibility, the draft refers to "substantial barriers." This choice is made in order to separate out two separate inquiries. The first seeks to determine just how difficult it is to find out what these sources actually contain. The second asks whether the discovery needs of the action justify a search of these sources in light of the demonstrated difficulty. A reference to "reasonable" accessibility seems to anticipate the second question, to set up a two-stage process in which the first stage closely resembles the second stage, looking to cost and burden in relation to the reasonable discovery needs of the case. The reference to "barriers" was chosen as a neutral description of elements that may result from software limitations or hardware limitations; other words, such as "impediments" or "difficulties" might be used if "barriers" seems too arcane. (4) In the same stage, the burden on the requesting party is to show the nature and extent of the barriers. If "substantial barriers" are shown, the requesting party moves to the second stage by showing a need for the information that justifies at least some search attempt.

This alternative draft was not discussed further, apart from a few incidental reflections.

It was noted that the (b)(2)(B) proposal generated substantial concern during the public comment period.

A motion was made to adopt the draft presented at the meeting. This "two-tier" approach to discovery of electronically stored information is important. To be sure, the "undue burden or cost" criteria are expressed in present Rule 26(b)(2), and several comments suggested that the present rule provides protection enough. But a better-developed rule is important to raise consciousness about electronic discovery problems and limits. This proposal may be the most important part of the package, focusing attention on the most important characteristics that make discovery of electronically stored information different from discovery of traditional documents. As revised, the draft puts a greater burden on the producing party than resulted from the published draft. It now makes specific the need to assert undue burden or cost as the foundation for asserting that the information is not reasonably accessible. This is better than the uncertainties conjured up by such alternative phrasing as "substantial barriers." The redrafting makes the rule much better.

It was asked how the motion for a protective order would work. The purpose is to enable the party responding to a discovery request to seek a determination of the extent of its search obligations if it cannot work the matter out with the requesting party. It was observed that the draft's reference to a "responding" party was potentially obscure. But to the extent this party invokes the protection of (b)(2)(B) it is not yet a "producing" party. It was concluded that the draft should be revised: "On

motion to compel discovery or for a protective order, the ~~responding~~ party from whom discovery is sought must show * * *."

A judge observed that the parties will know more about the accessibility issues than the judge does. This observation was accepted with the further observation that it is the parties' responsibility to educate the judge when they are not able to resolve among themselves the extent of the proper search obligation. In turn, it was asked whether the Committee Note should recognize the judge's authority to appoint a special master to govern the discovery process. The response was that the Note should not be made into a "Manual for Electronic Discovery." A perpetual dilemma in drafting Committee Notes arises from the conflict between the desire to capture much of the useful information gathered in the public comment process, along with practice pointers, and the conflicting need to preserve the flexibility of the rule text to accommodate to the circumstances revealed by actual practice over the years. And Committee Notes should not become too long.

It was asked whether "reasonably" should remain in the rule text now that "without undue burden or cost" would be added. Undue burden or cost seem to have become the definition of "reasonably," dispensing with the need to say "reasonably." It was concluded that it would be better to draw a causal nexus. The expression will be "not reasonably accessible ~~without~~ because of undue burden or cost" in both places where these words appear.

The need for any version of published Rule 26(b)(2)(B) was challenged. It was said that a party who is not going to search a source of potentially responsive information will come forward with this decision now. "The existing process is extremely flexible." The comments tell us this is how people do it now. There is no indication that judges are insensitive to these problem. No one has testified to any benefit that would be realized by amending the rules. And strong observations were made that a party should not be required to reveal specific sources of electronically stored information. Beyond that, there was much disagreement as to what is meant by "not reasonably accessible." The ABA survey showed a wide divergence of understandings, and often showed widespread ignorance as well. Many respondents, for example, thought that information in personal digital assistants is not reasonably accessible; commonly it is. The magistrate judges oppose the proposal. The proposed procedure truncates the burden of proof. And the alternative draft "has only a passing resemblance to what was published."

Sympathy for this view was expressed, but in terms that supported the revised proposal. The revisions clarify what "not reasonably accessible" means. The rule codifies best practices, and sets these practices out in one easily accessible place. The two-step process makes sense. And the Committee Note provides much useful guidance. Codification of good practice in a rule is a proper object of rules reform.

This support was extended by another member, who observed that "reasonableness does not give specific answers." It restates the true issue and identifies the obvious ways to present the issues to the court.

It was noted that the opposition of the magistrate judges association was based on the responses of the magistrate judges who were able to command the time and interest to respond to an on-line survey. There also appears to be some misunderstanding of what is intended. We should not attribute undue weight to this thoughtful and useful attempt to get the views of those who are on the front line of many discovery disputes.

It was suggested that the reference to an order for discovery despite a showing that information is difficult to access should be revised: "the requesting party may obtain an order for discovery of ~~the~~ information not reasonably accessible ~~by showing that the discovery is consistent~~

~~with Rule 26(b)(2)(C)~~." This was resisted as too much abbreviated. Some further statement should be made of the showing required to justify discovery.

It also was suggested that it would be better to refer to "such information" rather than "the information." But it was observed that it would better to recognize that the sources not searched may hold responsive information but also may not. "the court may order discovery from such sources ~~of such information~~ * * *."

Then it was asked how a requesting party is expected to show that discovery is consistent with Rule 26(b)(2)(C). These provisions are drafted as criteria for limiting discovery, not as criteria for granting discovery. The idea is that the requesting party must show reason to overcome the burdens and costs of the search, considering the burdens and costs but also considering the information that is available by other discovery. It may appear that without the costly search there is little or no information available on important subjects. It also may appear that the difficult sources are likely to have responsive information. Or the converse may appear — other discovery may have produced great volumes of information, there is no particular reason to believe that any useful information is missing, and the probable yield from searching the difficult sources may seem trivial. But it remains to decide whether this process can be expressed by a simple cross-reference to subparagraph (C). Even saying that the court may order discovery "after [upon] considering the factors in Rule 26(b)(2)(C)" may not convey the idea accurately.

This dilemma was addressed by reviving the reference to "good cause" in the published proposal: "the court may order discovery from such sources for good cause, considering the limitations of Rule 26(b)(2)(C). The requirement that the requesting party show good cause provides a direct link to the subparagraph (C) limits.

The two-step process came under renewed question. This is envisioned as one motion. How do we separate the showing of the obstacles that impede access, that make search difficult, from the burden of showing good cause?

The process was explained as one of shifting burdens, but still questioned on the ground that the proposed language "does not give much guidance; we're boxing in the party who wants discovery." Why not just end it with "good cause," forgoing any reference to Rule 26(b)(2)(C)? This reference is new after publication, and is not needed.

The need for the cross-reference was repeated. The published proposal drew many comments that "good cause" is inherently obscure, and inevitably will be explained — after some initial confusion — as invoking Rule 26(b)(2)(C) principles.

Further drafting alternatives were explored. The rule might be drafted: "Subject to Rule 26(b)(2)(C), if that showing is made, the requesting party * * *." This formula would better capture the basic principle of modern discovery that a requesting party gets the information unless a powerful-counter showing is made under (b)(2)(C). Or we could say "as limited by Rule 26(b)(2)(C)." Or "good cause" could be removed again — the only proposed function is to serve as a bridge to consideration of the limiting principles. "good cause consistent with Rule 26(b)(2)(C)" would be an alternative. Or "by showing that production should not be limited by application of Rule 26(b)(2)(C)." The difficulty arises because we are directing the requesting party to show an absence of limitations, to show that discovery is not blocked by (C) factors (i), (ii), or (iii). "good cause" serves as a bridge, as in the agenda book version, p. 9 lines 20-21: "may order discovery for good cause when consistent with Rule 26(b)(2)(C)."

All of this discussion prompted a further summary of the apparent difficulty. The reference to "reasonably accessible without undue burden or cost" in defining the first stage seems to invoke a balancing process that is difficult to distinguish from the second stage that looks to good cause consistent with the limiting factors embodied in Rule 26(b)(2)(C). What is "reasonable" depends on need for the information in light of the search costs and predictions of importance. What is an "undue" burden or an "undue" cost depends on the same balancing of cost and predicted benefit, no matter how uncertain the prediction may be. After a court has found that these elements bar discovery without a further showing, how is it carry forward to find that the same elements do not after all bar discovery? Why has it not already rejected a "good cause" conclusion?

This question led to a further question — why should we impose this burden on a party requesting discovery of electronically stored information, but not on a party who requests discovery of information stored by other means, notably paper? It was responded that this burden should be on the requesting party precisely because electronically stored information frequently presents access problems of a kind rarely encountered with paper records. In a wide range of circumstances, electronically stored information may pass from easily retrieved form to forms that may or may not be accessible at all, and that can be searched only with great cost. The circumstances in which this happens continue to change as technology develops and as system designs evolve. It is difficult for a requesting party to know, at the time of its request, what information may lie, if anywhere, in sources that are difficult to search. The two-stage process is designed to convey this information to the requesting party by the initial identification of the sources and an identification of the cost and burden factors that impede access. The requesting party then can consider the possible need for the information in relation to the fruits of other discovery and its own investigations, and focus on the apparent need for further discovery. The parties can then discuss the problem and often will work out a sensible response. If the parties cannot work it out, the requesting party should undertake to show justification for the discovery.

This two-stage process can be captured in words that do not seem to saddle the requesting party with the burden of proving a negative. By a vote of 12 yes to 1 no, the Committee approved this sentence:

> If that showing is made, the court nonetheless may order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).

It was suggested that here may be room for further small editorial revisions; if any are suggested, they will be included in materials circulated for Committee review before a recommendation for adoption is made to the Standing Committee. One proposal was that the second and third sentences could be integrated into one longer sentence. The full rule would read: "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible without undue burden or cost. If, on motion to compel discovery or for a protective order, the party from whom discovery is sought shows that the information is not reasonably accessible without undue burden or cost, the court may nonetheless order discovery from such sources for good cause shown by the party seeking discovery, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions."

Committee Note language will be devised to reflect this discussion. Committee members were invited to make suggestions immediately after the meeting. The Note, for example, must be revised to reincorporate references to a "good cause" showing. This will tie to the burden described in the revised rule text, which directs that the requesting party must show good cause.

Earlier discussion was revived by asking whether all of this two-stage procedure would be accomplished by a single motion. The requesting party will have the information provided by the responding party when it designates information as not reasonably accessible. But it may not have the information needed to show good cause at the time of the initial hearing, and in any event may need discovery to be able to test the actual search burdens and costs, the probability of finding important information by the search, and for that matter the extent of the information that may be available by exhausting other discovery opportunities.

The same theme was expanded by observing that most courts have little time to devote to discovery disputes. If the parties cannot work the matter out without court supervision, the hearing is likely to consist of a 10-minute telephone conference. That is not a promising vehicle for working through the complex issues presented by these electronic discovery difficulties.

These comments were countered by noting that they seemed to invite a reopening of the entire discussion. The published proposal required a showing of good cause to get discovery of information not reasonably accessible, and it was understood that the burden of showing good cause lies on the party requesting discovery. Adding words to make the burden explicit does not change the two-stage process that has been intended from the beginning.

The Committee again approved, again with one dissent, its approval of the formulation supporting discovery "if the requesting party shows good cause."

It was observed that the current draft Committee Note refers to seven "factors" that will guide the determination of good cause and consideration of the Rule 26(b)(2)(C) factors. These elements, however, are not "factors" described in the rule. They are elements that inform application of the (b)(2)(C) criteria, and are better described by a word other than "factors."

A separate question was raised as to the Committee Note discussion of the relationship between a Rule 26(b)(2)(B) designation of information not reasonably accessible and the duty to preserve that information. The agenda book, p. 15 note 7, includes as a possible alternative Note language these sentences:

> If the responding party has placed a litigation hold on reasonably accessible electronically stored information that may be discoverable in the action, information stored on inaccessible sources generally would not need to be preserved. A responding party would need to include in the litigation hold information that is not reasonably accessible if that party had a reasonable basis to believe that it may be discoverable in the action and was not available from accessible sources.

Interest in this formulation was expressed, with the further observation that "everyone wants to know about the relationship between (b)(2)(B) and the duty to preserve." But it also was observed that it goes a long way to say that "information stored on inaccessible sources generally would not need to be preserved." That may be too specific to include as part of a process that has deliberately refrained from attempting to prescribe preservation obligations.

It was agreed that the duty to preserve aspects of the Rule 26(b)(2)(B) Committee Note should be considered in conjunction with the Rule 37(f) text and Committee Note.

A revised Committee Note will be circulated for Committee consideration soon after the meeting concludes.

Rule 37(f)

The agenda book included Rule 37(f) as published for comment, marking with brackets alternative words that might be considered:

> **(f) Electronically Stored Information.** Unless a party violated an order in the action requiring it to preserve [specific] electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
>
> **(1)** the party took reasonable steps to preserve the information after it knew or should have known the information was [would be]{likely would be} discoverable in the action; and
>
> **(2)** the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

Judge Rosenthal introduced discussion of Rule 37(f) by noting that it had drawn much attention during the comment period. Criticism was offered from many perspectives. The proposed variations also have drawn criticism. The rule will apply to all civil actions. But some comments suggest that it does not go far enough — indeed that it does not accomplish anything. On this view, no court would ever impose sanctions for the conduct that it purports to protect. That leaves the question whether the correction is to expand the rule to give greater protection, or instead to abandon the project.

The question is whether we can, by rule, offer meaningful guidance on the appropriate response to the discovery problems that can arise from the dynamic character of electronic information systems. Routine operation can banish information beyond recall or make retrieval much more difficult. One recurrent issue goes to the state-of-mind element. Many comments support the view that sanctions should be available only for intentional or reckless failure to preserve information against routine destruction. Another recurrent issue focuses on the relationship between Rule 26(b)(2)(B) and Rule 37(f): if a party identifies a source of information as not reasonably accessible, is it excused from any duty to protect against destruction in the routine operation of its system? Yet another question is framed by the "reasonable steps" standard of culpability — if the standard authorizes sanctions for merely negligent conduct, should the Committee Note comment on the need to calibrate the severity of sanctions to the relative degree of culpability?

The rule text was introduced by observing that it remains much the same as the published proposal. The Note in the agenda book is expanded to address the relationship between Rule 26(b)(2)(B) and Rule 37(f). Options inserted in the rule text begin with the question whether the preservation order provision should recognize sanctions only for violating an order to preserve "specific" information. This option responds to complaints about entry of catch-all preservation orders that require preservation of "all" electronically stored information. It may be impossible to comply with such an order — if nothing else, the simple acts of turning a system off and on again may alter information in the system. In the Rule 26(f)(3) discussion, the Committee approved Committee Note language advising that a preservation order should be narrowly tailored. The same approach might be reflected here in rule text. On the other hand, this limitation implies criticism of the overbroad order, and more than criticism — it seems to say that the order cannot be enforced.

It was noted that the Standing Committee added "under these Rules" to the rule text before publication. These words have been criticized by comments suggesting that Rule 37(f) would afford no meaningful protection if sanctions still can be imposed by drawing from authority outside the

rules, and particularly if a court can simply assert "inherent authority" to do what the rule seems to proscribe.

Another drafting question is raised by the reference to information the party knew "was" discoverable. Proposed alternatives include "would be" discoverable or "likely would be" discoverable. The choice may relate in part to the interrelationship with the Rule 26(b)(2)(B) provisions on information stored in sources not reasonably accessible. Referring to information that "would be" discoverable may better reflect the obligation to preserve difficult-to-access information that will become discoverable only if the court finds good cause to order discovery; it may be difficult to say that such information "was" discoverable at the time the party identified it. On the other hand, "would be" may create a risk of hindsight judgment. "likely would be" may seem a more direct description of the litigation-hold calculation we want a party to make, but it may offer too much protection. (The Committee Note, at page 11 of the agenda book and note 9, also addresses the relationship between 26(b)(2)(B) designations and the duty to preserve. Preservation obligations also are addressed on the Committee Note at agenda book page 10, referring to the common-law duty as well as other preservation obligations.)

Footnote 4 on page 6 of the agenda book addresses the standard of culpability, suggesting intent or recklessness, and even illustrating an approach that would allow sanctions for violating a preservation order or an order compelling discovery only if the party acted willfully or recklessly.

Finally, the Committee Note at agenda book pages 15-16 adds language observing that the severity of sanctions should correspond to the culpability of the responding party's conduct. The most severe sanctions ordinarily should be reserved for intentional or reckless conduct.

Discussion began by addressing the culpability standard. It was urged that "negligence" is the standard in the Second Circuit. it is right. "Simple sanctions" should be available to redress the negligent loss of discoverable information. At lease one court in every circuit has recognized the appropriateness of sanctions in such circumstances.

The offsetting view draw support from a comment submitted by Professor Arthur R. Miller. The challenge in drafting a safe-harbor provision is that we are dealing with very complex information systems that delete material even before a party knows whether it is there or whether it is responsive to a discovery request. The reaction today is to preserve more information than need be preserved, often at untoward cost. The lawyers are afraid of sanctions. Sanctions may have an impact on the outcome of the litigation. And they have an impact on a lawyer's career and professional standing that is not much limited by the seeming severity of the sanction in its own terms. The result of cautious over-preservation "geometrically increases the costs of discovery." A reasonableness standard offers little comfort because lawyers fear hindsight determinations of what is reasonable. A safe harbor that allows sanctions on a negligence standard offers little protection. And all of this is further complicated by the problem of inaccessible information.

It was responded that courts in every circuit recognize that a party who negligently fails to protect information against destruction can properly be made to bear the costs of recreating the information or of additional discovery aimed at retrieving the information (or substitute information) from other sources.

A further observation was that these problems resemble qualified immunity. It is not only lawyers but also clients who should be protected against concerns about routine computer operations that destroy discoverable information. A safe harbor rule should protect against "gotcha" discovery tactics, against the risk that a requesting party will benefit more from the loss of information than from the discovery of information. The rule should adopt an intent or recklessness standard, with

the expectation that the question can be reviewed in another five years after experience shows whether a different standard should be adopted.

The intent or recklessness standard was further supported by stating that it is impossible to prevent all overwriting. Information is destroyed by the simple act of turning a computer on or off. The published rule "does nothing; a court will not impose sanctions if you were not negligent." A party who takes reasonable steps will not be sanctioned if the computer system destroys information. The comments, moreover, show the need to protect against sanctions "that affect careers or cases." The provision excluding safe-harbor protection for violation of a court order, moreover, seems to authorize sanctions even though a party took all reasonable steps to comply.

It was responded that a court should be able to impose sanctions when an order is violated. But rejoined that a party who takes reasonable steps to comply with an order should be protected. And sur-rejoined that a court should be able to protect an innocent requesting party against the prejudice that flows from loss of information caused by failure to comply with a court order.

The dilemma was framed by observing that an "intentional" standard makes life "way too easy" for a party who fails to preserve information. But the published draft offers no meaningful protection. "It may be better to do nothing." The negligence standard adds nothing because courts do not sanction non-negligent conduct. An "intent" standard asks the Supreme Court to adopt a rule overriding what many courts have found appropriate. Again, the suggestion was that it may be better to abandon the Rule 37(f) effort.

The attempt to craft a safe harbor was then defended. Beginning with the observation that it will make litigators nervous, it was suggested that "it aims at 'gotcha' with respect to electronically stored information." It is well calibrated to balance the competing concerns.

Drawing back a bit, the genesis of the published proposal was explained. A party who violates an order in the action was excluded from the safe harbor because the Committee did not want to nullify the court's ability to enforce its order. At the same time, there was concern that this provision will encourage many litigants to seek protection orders as a matter of routine, and often to propose overbroad protective orders. The standard of culpability when no order is violated presents a related but separate issue: should sanctions be available whenever the conduct is not "reasonable"? Or, since the focus is only on routine operations, should a higher standard be adopted? These issues should be separated for discussion.

The negligence standard was again defended on the ground that a party injured by another party's negligent failure to take reasonable steps to preserve information should be protected by sanctions calculated to reduce the prejudice. And it was again attacked on the ground that there is a risk that a party who does its best still may be found negligent after the event.

A broader question was introduced: should the rule be revised to protect against sanctions imposed for failure to take reasonable steps to preserve information that was lost for reasons other than routine operation of an electronic storage system? The response was that a rule this broad would directly address the duty to preserve information. As much as many litigants would welcome an explicit preservation rule, the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority.

The dilemma was then reiterated. A safe harbor should give meaningful, even strong, protection. But it is difficult to adopt a rule that excuses negligent failure to protect information. Perhaps a solution can be found by softening the rule to say that "ordinarily" sanctions should be

imposed only for intentional or reckless failure to preserve, etc. This tack might be coupled with a statement, in rule text or Committee Note, that the central concern is that severe sanctions not be imposed for merely negligent conduct.

The next suggestion was that violation of an order should impose "absolute" liability, leaving an intent or recklessness standard for the rest. But it was noted again that this approach will invite routine applications for protective orders.

The published proposal was defended as "a check list — a warning on what to do when a case is filed." Preservation issues can be discussed when the parties sit down to talk, but that may not happen until 30 or 40 days or more after the case is filed. Counsel for a defendant is obliged to consider a litigation hold from the very beginning. The published rule heightens the obligations. But it is an interim thing — counsel requesting discovery will seek a preservation order. And the preservation order may actually help counsel for the producing party, because it makes it easier to prevail on the client to do what should be done. On balance, the proposal is useful because it forces the parties to deal up front with these issues.

The published rule also was challenged as worse than no order. Many comments said that the first thing to do under this rule will be to get a preservation order. And the orders will be broad. The result will be that the producing party is worse off. Evidentiary sanctions for violating an order can be severe. And every sanction is severe in other ways. In the Department of Justice, for example, every sanction order automatically leads to an investigation; records are made and preserved. The higher intent standard would help give some value to the rule. Without the higher standard, we do not want a rule that serves only as a stimulus to seek protective orders. And a negligence standard will exert a gravitational pull — it will be the only preservation standard expressed anywhere in the rules, and will be viewed as a model for all circumstances.

The frequent interrelationships between procedure and professional responsibility were brought into the discussion by a reminder that intentional destruction of evidence is subject to professional discipline. We do not need a rule that protects only against that.

An alternative was suggested. This one would pick up the introduction that a court "ordinarily should not impose sanctions," but would omit any reference to routine operation of a party's electronic information system — "Ordinarily, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information unless the party intentionally or recklessly failed to preserve the information." It was objected that this approach would adopt an express definition of preservation obligations.

It was asked whether discussion had proceeded to a point making it appropriate to vote on abandonment of any Rule 37(f) proposal. The suggestion was resisted. Improvement seems possible. When and if discussion is exhausted at a seeming impasse, it would be better to table Rule 37(f) for further work later. It would be a great disappointment to the bar to abandon the project completely. These problems drive up litigation costs exponentially. Tabling would mean that Rule 37(f) should be "decoupled" from the rest of the e-discovery package. The other proposals can stand on their own, and it is important to carry them through the process to adoption without the delay occasioned by the uncertain prospects of eventually developing a successful Rule 37(f) proposal. A serious attempt to draft a meaningful safe harbor is important. Indeed, it is possible that an interruption of present discussion may be followed by fruitful further discussion after other agenda items are dispatched. There are great advantages in continuing the discussion now, while Committee members are closely focused on the problems. If there is to be no express rule, these problems will be resolved on a day-to-day basis in the district courts. Different approaches will emerge. Appellate

review is seldom possible. The practical consequence will be that all litigants will feel obliged to tailor their preservation behavior to the most demanding standard identified by any reported case or known practice, for fear that that standard may be applied to them. We should continue to make the effort.

Discussion was suspended for consideration of remaining agenda items, and then resumed. The discussion focused on the concepts that might be expressed in a revised Rule 37(f), recognizing that drafting implementation of the concepts likely must be left for post-meeting work and, in a few weeks, a meeting by conference call.

Attention was again directed to the alternative draft set out in the agenda book at p. 6, footnote 4. It was suggested that there was an emerging consensus that the published proposal was too insipid, and this alternative might prove the foundation for crafting a more robust form of protection.

One suggestion was that "routine operation" is a mysterious concept. The rule should protect against an "unintentional" loss so long as there was a "good-faith effort" to avoid loss. The rule also should provide for sanctions against a person who wilfully violated an order. This was developed into a proposal:

> "Ordinarily, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information unintentionally deleted or lost solely as a result of the routine, good-faith operation of the party's electronic information system."

"unintentionally" was questioned by observing that if the loss resulted from routine, good-faith operation, it could not be intentional.

A parallel observation was that in framing the rule, the Committee has not supposed that there is any need to draft in a way that covers such matters as a fire that destroys the system.

It was asked whether "good faith" captures the need to establish a reasonable litigation hold. A proponent of the good-faith proposal responded that there is an obligation to preserve what you reasonably know may be needed for the litigation. And it was observed that that is what the published proposal says: no sanctions are imposed if a party took reasonable steps to preserve the information. The proponent suggested that such is the problem — the published proposal goes too far.

The good-faith element was explored from a different angle: is it strict enough that a producing party will not rely on it in allowing routine data destruction to go on unabated?

A different question suggested that the good-faith proposal seems a modest suggestion that there is a presumption against sanctions, but we need to be clear on when it is that the presumption arises.

The proposal was challenged on the ground that if it is designed to give guidance, it should be softened to say that ordinarily a court "should not" impose sanctions. And "solely" should be deleted as well. Substitution of "should not" for "may not" was resisted; it leaves too much room for sanctions.

"Ordinarily" was questioned as not a good word, either in terms of general rule drafting or in terms of a rule that sets up a presumption. Drawing from Rule 11(c)(1)(A), it was suggested that it may be better to say "Absent exceptional circumstances."

A mix-and-match approach was suggested: "Absent exceptional circumstances" is robust; "should not" is weak. Together, a rule saying that "absent exceptional circumstances, a court should not impose sanctions" may strike the proper balance.

"Should not," however, was again criticized. It strongly implies that the court can order sanctions, eroding the premise that there must be exceptional circumstances. The result is not a safe harbor. Instead, everything turns on the perspective of the particular judge. And that will leave us in the predicament that lawyers and clients must preserve too much, for fear of coming under the most exacting scrutiny. The premise, it must be remembered, is that the party has acted in good faith.

It was agreed that "may not" gives more production. "Should not" "is not a safe harbor." On the other hand, "should not" has the virtue of not fencing off remedial authority.

The concept of "sanctions" also came under scrutiny. Is an order to restore backup takes a "sanction," or something else? Perhaps the rule should distinguish between "remedial" and "punitive" sanctions. On this approach, good faith would shield against the most severe sanctions, but would leave the court free to make orders that seem to adjust for the loss of information. This distinction, however, was questioned on the ground that almost all of the orders identified as "sanctions" have a remedial aspect. An adverse-inference instruction, one of the most feared consequences of failing to preserve information, is at least in part designed to provide a remedial substitute for the information that was lost. A different approach was taken by the suggestion that such orders as cost sharing for added discovery designed to make up for the loss of information fall within the "exceptional circumstances" proviso.

Again, it was suggested that sanctions may be appropriate for negligent loss of information. And that rather than describe the appropriate order as a "sanction," it could be characterized as a "discovery order."

The problem of court orders returned. If a court orders a party to stop routine operation of its system, the party attempts to comply, but there is a failure of internal communication and routine operation continues to lose discoverable information, can the court order sanctions? Or is this good faith? Or instead an exceptional circumstance that permits a sanction?

Returning to good faith, it was asked again whether reasonable steps to preserve information are part of good faith? Should the Committee Note say something about this? A proponent of the good-faith standard said that good faith lies at a point intermediate between negligence and recklessness. It assumes the party has a reasonable litigation hold, and did not deliberately use the system's routine destruction functions. "If you know it will disappear and do nothing, that is not good faith." Another proponent suggested that there is routine good-faith operation if the system was not set up for the purpose of destroying litigation information. The first proponent agreed that it is not good faith if you know the system will destroy information, but suggested that it is good faith if you attempt to preserve the information. "The line is conscious awareness the system will destroy information."

A noncontroversial example was suggested. In an individual employment case, it is not good faith if you give the plaintiff's supervisor a notice to preserve e-mail messages but the supervisor disregards the notice and no one follows up on the notice. But if you took steps to preserve, and some of the information was lost notwithstanding those efforts, there is good faith.

It was protested that the proponents of the good-faith approach, when pushed, still seem to fall back on a requirement that there be reasonable steps to preserve information against routine

destruction. A proponent responded that "good faith" "tries to get between an objective negligence test and intent — it is in part subjective."

The focus on good faith was questioned on the ground that it "rewards the party who carries off a good act of indolence or stupidity." State-of-mind proof is difficult. It is better to invoke an objective reasonableness test. "reasonable operation" does not do it.

The good-faith element was tested from a different direction by asking whether one component of good faith turns on compliance with preservation obligations arising independently from common law, statute, or regulation. A proponent of the good-faith test agreed that litigation hold and preservation requirements "are what they are." But "if you do not know enough to stop your computer from doing what computers do, that is good faith."

Another observation was that "good faith" seems to capture part of the "intentionally or recklessly" approach: it implies some level of culpability. You cannot be in good faith, even with routine operation, if you act intentionally or recklessly.

The "reasonable steps" question was renewed by asking whether the good-faith proposal abandons the objective inquiry whether a party took reasonable steps to preserve information, noting that the reasonable steps approach had won strong support throughout a long phase of this project.

It was asked whether "discovery orders" would be carved out as not "sanctions." The response took the question to be whether the rule should continue to exclude all violations of court orders from the safe harbor, saying that the exclusion should be dropped because it simply invites routine applications for preservation orders.

A return to a "should not" formulation was again urged on the ground that this would counterbalance the ambiguity of "good faith." When sanctions seem appropriate, a court could invoke them without the need for a refined determination whether there was "good faith." Judges, moreover, will be better pleased by a rule that does not so tightly confine the sanction authority. But "may not" was again defended on the ground that "should not" is not a safe harbor. The leeway provided by "absent exceptional circumstances" gives discretion enough.

The motion was repeated, recommending adoption — subject to drafting "polishments" — of Rule 37(f) in this form:

> Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost solely as a result of the routine, good-faith operation of the party's electronic information system.

The motion passed, 9 yes, 2 no. The purpose of the motion is to "recouple" the Rule 37(f) proposal with the package of electronic discovery amendments to be transmitted to the Standing Committee with a recommendation for adoption. It was agreed that the Advisory Committee would review a redrafted Committee Note, and any suggested changes in the proposed rule text, before the rule is transmitted.

Rule 45

The August 2004 publication included revisions of Rule 45 to maintain the parallels between the nonparty discovery provisions in Rule 45 and the e-discovery provisions to be added to the party discovery rules. Rule 45 will be adjusted to conform to the recommendations made for adoption of

the other rules, and with them will be sent to the Standing Committee with a recommendation that they be approved for adoption.

Republication

Toward the conclusion of discussions of the electronic discovery proposals, the Committee was asked whether the multiple revisions that it will recommend are such departures from the published proposals as to make it wise to republish the revised proposals for a new round of public comment and testimony.

An initial response was that changes had been made in the rule text for virtually all of the published proposals. Some of the changes seem significant. The Committee Notes have been revised extensively. There are a lot of material changes that would benefit from further comment. A general republication of the entire package also might avoid the need to separate Rule 37(f) from the package for republication alone if the final efforts at refinement encounter renewed difficulties. But this response was conditioned on the observation that the standard for republication is not clear.

The standard for republication is open-ended. The Advisory Committee has discretion about what it recommends with respect to the Standing Committee's discretionary determination whether to republish. A common test is whether a "new concept" has been introduced, but that test is itself flexible. Republication is available, if that seems wise, when there is "any substantial change."

Republication was supported by suggesting that it would entail only a one-year delay in adoption of the proposals. These are important issues, and still better proposals might emerge given more time. Further support was offered by noting that practicing lawyers are quickly adapting to the challenges of electronic discovery; republication will elicit new information about new practices. In addition, comments on specific language changes might reveal still better ways to express the basic ideas.

It was agreed that publication generates a lot of useful information. But that proposition is one without end — multiple stages of publication might each yield improvements. The dynamics of the process must be taken into account. The Advisory Committee and Standing Committees change. Great effort has gone into this project, and it may be difficult to sustain the concentrated focus that has done so much to improve these proposals. The test should be whether there is a "fresh beginning." The revised proposals all keep within the broad approaches of the published proposals. The Advisory Committee has learned much in the process, and should be able to act now on what it has learned.

Related observations noted that the testimony and comments have led to many useful improvements. But there has been no change in the framework or the basic concepts. Everything now proposed was discussed in the hearings and comments. The published proposals provoked exactly what they are aimed to provoke: rich information that both demonstrates the wisdom of the basic ideas and also shows better ways of implementing them.

Another summary of the process was that there were more than 250 written comments, and dozens of witnesses at more than three days of hearings. The number of people involved in preparing the written comments far outstrips the number of comments. Most of the revisions being proposed "tune the same concepts." The reaction of the bar to republication would be "we've been there already."

A motion to republish failed, 2 yes, 10 no.

II RULE RECOMMENDED FOR PUBLICATION

Proposed new Rule 5.2 is one of a set of rules that would implement the E-Government Act. The Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees have considered parallel proposals under the guidance of a Standing Subcommittee chaired by Judge Fitzwater. Professor Capra, Reporter for the Evidence Rules Advisory Committee, has served as Chief Reporter for this project, drafting successive "template" rules for consideration by the several advisory committees. The purpose of the project is to adopt rules that are as nearly identical as possible for the Bankruptcy, Civil, and Criminal Rules, recognizing that the context of each rules set may at times justify departures from absolute uniformity. The Appellate Rules Committee seeks uniformity by a different path, carrying forward on appeal the rules that governed in the district court, and choosing between the district-court rules as appropriate for original proceedings in a circuit court of appeals. Professor Capra attended the meeting by telephone.

The Rule 5.2 in the agenda book includes many questions, most of which address the best means of drafting uniform provisions that will apply across all the sets of rules. Only a few of the questions ask whether there are distinctive needs that justify Civil Rules provisions different from the Bankruptcy or Criminal Rules. It was noted that the Bankruptcy and Criminal Rules Committees had already met; their recommendations came too late to be included in the agenda book, but were available at this meeting.

Judge Fitzwater noted that for the moment there are three sets of variations on the template rule. In part the variations reflect adaptations to meet distinctive needs — Civil Rule 5.2, for example, includes a subdivision addressing social security and immigration cases that has no counterpart in the Bankruptcy or Criminal Rules. The Subcommittee will consider the global questions that seem to apply alike to all of the rules.

Professor Capra stated that the E-Government Act requires the rules to be as uniform as practicable. Variations are permissible when there are reasons for them — for example, the Criminal Rules require redaction of home addresses, while bankruptcy procedure needs full home addresses. He further noted that the project for the moment is to approve rules for publication. This is not the final stage of the project; time remains to make changes during the comment period. He also noted that the template rule was reviewed by the Style Subcommittee a year ago; quite recently, the Style Subcommittee has provided another set of suggestions. It is better to consider these suggestions during the comment period than to attempt to agree on them now.

Professor Capra then provided a quick overview of the rule. The basic provision is subdivision (a), which calls for redaction of several categories of personal information to protect privacy in an era of electronic access to court filings. Subdivision (b) establishes exceptions to the redaction requirement for situations where redaction would be unduly costly or seems unnecessary. Subdivision (c), unique to the Civil Rules, limits remote public access to filings in social security and immigration cases. Subdivision (d) recognizes that there is no need for redaction if a filing is made under seal, and also governs when a sealed filing is later unsealed. Subdivision (e) allows the court to order redactions not required by subdivision (a), or to limit remote access by nonparties in situations outside subdivision (c). Subdivision (f), following the dictate of the E-Government Act, provides that a party who makes a redacted filing may also file an unredacted copy under seal. Subdivision (g) allows a party who makes a redacted filing to file a reference list that identifies each item of redacted information and specifies an appropriate identifier that corresponds to each item listed. This subdivision is dictated by an amendment of the E-Government Act enacted at the behest of the Department of Justice. Subdivision (h), finally, provides that a party waives the protection of Rule 5.2(a) by filing its own information not under seal and without redaction.

The draft Civil Rule 5.2 in the agenda book introduces variations on the most recent "template" and in some respects departs from the revisions suggested by the Bankruptcy and Criminal Rules Committees. It also raises several questions, and incorporates most of the suggestions made by the Style Subcommittee. It may be that the civil action context justifies a small number of variations from the parallel rules because of distinguishing differences from the bankruptcy and criminal contexts. But most of the questions and variations are suggestions for the best drafting of a uniform rule. They are included in the draft to facilitate comment by Civil Rules Committee members, recognizing that for the most part uniform drafting must be accomplished by other and later means. It was agreed that there was no point in pursuing these variations in detail.

One difficult set of issues was noted with respect to habeas corpus proceedings. Subdivision (b), drafted in parallel with the Criminal Rule, generally exempts habeas corpus proceedings from the redaction requirements of subdivision (a). This exemption reflects the volume of unredacted records often involved in habeas corpus proceedings, and may reflect as well concerns that habeas corpus petitioners are not well positioned to redact their filings. But § 2241 habeas corpus proceedings may present special difficulties. One difficulty, unique to the Civil Rules, arises from the occasional use of § 2241 habeas corpus to raise immigration law questions. Rule 5.2(c) limits remote public access to immigration proceedings; Rule 5.2(b)(5) exempts any filing covered by Rule 5.2(c) from the redaction requirement. If immigration-related § 2241 proceedings are properly treated in this way — very limited public access and no redaction — the question remains whether other § 2241 proceedings should be exempt from redaction. Section 2241 may be used to challenge detention that does not flow from a state or federal criminal conviction. The reasons for exempting other habeas corpus proceedings from redaction may not apply, and there may be stronger reasons to mandate redaction. These questions will be explored further under the direction of the Subcommittee.

One general question was addressed. The Bankruptcy Rules Committee recommended the provision in Rule 5.2(e) that recognizes the court's authority to order redactions not directed by Rule 5.2(a). The agenda draft suggests that this authority might better be included in subdivision (a), so that mandatory and court-ordered redaction provisions are contained in the same place. That drafting question is one that will be worked out with the Subcommittee, either before the Standing Committee meeting or during the public comment period. But the general question whether the rule should somewhere recognize authority to order additional redactions was discussed, along with the authority to limit remote public access. The Committee unanimously agreed that the rule should recognize the court's authority to order redactions not mandated by the rule, and also the authority to limit remote public access in circumstances not covered by subdivision (c).

The Committee voted to recommend publication for comment, in a version to be worked through by the Subcommittee and the Standing Committee.

III AGENDA

Judge Rosenthal noted that the full agenda for this meeting — and the high level of committee activity that prepared for it — foreclosed any opportunity to undertake a general review of the many items that remain on the agenda. An agenda review is planned in advance of the fall meeting. As in earlier years, it is likely that a memorandum suggesting topics to delete from the agenda will be circulated well in advance of the meeting, so that members can consider whether some of the suggested topics should be retained or advanced on the agenda.

The Standing Committee has approved a cross-Committees project to review the methods used to calculate time periods. Review of the calculation methods will entail reconsideration of many of the time periods as well. A Subcommittee chaired by Judge Kravitz will coordinate the work of the several advisory Committees. The Administrative Office has prepared comprehensive tables of the time provisions in all of the sets of rules. The reporters will review these tables and begin to shape plans for pursuing the project. The practicing bar will be deeply grateful for any improvements that facilitate easy and assured calculation of time periods.

Another project likely to come on for attention soon is a proposed Rule 48 amendment that would adopt jury polling provisions parallel to Criminal Rule 31(d). The Federal Judicial Center has already undertaken a review of civil jury trials over the last 20 years, finding that juries "hang" without returning a verdict in less than 1% of the trials. This information may assuage concerns that polling might lead to an undue number of mistrials. There may be some reason to distinguish Rule 48 from the Criminal Rule, in part to adjust to the provisions in Rule 49(b) that address situations in which inconsistencies appear between a general verdict and the jury's answers to interrogatories.

Several lawyers have already shown interest in another project, which would explore questions raised by expanding uses of Rule 30(b)(6) depositions.

A long-standing agenda item briefly described in the materials was a proposed new Rule 62.1 to address "indicative rulings" made by a district court to indicate what action it would take on a motion that it cannot decide because an appeal has transferred the case to an appellate court.

Next Meeting

The next Committee meeting has been set for October 27 to 28, most likely in San Francisco. The dates complement the public hearing scheduled for San Francisco on October 26. It is too early to know whether all three of the scheduled hearings will be required to meet the public interest in testifying on the Style Project. If fewer than three hearings are needed, the October 26 hearing may be canceled.

Judge Rosenthal concluded the meeting by expressing the Committee's thanks and appreciation for the superb help provided by the Administrative Office staff in planning the meeting and supporting all the work that led up to it. Special thanks were extended to John Rabiej, Peter McCabe, and James Ishida. She also noted the Committee's appreciation and thanks to Myles V. Lynk for his work chairing the Discovery Subcommittee that brought to the Committee the proposals for the e-discovery rules that are now well on the way to adoption.

Respectfully submitted,

Edward H. Cooper
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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October 10, 2005

To: **Civil Rules Committee**

From: **Judge Lee H. Rosenthal**

This meeting provides a welcome opportunity for the Committee to step back and reflect on what our next projects should be. The Committee has been deeply engaged in several difficult, lengthy projects for over a decade, as well as making smaller improvements to individual rules. The amendments to the class action and discovery rules, the proposed electronic discovery amendments, the proposed amended forfeiture rule, and the Style Project were all large efforts that reflect hard and careful work. The Style Project is, of course, not completed. In the November 18 hearing in Chicago, we will hear from a group of practitioners and academics who have undertaken a detailed review of the published proposed changes. The end of the public comment period will generate further comments for us to consider. But this meeting finds us in the rare position of not having a full agenda of works in progress. It allows us to think about how best to use the resources that the Committee's own members represent and that the thoughtful lawyers, academics, and judges who follow and support our work have repeatedly provided. This is an opportunity to reflect on what problems in the practice are the most pressing that can be addressed by rule amendment, in light of

the very active pace of rule changes the past decade has brought. This agenda book is divided into three parts. The first is the easiest. Every Advisory Committee agenda book includes a current version of the suggestions docket. This docket is our record of suggestions for rule amendments that the Committee is asked to consider. The docket has grown steadily over the past several years. There has been no recent effort to identify and remove suggestions that are not likely candidates for continued work in the foreseeable future. It is time to review the docket for that purpose, leaving us a list of suggestions that are likely candidates for detailed examination. It is the Committee version of cleaning the closet so that it contains clothes we really intend to wear. The first part of these agenda materials identifies those suggestions that have been pending for a long time and are candidates for removing from the docket. Any Committee member may ask that any of the docket suggestions be retained for further examination. Suggestions that no one wants to retain or discuss will be eliminated from the docket.

The second section of these agenda materials sets out relatively discrete topics that the Committee has at different times considered or indicated a desire to examine. Examples of these topics include proposed amendments to Rule 15 to clarify relation back when the defendant's identity is initially not known; examining Rule 30(b)(6) to determine if problems in its application can usefully be addressed by amending the rule; a proposed revision of Rule 48 on jury polling; and a proposed "indicative rulings" amendment to clarify the authority of the district court to act on motions filed after an appeal has been docketed and is pending. A number of these proposals have been on the docket for years and some work has already been accomplished. The second section of these materials discusses these proposals, presents the work that is already available, and asks you to consider whether the work should be completed; deferred; or the project removed from the

suggestions docket. Professor Cooper has drafted an extensive memorandum on the issues raised by Rule 15 and Professor Marcus has drafted an extensive memorandum on Rule 30(b)(6). Both provide the basis for a lively discussion.

The third section of these materials sets out some more ambitious and larger projects for consideration. These larger projects include two that have been on the Committee's docket for a long time. One of these projects, the time-counting project, has already been launched. One is an examination of Rule 56. The Style Project revealed a number of problems with the present rule, including, but not limited to, some of the time periods specified. The question is whether there are problems in practice that should be addressed by rule changes. Another larger project is an examination of notice pleading under Rule 8. Professor Cooper has drafted thoughtful memoranda setting out some of the problems and promise of both projects.

These larger proposals are perhaps most productively viewed as part of a yet larger project. Much of the Committee's work is directed to efforts to make civil litigation more efficient, less time-consuming, and less costly, without sacrificing fairness or procedures that are fundamental to our system for resolving disputes in court. Yet we have not recently stepped back and asked if there are ways beyond revisions to existing rules that might advance this goal more directly. Some years ago, Judge Niemeyer suggested that we look at developing a set of simplified procedures for certain kinds of cases that did not deserve either the expansive approach appropriate for many "big" cases or the more truncated approach achieved by statute for certain kinds of cases, such as habeas or prisoner civil rights. The discussion that followed the simplified procedures suggestion revealed a great dependence on, and trust in, case-specific orders entered by judges engaged in a case at an early stage. Many of the recent changes to the discovery rules follow this approach, attempting to

facilitate judicial involvement when and as needed. Since that suggestion, however, we have not stepped back and asked whether to pursue this avenue or whether there are other changes that might serve the larger goal of less expensive, more efficient case resolution.

There are other projects that we have considered or that remain on the suggestions docket not specifically addressed in the agenda materials. Their omission is not intended to suggest that they are not viable candidates for further work. Some of those proposals need more time before they are examined in detail. For example, it makes sense to defer consideration of a proposal to amend Rule 23 to provide separate certification standards for settlement classes until we have more information about the courts' experience under the recently-enacted Class Action Fairness Act. It makes sense to defer some of the suggestions on amending Rules 4 and 5 to make them consistent with electronic filing until there is more experience with electronic filing and we can look generally at whether amendments should be made in light of that experience.

We of course cannot come close to a full understanding, much less resolution, of the many issues raised by these materials in our October meeting. These materials are intended to provide a basis for thorough discussion and careful deliberation about what our next projects should be, not to press for a hasty decision.

L.H.R.

I. The Suggestions Docket

The first section of this memo sets out a list of docket suggestions proposed for elimination from the docket, summarizing the original proposal and providing a brief statement of the reasons for suggesting that it be removed from the docket. Some of the suggestions are moot because other projects have addressed the issue or developments – such as electronic filing – have overtaken it. Some of the suggestions have been examined several times in the past. In some cases, the Committee decided not to proceed; if those or other reasons remain persuasive, it may be time to remove the item from the docket. In other cases, the Committee decided that the suggestion might merit examination after more time and experience, but neither time nor experience has led to interest in proceeding. Other suggestions have languished with no apparent support for proceeding in the foreseeable future. These and other reasons may support removing items from the suggestions docket. The order follows the docket itself: by civil rule number, form number, and, if not tied to a particular rule or form, alphabetically by subject matter.

Rule 4

Rule 4(c)(1) 1994, 1997 This proposal from a clerk of court resulted from the last set of changes to Rule 4. Former Rule 4(a) made the plaintiff "responsible for prompt service of the summons and a copy of the complaint." Rule 4(c) makes the plaintiff responsible for service "within the time allowed by subdivision (m)." The question is whether to restore the requirement that the plaintiff effect service "promptly." The suggestion was accompanied by the complaint that because plaintiffs may take the full 120 days to effect service, cases are delayed at the front end. The change from the prompt service requirement resulted in part from the rule change from service by mail to the present waiver of service provisions of Rule 4(d). A promptness

requirement would apply to efforts to serve or to seek a waiver of service. To the extent this suggestion criticizes the length of the 120-day period for service provided under Rule 4(m), it is within the scope of the time-counting project. To the extent it seeks a rule amendment to restore a requirement that plaintiffs effect service "promptly," it is recommended that the suggestion be deleted from the docket.

Rule 4(d) 97-CV-R 1997 A prisoner suggests that Rule 4(d) be revised to make it clear that a plaintiff is not required to seek a waiver of service. It is recommended that this be deleted from the suggestions docket. The courts have developed procedures for handling pro se cases, including cases filed by prisoners, and the cases do not reflect a need for this amendment.

Rule 4 97-CV-K 1997 A magistrate judge suggests that Rule 4 be amended to impose a duty to cooperate on a party who is the subject of attempted service, and that the amendment provide for contempt for a wilful violation of that duty, that is, a sanction against the wilful evasion of service. There has been no other similar suggestion. The courts seem to have sufficient tools for effecting service when attempts to do so by conventional methods fail. No further consideration seems warranted. It is recommended that this suggestion be removed from the suggestions docket.

Rule 5

Rule 5 2000 A lawyer suggests that the rule be changed to clarify that a document is deemed filed on delivery to an established courier. The suggestion was based on an incident involving an attempt to deliver a filing to a court on the day after Thanksgiving. The court was "open," but with a skeleton staff. The filing ended up not being made. Apparently the courier and the clerk's office blamed each other. The proposed resolution is to amend the rule to

deem a filing complete on delivery to an established commercial courier. It is recommended that this suggestion be removed from the docket. Electronic filing will largely moot this issue, to the extent it exists. The problem of failed service by electronic means was dealt with in the 2001 amendments; further work is likely to be based on further experience with electronic filing.

Rule (5)(b)(2)(D) 04-CV-A 2004 A lawyer suggests that Rule 5(b)(2)(D) be amended to treat delivery of materials by electronic mail or facsimile the same as hand delivery. It is recommended that this suggestion be removed from the docket. The issue it addresses has been overtaken by electronic filing provisions. The aspect of Rule 5 that does need to be addressed is the language relating to the parties' deemed consent to receiving electronic service of submissions. This should be reviewed as part of the project to consider the rule implications of electronic filing after sufficient experience accumulates.

Rule 5(d) 1999 This was a general question referred by the Standing Committee: whether the change to Rule 5, from having all discovery materials filed with the court to only allowing them to be filed when used in the proceeding or on court order affects evidentiary privileges. This issue has not seem to have emerged as a problem since the rule was amended in 2000. Professor Capra, reporter to the Evidence Rules Committee, was consulted; he does not believe that this question needs to be pursued by either the Civil Rules Committee alone or as part of a joint Civil Rules/Evidence Rules Committee project. It is recommended that this suggestion be deleted from the docket.

Rule 6

Rule 6(e) 04-CV-A 2004 This proposal is the same as the proposal to amend Rule 5(b)(2)(D); it too is recommended for removal from the suggestions docket.

Rule 7

Rule 7.1 During the Style Project, it was suggested that Rule 7.1 be amended to address the consequences of a party's failure to provide the required disclosures. See Rule 5(d)(2). The following paragraph illustrates what could be added to the rule to cover this point:

> (c) Failure to File. If a party fails to file a disclosure statement [when] required under (b)(1), the clerk [may]{must} refuse to accept submissions by that party.
>
> Committee Note: A disclosure statement is essential to ensure that a judge has access to information relevant to possible disqualification. The clerk should refuse to accept any submission by a party who has not filed a disclosure statement [unless exigent circumstances justify filing subject to prompt submission of a disclosure statement].

The issue is whether such a provision is needed. The question did not arise when Rule 7.1 was adopted, either in studying many local rules or in the public comment process. Any such change would also require the other advisory committees to work on corresponding changes to their disclosure provisions. It might be useful to do an informal study, asking clerks of court in several large cities if noncompliance with the disclosure statement requirement has been a problem. If not, the recommendation would be to remove this question from the suggestion docket.

Rule 8

Many have suggested that we examine the basic premise of notice pleading. The larger issue of notice pleading is discussed in the third section of this memo. If such a project is undertaken, it could provide a useful opportunity to examine whether other changes should be made to Rule 8. Even if the larger project is deferred, there are small changes to Rule 8 that have been proposed. It

is recommended that one such proposal be removed from the list of candidates for future consideration.

Rule 8(a)(2) 2002 A lawyer suggests that the rule be amended to require a "short and plain statement of the claim that alleges facts sufficient to establish a *prima facie* case in employment discrimination suits. It is recommended that this be deleted from the suggestions docket, even if other aspects of Rule 8 are taken up. There has been no support for pleading rules specific to employment discrimination cases.

Rule 12

Rule 12 97-CV-R 1997 A lawyer suggests amending the rule to conform to Prison Litigation Reform Act of 1996, that allows a defendant sued by a prisoner to waive the right to reply. It is recommended that this suggestion be deleted. The rule states that the requirements apply "unless a different time is prescribed by a statute of the United States." Most courts have rules or orders that address pleadings, discovery, and motions in prisoner cases. A rule change does not seem warranted for this particular category of cases. It is recommended that this suggestion be removed from the suggestions docket.

Rule 12(f) 02-CV-J 2002 A district judge suggests amending the rule to provide guidance for a clerk of court when a judge grants a Rule 12(f) motion and "order[s] stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The question is whether there is confusion or uncertainty as to what happens to "stricken" matter. The consistent approach appears to be that the order does not physically remove the material from the court files, return it to the parties, or destroy it. Rather, the order simply removes the stricken material from further consideration as the action proceeds. The question is whether the

absence of explicit guidance has created problems, either with paper filings or with electronic filing. The cases relating to appellate records, and consultation between the reporters of the Civil Rules and Appellate Committees, show no problem. There is no basis to believe that clerks of court are confused as to whether they are to remove or delete "stricken" pleadings from the official record. Because the present rule language is consistently and appropriately applied, a rule change does not seem necessary. It is recommended that this suggestion be removed from the suggestions docket.

Rule 16

Rule 16 04-CV-A 2005 A law professor suggests adding language to Rule 16 to provide that the court may require the parties "or their representatives or insurers" to attend a conference to consider possibilities of settlement." The proposal would add a statement of express authority to compel attendance of nonparties who are closely related to the parties in a way that gives them a vital interest in the action and its settlement. A liability or health insurer of a party is the most obvious example. The suggestion would amend Rule 16 to provide that the court could require the attendance of individuals or entities whom the court could not force to attend. A more limited proposal was considered and abandoned in the process that led to the 1993 Rule 16 amendments. In 1991, the Committee published a version of Rule 16 that would have authorized a court to require the attendance of a party representative or insurer at the Rule 16 conference. That proposal was criticized in part because it mandated ADR and in part because it compelled attendance of nonparties. The proposal was softened to its present form, stating that the court "may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." The report to the Standing Committee transmitting this language explains that the language "does not attempt to address the extent to which a court by exercise of its

inherent power can compel parties to attend conferences or participate in alternative dispute resolution procedures and does not limit the powers of court to compel participation when authorized to do so by statute."

To the extent the proposal allows a court to invite a party's representatives or insurers with authority to settle to attend settlement conferences, that is already the practice in many courts and does not seem to require express support in the rule. Because parties are often interested in exploring settlement, such invitations are routinely accepted and no rule amendment appears necessary. To the extent the proposal suggests that a court could compel attendance by a nonparty who refuses to attend such a conference simply because that individual or entity has the authority to make a decision on whether a party will or will not settle, that authority is not clear. A party and a party's insurer may have a right not to settle and to withhold settlement authority. The problems of writing a rule to state that a court has the ability to exert such authority over someone not a party to the action and often not within the court's jurisdiction are significant. It is recommended that this proposal be removed from the suggestions docket.

Rule 16 05-CV-F 2005 A lawyer suggests that there is a need for a "new rule governing motions in limine" created by *Daubert* hearings. Although the proposal includes a complaint that these hearings "throw the scheduling orders out of whack," to the extent this calls for a rule change, it would seem to be a problem better addressed by the Evidence Rules Committee. It is recommended that the proposal be referred to Judge Smith and removed from the Civil Rules suggestions docket.

Rule 23

Rule 23 03-CV-D 2003 A lawyer suggests revising Rule 23 to protect the status of the small defendant in a class action. It is recommended that this be removed from the suggestions docket. The rules in general do not make distinctions based on the size or wealth of a party. Rule 23 has been the subject of extended recent study and revealed no support for such a proposal.

Rule 26

Rule 26 1994 A lawyer suggests revising Rule 26 to set out express limits on interviewing former employees of a party. The proposal is in the form of a law review article that notes disagreements among courts in applying ethical and attorney conduct rules to such interviews and suggests using the rules governing discovery as a means of regulation, even if the interviews are outside formal discovery. The recommendation is to remove this suggestion from the docket. This area is subject to an extensive body of case law and to rules governing attorney conduct and would be difficult to address within Rule 26.

Rule 32

Rule 32 1996 A district judge suggests that in mass torts cases, Rule 32 should provide that expert witness testimony may be used at subsequent trials without cross-examination. The recommendation is to delete this from the suggestions docket. It has proven very difficult to use the Civil Rules to formalize practices for problems unique to mass torts cases, such as repeatedly-used expert testimony. This proposal has the additional complication that it treads on the area covered by the evidence rules. While it is recommended that this suggestion be removed from the suggestions docket, it is also suggested that we refer the proposal to the FJC for consideration in judge-education materials.

Rules 33 and 34

Rule 33 and 34 99-CV-E 1999 A lawyer suggests amending the discovery rules to require submission of a floppy disc version of a discovery request or response. This specific proposal has been overtaken by changes in technology and the larger issue has been subsumed in the electronic discovery proposals. The recommendation is to delete this from the suggestions docket.

Rule 40

Rule 40 00-CV-A 2000 A lawyer suggests a rule change to require precedence to the elderly in setting trials. The recommendation is to delete this from the suggestions docket. The Judicial Conference and Standing Committee are institutionally opposed to statutes and rules that establish priorities on a general basis. The suggestion is better handled on a case-by-case basis.

Rule 81

Rule 81 1997 A lawyer suggests adding injunctions to the list of proceedings to which the Rules of Civil Procedure apply. It is suggested that this proposal be removed from the suggestions docket. There does not appear to be an ambiguity or gap that requires a rule change.

Rule 81(c) 1994 A lawyer suggests deletion of "petition" for removal as a conforming technical change. This change was made in the Style Project ("petition" became "notice"). It is recommended that this proposal be removed from the suggestions docket.

Rule 83

Rule 83(a)(1) 2002 This proposal suggests that Rule 83 be amended to require that there be a uniform effective date for local rules and a uniform date for transmission to the AO. The rule now states that a local rule takes effect on the date specified by the district court. This proposal has been deferred indefinitely since 2000. Some of the problems that led to the proposal have been addressed. A major problem was the difficulty in accessing local rules, particularly for out-of-town counsel and litigants. A related problem was the difficulty in knowing when or if local rules had been amended. Courts now routinely post those rules on the Internet, and the E-Government Act will require such posting. Although this does not solve the problem of new local rules being effective at different times, which requires a lawyer or litigant to check more than once a year to see if there are relevant changes, this is not viewed as sufficient to require a nationwide consistent calendar for local rules changes. That would be a significant incursion on local districts, which could in turn limit their ability to make rule changes on a timely basis to deal with localized but urgent problems. And, as noted by Professor Cooper, a change to the national rule may conflict with the Rules Enabling Act (28 U.S.C. 2071(b)), which plainly says that the effective date of a local rule is "specified by the prescribing court." Professor Capra, who was the reporter to the now-completed Local Rules Project, concurs in the recommendation that we not pursue this suggestion. It is recommended for removal from the suggestions docket.

Rule 83 02-CV-H 2002 A lawyer suggests that Rule 83 be amended to add provisions similar to Rule 46 of the Rules of Appellate Procedure, governing attorney admission. Rule 46 includes eligibility for admission to the bar of a court of appeals, the application form, admission procedures, suspension or disbarment standards and procedure, and discipline. The suggestion is to impose a similar set of requirements and procedures for the district courts. There

has been no interest in this proposal and no suggestion that it would be a useful way to improve practice or would ease an onerous, conflicting sets of district-by-district requirements to attorney admission. It is recommended that this be removed from the suggestions docket.

SUBJECT MATTER

Court filing fee 02-CV-C 2002 A lawyer suggests that AO regulations on court filing fees should not be effective until adopted in the Civil Rules or Local Rules. It is recommended that this be deleted from the suggestions docket. The Rules Enabling Process is not appropriate or necessary for such regulatory changes.

De Bene Esse Depositions 02-CV-G 2002 A district judge suggests that the rules be amended to provide specifically for such depositions. The discovery subcommittee examined this proposal and suggested that it not be pursued. No further suggestion of need has appeared. It is recommended that this be removed from the suggestions docket.

Discovery Rules 04-CV-D 2004 A district judge suggests returning the discovery rules to their pre-1993 form, with no mandatory disclosures. The primary concern is that the disclosure requirements straight-jacket good lawyers and front-load cases. The 2000 amendments to the discovery rules exhaustively studied the rules on mandatory disclosures and made extensive changes that resulted in a uniform, but less stringent, mandatory disclosure requirement. There appears to be no basis for a project to eliminate that requirement. It is recommended that this be removed from the suggestions docket.

Electronic filing 99-CV-I 1999 A prisoner suggests that the clerk's office date stamp and return papers filed with the clerk. The clerks' offices are developing protocols for electronic filing and electronic docketing and have procedures for handling paper in cases filed by

pro se and incarcerated litigants. It is recommended that this suggestion be removed from the suggestions docket.

Interrogatories on Disk 98-CV-C 1998 A lawyer suggests that the rules be amended to require that interrogatories be submitted and answered on floppy disks. This is similar to the suggestion for changes to Rules 33 and 34, 99-CV-E, which was recommended for removal from the suggestions docket. This proposal is now obsolete because of changes in technology, and the larger issue has been subsumed in the electronic discovery proposals. As with the related proposal, it is recommended that this proposal be removed from the suggestions docket.

Medical Billing System 05-CV-B 2005 This suggestion is in the form of an article discussing the law of medical expenses when they are an element of damages. The focus is on problems that arise from the difference between stated charges for medical care and the amounts that providers agree to accept from insurers or government sources. These problems include agreements by providers not to engage in "balance billing"; subrogating providers to the medical expenses component of a personal injury claim; and the difficulty of finding competent witnesses to the "usual and customary" charges for medical expenses. These problems are not amenable to treatment through the Civil Rules. The problem appears to be a matter of the substantive law of damages; the article is a detailed discussion about Alabama damages law relating to medical expenses. One suggestion is to amend Rule 26(a) to require disclosure of an agreement between the plaintiff and a nonparty insurer that reduces the amount of the insurer's subrogation claim. Rule 26 generally requires disclosures about insurance and "the computation of any category of damages claimed by the disclosing party," but has not attempted to impose more detail about the information that must be provided. Such detail is so interdependent with substantive law that it could not feasibly be

included in the rule itself. The proposal is inconsistent with Rule 26(a) to the extent it seeks to include such a level of detail as to the disclosures required. It is recommended that this proposal be removed from the suggestions docket.

Postal Bar Codes 00-CV-D 2000 A lawyer suggests that the rules prevent manipulation of bar codes in mailings. It is recommended that this be removed from the suggestions docket based on required electronic filing and the lack of evidence of a problem that the civil rules should address.

Pro Se Litigants 97-CV-1 1997 A magistrate judge, on behalf of the Federal Magistrate Judges Association, supports a proposal by another magistrate judge that a set of rules be promulgated to govern cases filed by pro se litigants. The proposal is over six years old. The largest single category of pro se cases – prisoner and habeas petitions – already have specific statutory requirements, and there are national rules governing section 2254 habeas motions. To the extent this proposal seeks to provide assistance to pro se litigants, it may not be necessary; many courts have helpful booklets for pro se litigants. To the extent this proposal seeks to provide assistance to courts, it may not be necessary; most courts have developed specific forms to use in recurring pro se cases, such as prisoner cases or pro se employment complaints. There has not been a demand for creation of a new and separate set of rules for pro se litigants. It is recommended that this be removed from the suggestions docket.

Verdict 04-CV-F 2004 A judge suggests that the rule (presumably Rule 48) be amended to require less than unanimous verdicts. No interest has been expressed in pursuing this proposal. Particularly given the fact that the rule allows civil juries of as few as six jurors, a less than unanimous verdict is problematic. A recent FJC check of available statistics on civil juries failures

to agree showed that from 1980 to 2004, of approximately 107,265 federal court jury trials, 0.8% resulted in a hung jury. (From 1996 on the number hovered at or above 1%.) The fear that unanimity is causing a lot of mistrials seems ill-placed. The unanimity requirement is seen as an important a way to preserve the way juries function and to enable even a single individual to refuse to give up a position for the sake of a verdict and thereby to serve as the "conscience" of the jury. It is recommended that this proposal be removed from the suggestions docket.

Word Substitution 02-CV-F 2002 A professor suggests consistent use of "action" for "case" and other similar words, and other suggestions for using the same word to mean the same thing. It is recommended that this be removed from the suggestions docket. The proposal has been subsumed in the style project.

CIVIL RULES SUGGESTIONS DOCKET (Pending Suggestions Only)

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Rule 4(c)(1) Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 - Committee deferred as premature **DEFERRED INDEFINITELY**
Rule 4(d) To clarify waiver-of-service provision	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 Permit electronic service of process on persons/entities located in the US	03-CV-F Jeremy A. Colby 8/26/03	9/03 - Sent to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 4 To provide for sanctions against the willful evasion of service	97-CV-K Judge Joan Humphrey Lefkow 8/12/97	10/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended accumulation for periodic revision **PENDING FURTHER ACTION**
Rule 5 Clarifies that a document is deemed filed upon delivery to an established courier	00-CV-C Lawrence A. Salibra, Senior Counsel 6/5/00	6/00 - Referred to chair, reporter, and agenda subcommittee **PENDING FURTHER ACTION**

Rule 5(b)(2)(D) Treat electronic mail or facsimile the same as hand delivery	04-CV-A David R. Fine, Esq. 1/2/04	1/04 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 5(d) Does non-filing of discovery material affect privilege	Standing Committee 6/99	10/99 - Committee considered **PENDING FURTHER ACTION**
Rule 5(e) Mandatory electronic filing should be encouraged to the fullest extent possible	04-CV-G Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair 11/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
New Rule 5.1 Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action	00-CV-G Judge Barbara B. Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and deferred action 1/05 - Standing Committee approved 3/05 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 6 Clarifies when three calendar days are added to deadline when service is by mail	00-CV-H Roy H. Wepner, Esq. (via Appellate Rules Committee) 11/27/00	12/00 - Referred to reporter and chair 5/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**

Rule 6 Time Issues	03-CV-C Irwin H. Warren, Esquire 6/26/03	6/03 - Referred to reporter and chair 4/04 - Committee considered and approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 6(e) Clarify the method for extending time to respond after service	Appellate Rules Committee 4/02	4/02 - Referred to Committee 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 6(e) Treat electronic mail or facsimile the same as hand delivery	04-CV-A David R. Fine, Esq. 1/2/04	1/04 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7.1(a) Simplify filing by creating a national event in the CM/ECF system for filing of supplemental statement	04-CV-I Lawrence K. Baerman, Clerk 11/29/04	12/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 8(a)(2) Require "short and plain statement of the claim" that allege facts sufficient to establish a *prima* facie case in employment discrimination	02-CV-E Nancy J. Smith, Esq. 6/17/02	6/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 8(c) In restyling the civil rules: delete "discharge in bankruptcy"; and insert "claim preclusion" and "issue preclusion"	04-CV-E Judge Christopher M. Klein 3/30/04	4/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12 To conform to *Prison Litigation Act of 1996* that allows a	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee considered

defendant sued by a prisoner to waive right to reply		4/99 - Committee considered and deferred action **DEFERRED INDEFINITELY**
Rule 12(f) Provide guidance for the clerk when the court strikes a pleading	02-CV-J Judge D. Brock Hornby 10/02	10/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 15(a) Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 - Committee considered 11/95 - Committee considered and deferred **DEFERRED INDEFINITELY**
Rule 15(c)(3)(B) Clarifying extent of knowledge required in identifying a party	98-CV-E Charles E. Frayer, Law student 9/27/98	9/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee rec. accumulate for periodic revision (1) 4/99 - Committee considered and retained for future study 5/02 - Committee considered along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001). 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 15(c)(3)(B) Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 - Referred to chair and reporter 1/02 - Committee considered 5/02 - Committee considered 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 16 Proposals regarding compelled attendance and settlement enforcement.	04-CV-A Professor Jeffrey A. Parness 1/3/05	1/05 - Referred to chair and reporter **PENDING FURTHER ACTION**

Rule 23 Revise to protect the status of the small defendant	03-CV-D William S. Karn 7/31/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 26 Interviewing former employees of a party	John Goetz	4/94 - Declined to act **DEFERRED INDEFINITELY**
Rule 26 Does inadvertent disclosure during discovery waive privilege	Discovery Subcommittee	10/99 - Discussed **PENDING FURTHER ACTION**
Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered 5/03 - Committee considered Discovery Subcommittee=s report 2/04 - Committee presented E-Discovery Conference at Fordham Law School in New York 4/04 - Committee considered and approved subcommittee's recommendation to publish for public comment 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 26 Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**

Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof. Stephen D. Easton 11/29/00	12/00 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 26(a)(2)(B) To clarify that all testifying expert witnesses are subject to the same disclosure requirements	05-CV-C George Brent Mickum IV, Esq. 5/25/05	6/05 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 30(b)/45 Give notice to deponent that deposition will be videotaped	99-CV-J Judge Janice M. Stewart 12/8/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Discovery Subcommittee 4/00 - Referred to Discovery Subcommittee 8/03 - Committee published proposed amendments to Civil Rule 45 re notifying witness of the manner of recording the deposition 4/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 30(b)(6) Myriad proposed amendments	04-CV-B New York State Bar Association Commercial and Federal Litigation Section (Gregory K. Arenson, Esq., Chair) 2/24/04	3/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 32 Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 Referred to chair and reporter 10/96 - Committee considered. Federal Judicial Center to conduct study 5/97 - Reporter recommended that it be considered part of discovery project 3/99 - Agenda Subcommittee recommended referral to other committee **PENDING FURTHER ACTION**
Rules 33 & 34 Require submission of a floppy	99-CV-E Jeffrey K. Yencho	7/99 - Referred to Agenda Subcommittee 8/99 - Agenda Subcommittee recommended

disc version of document	7/22/99	referral to other Subcommittee **PENDING FURTHER ACTION**
Rule 40 Precedence given elderly in trial setting	00-CV-A Michael Schaefer 1/19/00	2/00 - Referred to chair, reporter, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 50(b) Eliminate the requirement that a motion for judgment be made "at the close of all the evidence" as a prerequisite for making a post-verdict motion, if a motion for judgment had been made earlier	03-CV-A New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section 2/25/03	3/03 - Referred to chair and reporter 5/03 - Committee considered 10/03 - Committee considered 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 50(b) When a motion is timely after a mistrial has been declared	97-CV-M Judge Alicemarie Stotler 8/26/97	8 /97 - Referred to chair and reporter 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 54(b) Define "interlocutory order"	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 56 To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further

		discussion **PENDING FURTHER ACTION**
Rule 62.1 Proposed new rule governing "Indicative Rulings"	Appellate Rules Committee 4/01	1/02 - Committee considered 5/03 - Committee considered 10/03 - Committee considered 4/05 - Committee reviewed **PENDING FURTHER ACTION**
Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 S. 79 Civil Justice Fairness Act of 1997 and ' 3 of H.R. 903 02-CV-D Gregory K. Arenson 4/19/02	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered. Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (Advised of past comprehensive study of proposal) 1/97 - S. 79 introduced. ' 303 would amend the rule 4/97 - Stotler letter to Hatch 5/97 - Reporter recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED** 5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**
Rule 68 Permit plaintiffs and defendants to make offers of compromise	04-CV-H Judge Christina A. Snyder 7/23/04	8/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 68 Address the practice of "high-low" settlement agreements	04-CV-J Judge Paul D. Borman 12/21/04	12/04 - Received by chair **PENDING FURTHER ACTION**
Rule 72(a) State more clearly the authority for reconsidering an interlocutory order	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**

Rule 81 To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 81(c) Removal of an action from state courts C technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 - Accumulate other technical changes and submit eventually to Congress 11/95 - Reiterated April 1995 decision 5/97 - Reporter recommended that it be included in next technical amendment package 3/99 - Agenda Subcommittee to accumulate for periodic revision 4/99 - Committee considered **PENDING FURTHER ACTION**
Rule 83(a)(1) Uniform effective date for local rules and transmission to AO		3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommends referral to other Committee (3) 4/00 - Committee considered **DEFERRED INDEFINITELY**
Rule 83 Have a uniform rule making Federal Rules of Civil Procedure consistent with Federal Rules of Appellate Procedure with respect to attorney admission	02-CV-H Frank Amador, Esq. 9/19/02	9/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W. Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, "that the action	02-CV-F Prof. Bradley Scott Shannon	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant

be dismissed on the merits" as erroneous and confusing	5/30/02	**PENDING FURTHER ACTION**
AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E. Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
Admiralty Rule B Clarify Rule B by establishing the time for determining when the defendant is found in the district	01-CV-B William R. Dorsey, III, Esq., President, The Maritime Law Association	6/00 - Referred to reporter, chair, and Mark Kasanin 11/01 - Committee considered 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved. **PENDING FURTHER ACTION**
New Admiralty Rule G Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice 5/03 - Committee considered new Admiralty Rule G 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved **PENDING FURTHER ACTION**
Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in	97-CV-V Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir.	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended

actions *in rem*	12/4/97	deferral until more information available **PENDING FURTHER ACTION**
Court filing fee AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court	02-CV-C James A. Andrews 4/1/02, 5/13/02	4/02 - Referred to reporter and chair 6/02 - Referred second letter to reporter and chair **PENDING FURTHER ACTION**
De Bene Esse Depositions Provide specifically for *de bene esse* depositions	02-CV-G Judge Joseph E. Irenas 6/7/02	7/02 - Referred to reporter and chair 10/02 - Solicited input from Evidence Rules Committee **PENDING FURTHER ACTION**
Discovery Rules Return to them as they were before the 1993 amendments	04-CV-D Judge Wm. R. Wilson, Jr. 2/9/04	3/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Electronic Filing To require clerk's office to date stamp and return papers filed with the court.	99-CV-I John Edward Schomaker, prisoner 11/25/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Technology Subcommittee **PENDING FURTHER ACTION**
Interrogatories on Disk	98-CV-C Michelle Ritz 5/13/98 See also 99-CV-E: Jeffrey Yencho suggestion re: Rules 3 and 34	5/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee received and referred to other Committee **PENDING FURTHER ACTION**
Medical Billing System Simplify the system	05-CV-B John D. Gleissner, Esquire 1/26/05	1/05 - Referred to chair and reporter **PENDING FURTHER ACTION**
Motions in Limine Need for new rule	05-CV-F John L. Runft, Esquire 8/4/05	9/05 - Referred to chair and reporter **PENDING FURTHER ACTION**
Plain English Make the language understandable to all	02-CV-I Conan L. Hom, law student 10/2/02	10/02 - Referred to reporter and chair 5/03 - Committee considered and approved restyled Civil Rules 1-15 6/03 - Standing Committee approved for publication. Publication to be deferred. 10/03 - Committee considered and approved for publication restyle Civil Rules 16-25 and 26-37 and 45 4/04 - Committee approved for publication

		restyle Civil Rules 38-63 6/04 - Standing Committee approved for publication 1/05 - Standing Committee approved for publication 2/05 - Published for public comment **PENDING FURTHER ACTION**
Postal Bar Codes Prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes	00-CV-D Tom Scherer 3/2/00	7/00 - Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
Pro Se Litigants To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	97-CV-I Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Committee, to support proposal by Judge David Piester 7/17/97	7/97 - Referred to reporter and chair 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee received schedule for further study **PENDING FURTHER ACTION**
Require less than unanimous verdicts	04-CV-F Judge James T. Trimble, Jr. 4/1/04	4/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**
Word Substitution Substitute term "action" for "case" and other similar words; substitute term "averment" for "allegation" and other similar words	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to reporter and chair 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

II. Relatively Discrete Proposals for Consideration

A. Rule 8: A Smaller Question

During the Style Project, it became clear that the listing of affirmative defenses in Rule 8(c) raised issues beyond the scope of that project. Bankruptcy Judge Chris Klein suggested an amendment to the listing of affirmative defenses to remove "discharge in bankruptcy." "Contributory negligence" is a defense in some states, but in more states, defenses of comparative negligence and comparative responsibility apply. If the Committee decides to undertake a large-scale examination of notice pleadings, this topic could be a part of the large question. If the Committee decided not to launch that project, this issue could – and perhaps should – be addressed.

II. B. Rule 15

1. Introduction

A number of Rule 15 proposals have been advanced in recent years. The relation-back provisions of Rule 15(c)(3) have been on the agenda for recent meetings. Older proposals address more general problems. The most recent proposals have emerged from the Style Project. All are gathered in this memorandum to establish a framework for deciding whether to undertake comprehensive revision or address any of the specific issues already identified. The purpose of these materials is to open Rule 15 for general discussion.

In 1995, possible Rule 15 revisions were framed around suggestions from two judges. One urged that the right to amend once as a matter of course should be abolished, while the other urged that it should be terminated by a Rule 12(b)(6) motion to dismiss. The 1995 memorandum is set out below. During the initial review of Style Rule 15, Professor Marcus made some suggestions for substantive revision. They are summarized in conjunction with the 1995 proposals.

Finally, the Rule 15(c)(3) materials are carried forward from the October 2002 agenda. Judge Becker has made a persuasive case for a "simple" correction of the gloss that courts have placed on the requirement that there be a "mistake concerning the identity of the proper party." The Committee's prior examination of this proposal made it apparent that the issue and any effort to correct it are, in fact, not simple. One practical concern is that further expansion of the opportunity to escape limitations problems by changing parties will pull federal practice deeper into the morass of "Doe" pleading. A more conceptual concern is that Rule 15(c)(3) already pushes the limits of Enabling Act authority, particularly with respect to state-law claims. Materials reflecting the Committee's prior consideration of Rule 15(c) are also set out below.

These materials cover many points and attempt to address a number of questions. Some of the questions are apparent on the face of Rule 15. The incorporation of Rule 4(m) in Rule 15(c)(3) is an example. The most difficult and interesting questions have been raised in thoughtful proposals carefully framed by experienced judges. But, as always, the question is not simply whether Rule 15 could be written more clearly; but also whether courts often encounter genuine difficulties in practice. The most important question for Rule 15 is whether the Committee's collective experience suggests that these issues are sufficiently important to warrant ongoing study. The most recent consideration of these topics was by a Subcommittee appointed to consider Rule 15 and Rule 50(b). The Subcommittee recommended that the Rule 15 questions be deferred until work had been completed on the more pressing projects to Style the rules, address e-discovery, and adopt a civil-forfeiture rule. The time has come to decide what to do.

One alternative is to undertake a thorough review of Rule 15. The Subcommittee noted that there are many conceptual difficulties, particularly with Rule 15(c), but pointedly observed that it is not clear whether any of these conceptual problems have caused significant difficulties in actual practice. It is a fair question whether an attempt to produce a conceptually clean rule would generate more real-world problems than it would solve. In any event, the task would be difficult. Many variations of several proposals could be considered. And at least as to Rule 15(c), it would require careful reconsideration of the Enabling Act validity of attempts to extend limitations periods beyond the reach allowed by the underlying statute.

A second alternative is to make a very modest change in Rule 15(c)(3) to address the problem of the plaintiff who knows that it is not possible to identify a proper defendant, as compared to the

plaintiff who mistakenly believes that a defendant has been properly identified. There are some variations on this alternative, but not many.

A third alternative is to retain the suggestion on the docket, continuing to defer examination but keeping open the possibility of further work in the event problems in the practice become more evident. A fourth alternative is to decide that the persistent lack of evidence of acute problems in application, coupled with the difficulties of any attempt to address the problem that has been identified, warrant removing this suggestion from the docket.

2. Rule 15: The 1995 Proposals for Amendment as a Matter of Right

Rule 15(a) begins:

> **(a)** **AMENDMENTS.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. * * *

The Style version currently begins:

> **(a) Amendments Before Trial.**
>
> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course:
>
> **(A)** before being served with a responsive pleading; or
>
> **(B)** within 20 days after serving the pleading if a responsive pleading is not permitted and the action is not yet on the trial calendar.

A Rule 12 motion — most commonly a 12(b)(6) motion to dismiss for failure to state a claim — is a motion, not a responsive pleading, and does not cut off the right to amend. District Judge John Martin wrote to suggest that the rule should be amended to cut off the right to amend when a motion addressed to the pleading is served. His suggestion was prompted by experience in a case in which the plaintiff served an amended complaint just as a decision on a motion to dismiss was

about to be released. The amendment was available as a matter of right. He observed that while application of Rule 15(a) seems clear in this setting — and is clearly undesirable — it becomes more confused after announcement of a decision granting a motion to dismiss. If the decision also grants leave to amend, there is no problem. But some courts have held that a decision granting a motion to dismiss without addressing leave to amend does not cut off the right to amend, which survives until a responsive pleading is served or a final judgment of dismissal is entered. This problem also becomes entangled with questions of appeal finality, where a variety of answers have been given. See 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.1.

Magistrate Judge Judith Guthrie also wrote about Rule 15(a), suggesting a different problem that arose from the practice in the Eastern District of Texas of holding hearings in prisoner civil rights cases before requiring an answer from any defendant. Many cases are dismissed without an answer being filed. But some prisoner-plaintiffs manage to continually file amended pleadings, raising new claims and joining new parties, before a dismissal can be entered. She suggested that Rule 15(a) should be amended by deleting the right to amend even once as a matter of course. As an alternative, she suggested that an amendment made as a matter of course may not add new parties or raise events occurring after the original pleading was filed.

Judge Guthrie's suggestion raises the basic question whether there is any need to permit amendment even once as a matter of course. There is a fair argument that amendment should be available only by leave. This approach would encourage more careful initial pleading, supplementing Rule 11. It might permit more efficient disposition of attempted amendments by denying leave without going through renewal of a motion to dismiss and renewed consideration of the motion. Rule 15(a) still would encourage a free approach to amendments. The drafting chore

would be simple. The first sentence of present Rule 15(a), to be Style 15(a)(1), would be deleted. "Otherwise" would be deleted from the second sentence in present Rule 15(a); "other than as allowed in Rule 15(a)(1)" would be deleted from the Style rule.

There may be sufficient benefit from permitting amendment as a matter of course to continue some version of the present rule. As careful as we want pleaders to be, it may be thought that occasional slips are inevitable and should not be taken seriously. It also may be thought that leave to amend is so freely given that a limited right to amend "once as a matter of course" simply avoids the bother of making a request that almost always would be granted.

If there should be a limited right to amend once as a matter of course, it remains to determine what event should cut off the right. The least forgiving approach would allow the amendment only if made before an adversary has pointed out a defect. A more generous approach would allow the amendment after an adversary has pointed out the defect. The present rule muddles these choices by adopting a strange middle ground: there is a right to amend if an adversary presents the defect by motion to dismiss, but there is not a right to amend if an adversary presents the defect by a responsive pleading. Although more time, expense, and strategic disclosure may be involved in framing an answer than in making a motion, it is difficult to guess why the reward should be cutting off the right to amend.

The most modest reaction, in line with Judge Martin's suggestion, would be to cut off the right to amend when a responsive motion is filed as well as when a responsive pleading is filed. It may be possible to do this clearly by adding two or three words. Using the Style Draft:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading or [responsive] motion; * * *

[Although it is subject to style objections, it may be safer to say "responsive motion." A motion for an extension of time to answer would not qualify. A motion to dismiss for lack of subject-matter jurisdiction might present some uncertainty: an argument could be made that it should cut off the right to amend the jurisdiction allegations but not to amend the claim.]

An alternative approach would be to cut off the right to amend after 20 days or some other brief period, unless a responsive motion or pleading is filed earlier:

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within 20 days after serving the pleading if:
(A) a responsive pleading or motion has not been served, or
(B) a responsive pleading is not permitted and the action is not yet on the trial calendar.

The April 1995 minutes include this: "Brief discussion included the observation that leave to amend is almost never denied unless the underlying claim is patently frivolous. The Committee concluded that this topic should be carried forward on the agenda for further discussion, including consideration of alternatives that would expand the right to amend as a matter of course, treat responsive motions in the same way as responsive pleadings are now treated, establish tighter limits on the right to amend as a matter of course, or abolish the right to amend as a matter of course. (The November 1995 Minutes are indirect: "Several other significant proposals were deferred for future consideration. Although many of them involve potentially useful improvements of the Civil Rules, the Committee does not have sufficient time to devote appropriate attention to every such proposal when the proposal is first advanced. Perhaps more important than Committee time constraints are the limits on the capacity of the full Enabling Act process.")

Mix-and-match variations abound. One would create a right to amend without regard to responses or the trial calendar, but limit it to a tight period:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within 20 days after serving the pleading if the action is not yet on the trial calendar.

Another would expand the present rule by allowing amendment as a matter of course within 20 days after either a responsive pleading or motion:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within 20 days after:
>
> **(A)** a responsive pleading or motion has been served if a responsive pleading is permitted, or
>
> **(B)** serving the pleading if a responsive pleading is not permitted and the action is not yet on the trial calendar.

Yet another, more complicated, approach would allow amendment as a matter of course until some later event. The possibilities include such events as a ruling on the sufficiency of the pleading, placing the case on the trial calendar, or dismissal of the claim addressed by the pleading:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course until:
>
> **(A)** the court has ruled on the sufficiency of the pleading;
>
> **(B)** the claim [or defense] addressed by the pleading is dismissed; or
>
> **(C)** the action is placed on the trial calendar.

3. Style Process Suggestions

a. "Trial calendar" cut-off.

The provision of Rule 15(a)(1)(B) that cuts off the right to amend if the action is on the trial calendar was questioned on the ground that many courts do not have a "trial calendar." One approach would be to delete this provision, relying on Rule 15(b), Rule 16, and perhaps inherent authority to authorize whatever control is needed when it would be disruptive to have an amendment

as a matter of course within 20 days after serving a pleading to which no responsive pleading is required. Another would be to find some substitute. None has yet been suggested.

b. Relation of Rule 15(a), 15(b) standards.

Professor Marcus reviewed Rules 8 through 15 at a time when it was unclear whether the Style Project would include modest changes in the substance of the rules. He raised an important question — whether the language of Rule 15(b) encourages trial amendments more than should be.

Style Rule 15(a)(1)(B) carries forward the standard for pretrial amendments: "The court should freely give leave when justice so requires." Style Rule 15(b)(1) carries forward the standard for amendments during trial: "The court should freely allow an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that admitting the evidence would prejudice that party's action or defense on the merits."

The close parallel between "freely give leave" and "freely allow an amendment" may unduly encourage amendments at trial. Or it may suggest a liberality that is not reflected in actual practice. And it may cause confusion in conjunction with Rule 16(e). Rule 16(e) allows amendment of an order following a final pretrial conference "only to prevent manifest injustice." If a final pretrial order specifies the claims, issues, or defenses for trial, Rule 16(e) should not be subverted by allowing free amendment of the pleadings.

The question, then, is whether Rule 15(b) should be revised for any of three reasons: it gives a false impression of actual practice; it accurately reflects a practice that is too liberal; or it causes

confusion with Rule 16(e). No work has yet been done to determine whether any of these possibilities reflects a real need to revise the rule. Practical advice on the need for further work is essential.

c. Complete Replacement Pleading.

Professor Marcus also raised a question whether Rule 15 should provide that any amendment must be made by filing a complete new pleading. Particularly given the ease of reproducing a complete amended pleading by word processing, the advantages of having a single document to consider would be offset only by the added bulk of paper files. But this may be a level of detail that the national rules should not address.

d. Integration with Rule 13(f).

Another question put out of the Style Project is whether Rule 13(f) should be directly integrated with Rule 15 or simply deleted. Integration could be accomplished simply enough. In the Style version, Rule 13(f) says: "The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires." Rule 15 could be added: "The court may permit a party to amend a pleading under Rule 15 to add a counterclaim * * *." Express incorporation would clearly apply the relation-back provisions of Rule 15(c) to the new counterclaim. But there might be a dissonance between the Rule 13(f) standard and Rule 15: Rule 13(f) does not require free leave to amend, and instead requires a showing of "oversight, inadvertence, or excusable neglect or if justice so requires." Yet Style Rule 15(a)(2) is more than free leave: "The court should freely give leave when justice so requires." Rule 13(f) permits amendment when justice so requires, and also on a mere showing of "oversight" or "inadvertence." It might be better to incorporate Rule 15 and delete any semblance of an

independent standard from Rule 13(f): "The court may permit a party to amend a pleading under Rule 15 to add a counterclaim," or "A party may amend a pleading under Rule 15 to add a counterclaim."

Integration by such means would not address the failure of Rule 13(f) to address an omitted crossclaim. So we could include crossclaim: "to add a counterclaim or crossclaim." (Third-party claims are governed by Rule 14(a): a third-party complaint may be served after the action is commenced, but the court's leave is required if the third-party complaint is filed more than 10 days after serving the original answer.)

An alternative would be to delete Rule 13(f), relying on Rule 15 to apply directly. That would include the right to amend as a matter of course, without requiring the court's permission.

4. Rule 15(c)(3)

The agenda carries forward a "mailbox" suggestion that Rule 15(c)(3)(B) be amended to overrule several appellate decisions. This proposal has been urged again by the Third Circuit opinion in *Singletary v. Pennsylvania Department of Corrections*, 2001, 266 F.3d 186. The nature of the Rule 15(c)(3)(B) problem is illustrated by the *Singletary* case. The plaintiff's decedent committed suicide in prison. On the last day of the applicable two-year limitations period, the plaintiff sued named defendants and "unknown corrections officers." The claim was deliberate indifference to the prisoner's medical needs. Eventually the plaintiff sought to amend to name a prison staff psychologist as a defendant. The court concluded that relation back was not permitted because it was clear that the new defendant had not had notice of the action within the period prescribed by Rule 15(c)(3)(A). It took the occasion, however, to address the question whether there is a "mistake" concerning the proper party when the plaintiff knows that the identity of a proper party

is unknown. The court counts seven other courts of appeals as ruling that there is no mistake when the plaintiff knows that she cannot name a person she wishes to sue. As a result, relation back is not permitted even though all other requirements of Rule 15(c)(3) are met. In this case, the psychologist could not be named as an added defendant. The court also concludes that its own earlier decision had taken a contrary view; if the other requirements of Rule 15(c)(3) are satisfied, the psychologist could be named.

The Third Circuit concludes its opinion by recommending that the Advisory Committee modify Rule 15(c)(3) to permit relation back in these circumstances. The specific recommendation, taken directly from the Advisory Committee agenda materials, would allow relation back when the new defendant "knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against" the new defendant.

The Rule 15(c) memorandum invoked by the Third Circuit is incorporated here. It identifies problems posed by Rule 15(c)(3) as it was amended in 1991. The problems almost certainly arise from focusing on the specific desire to overrule an unfortunate Supreme Court interpretation of the former requirement that the new defendant have notice of the action "within the period provided by law for commencing the action." If amendments are justified whenever an active imagination can show genuine difficulties with a rule, extensive amendments may be warranted.

There are good reasons to avoid the thicket of Rule 15(c)(3) amendments. Perhaps the most important is that the questions that can be raised on reading the rule do not appear to have emerged in practice. At least one leading treatise, for example, gives no hint of these problems. A second reason is that amendments should be made only when good answers can be given. Good answers are not immediately apparent, at least as to many of the questions. A third reason arises from the

interplay between *Erie* principles and the Rules Enabling Act. Rule 15(c)(1) allows relation back whenever "relation back is permitted by the law that provides the statute of limitations applicable to the action." Putting aside for the moment the settings in which state limitations periods are borrowed for federal claims, diversity actions present obvious problems. Limitations periods are "substantive" for *Erie* purposes. Any attempt to adopt limitations periods for state-law claims through the Rules Enabling Act would surely be challenged as abridging, enlarging, or modifying the state-created substantive claim. As they stand, the relation-back provisions of Rule 15(c)(2) and (3) invite the same challenge whenever they permit litigation and judgment on a claim that would be barred by limitations in the courts of the state that created the claim. Why is this a matter of pleading procedure, necessary to make effective the notice-pleading regime of Rule 8, not a direct adoption of limitations policies?

a. First Sketch: Revised [Style] Rule 15(c)

A revised Rule 15(c) can be put together by choosing from the menu suggested in the materials that follow:

Rule 15. Amended and Supplemental Pleadings

* * * * *

(c) Relation Back of Amendments.

(1) When an Amendment May Relate Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading or the opposing party's pleading; or

(C) the amendment changes[1] the party or the naming of the party against whom a claim is asserted ~~if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint,~~ and:

(i) Rule 15(c)(2) is satisfied;

(ii) the party asserting the claim has acted diligently to identify the party to be brought in by amendment;

(iii) the party to be brought in by amendment has received ~~such~~ notice of the action that meets the requirements of Rule 15(c)(1)(C)(iv) within 120 days after expiration of the limitations period for [commencing the action]{filing the claim},[2] or

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[1] Should we make a further amendment to reflect the use of relation back when a defendant is added, not simply substituted? One possible formulation would be: "the amendment asserts a claim against a new party or changes the party or the naming of the party against whom a claim is asserted, and:"

[2] This formulation makes more apparent a problem that inheres in the 1991 version, and for that matter in the earlier version as well. Should we attempt to address the questions raised by the many doctrines that may separate the conduct giving rise to the claim from the start of the limitations period? The plaintiff is a minor; a "discovery" rule applies; there is "fraudulent concealment"; and so on. The underlying theory that it is enough to get notice to the proper defendant at a time that would satisfy limitations requirements if the proper defendant had been properly named suggests that all of these complications should be included in the rule. But that may seem too much to endure when we consider the difficulty of determining when the proper defendant actually learned of the action and how good the information was. Probably these problems should bask in benign neglect.

within the[3] period for effecting service in an action filed on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action;[4] and

(iv) the notice received within the time set by Rule 15(c)(1)(C)(iii) is such that the party to be brought in by amendment ~~(A)~~ (a) will not be prejudiced in defending on the merits, and ~~(B)~~ (b) knew or should have known that the action would have been brought against it, but for a mistake or lack of information concerning the proper party's identity.

(2) When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(iii) and (iv) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.[5]

Committee Note

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[3] An earlier draft had "a shorter" period. But if state law allows more than 120 days, there is no apparent reason to adhere to the 120 day limit.

[4] This could be made still more complicated by invoking state time-of-service requirements only as to claims governed by state law: "or — if a claim is governed by state law — within the period for effecting service in an action filed on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action * * *."

[5] Is this right? Suppose the officer is brought into the action in an individual capacity?

Rule 15(c)(2) is amended to make clear the application of Rule 15(c) to an omitted counterclaim set up by amendment under Rule 13(f). The better view is that Rule 15(c) applies because Rule 13(f) provides for adding an omitted counterclaim by amendment, see 6 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 1430. When an answer or like pleading sets forth no claim at all, however, some difficulty might be found in present Rule 15(c)(2)'s reference to a claim set forth or attempted to be set forth in the original pleading. The amendment allows relation back if the claim arises out of the conduct, transaction, or occurrence set forth in the opposing party's pleading. A counterclaim in an answer, for example, will relate back if it arises out of the same conduct, transaction, or occurrence as the complaint.

Rule 15(c)(3) was amended in 1991 "to change the result in *Schiavone v. Fortune*[, 477 U.S. 21 (1986)]." Several changes are made to better implement that purpose.

The central purpose of relation back under Rule 15(c)(3) has been clear from the beginning. The purposes of a statute of limitations are fulfilled if a defendant has notice of the action within the time allowed for making service in an action filed on the last day of the limitations period. If the defendant is not named in the action, the notice must meet the standards first articulated in 1966: the notice must be such that the defendant will not be prejudiced in defending on the merits, and also such that the defendant knows (or should know) that the plaintiff meant to sue the defendant. The *Schiavone* decision thwarted this purpose by ruling that a defendant not correctly named must have this notice before the limitations period expires, relying on the 1966 requirement that the notice be received "within the period provided by law for commencing the action against" the new defendant. The 1991 amendment changed this phrase, requiring that notice be received "within the period provided by Rule 4(m) for service of the summons and complaint." If an action is filed on the last day of the limitations period, the apparent result is that notice to a defendant not named is timely so long as it occurs within 120 days after filing and expiration of the limitations period. The 1991 Committee Note, further, states that in addition to the 120 days, Rule 15(c)(3) allows "any additional time resulting from any extension ordered by the court pursuant to" Rule 4(m).

Incorporation of Rule 4(m) seemed to provide a convenient means of restoring the purpose of relation back. But it creates several difficulties. If the action is filed more than 120 days before expiration

of the limitations period, the time for notice to a defendant not named seems to end before the limitations period. There is little apparent reason, on the other hand, to impose on a defendant not named the open-ended uncertainty that arises from the prospect that the court may have extended the time to serve someone else for reasons that have nothing to do with the situation of the defendant not named. And there is no apparent provision at all for cases that fall outside Rule 4(m) entirely — by its terms, Rule 4(m) does not apply "to service in a foreign country pursuant to [Rule 4] (f) or (j)(1)." Further perplexities may arise if a claim for relief is stated in a cross-claim or counterclaim, followed by a later attempt to amend to add an additional defending party.

The amended rule deletes the reliance on Rule 4(m). Instead, it requires that notice to the defendant not named be received within the shorter of two periods. The first period is 120 days after expiration of the limitations period for [commencing the action]{filing the claim}. This period corresponds with the most direct application of the present rule in an action that in fact is filed on the final day of the limitations period. To this extent, it does not change the period in which a defendant is vulnerable to amendment and relation back. But it alleviates any uncertainty that might arise from the prospect that the period may extend beyond 120 days because an extension was granted under Rule 4(m), and applies to cases of foreign service that fall outside Rule 4(m). [It also gives a clear answer for counterclaims, cross-claims, and the like: the new defending party must have had notice of the required quality no later than 120 days after expiration of the limitations period for commencing the action.] {As to a claim stated by counterclaim, cross-claim, or the like, the amended rule is open-ended. By referring to the time for filing the claim, it allows 120 days from whatever limitations rule governs the counterclaim, cross-claim, or other claim.} The alternative period is less than 120 days. This period applies when the limitations law governing the claim requires service in less than 120 days after filing. A federal court may be bound by a state limitations statute that requires service within a defined period after the action is filed. See *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). There is no reason to subject a defendant not named in the original complaint to a longer period for receiving notice of the action than applies to a defendant who is named in the original complaint.

A new requirement is introduced in addition to deleting the reliance on Rule 4(m). Relation back is permitted under Rule

15(c)(3) only if the party asserting the claim has acted diligently to identify the party to be brought in by amendment. The rule should not encourage a plaintiff to prepare poorly during the limitations period, relying on relation back to save the day.

An unrelated change is made in describing the quality of the notice that must be received by a defendant not named in the complaint. A common problem arises when a plaintiff is not able to identify a proper defendant. Several courts have ruled that a plaintiff who knows that an intended defendant has not been identified has not made a "mistake concerning the identity of the proper party." The result is that a diligent plaintiff whose thorough investigation has proved inadequate is less protected than a less diligent plaintiff who mistakenly thought to have identified the proper defendant. This result cannot be justified by looking to differences in the position of a defendant not named — if anything, a defendant not named may be put on better notice by a complaint naming an "unknown named police officer" than by a complaint that incorrectly names a real police officer.[6] The reasons for allowing relation back against a defendant who knew that the lack of identification arose from a diligent plaintiff's lack of information are clearly stated in *Singletary v. Pennsylvania Department of Corrections*, 266 F.3d 186 (3d Cir.2001).

4. The Rule 15(c)(3) Puzzles In More Detail

Rule 15(c)(3) was amended in 1991 to supersede the decision in *Schiavone v. Fortune, Inc.*, 1986, 477 U.S. 21. It seemed like a good solution at the time. But literal reading leads to a number of puzzles. The puzzles may have satisfactory answers, but they present genuine difficulties.

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[6] This is the point to consider whether to say anything about suing "unknown named" defendants. The question may arise if there is at least one defendant who can be identified with enough confidence to satisfy Rule 11. That is the easier case: there is sufficient ground to sue that person, and — unless things go awry at the outset — to launch discovery. Adding "unknown named" defendants may provide additional notice to the anonymous potential defendants, particularly if a further category is added — "unknown-named police officers." The question also may arise if there is no reasonably identifiable defendant: it is a large police force, and there is no reasonable way to identify even one plausible defendant. Filing an action then becomes primarily a tool for launching discovery, and — if filed toward expiration of the limitations period — winning an extension of the limitations period. There is likely to be substantial resistance to an amendment that clearly contemplates this practice.

A first warning may be useful. These problems all involve statutes of limitations, commonly state statutes of limitations. There are real questions about the propriety of using the Enabling Act to achieve what seems to be sound limitations practice that supersedes practices bound up with the underlying statute.

a. Limitations Background

28 U.S.C. § 1658 provides a general four-year limitations period for federal statutes enacted after December 1, 1990, apart from statutes that contain their own limitations provisions. Some statutes enacted before December 1, 1990 have their own limitations provisions. Most do not. Federal courts have long chosen to adopt analogous state limitations periods for these statutes. (In some settings, the analogy instead is drawn to the limitations period in a different federal statute.) The alternatives of having no limitations period, or creating limitations periods in the common-law process, are very unattractive. One frequently encountered illustration — the one involved in the *Worthington* case — is 42 U.S.C. § 1983.

State limitations periods also are applied by federal courts when enforcing state-created claims. One of the well-known wrinkles occurs when the state limitations scheme provides time limits not only for commencing the action but also for effecting service. *Walker v. Armco Steel Co.*, 1980, 446 U.S. 740, confirmed the rule that Civil Rule 3 does not supersede the state service requirements in these settings. The Rule 3 provision that an action is commenced by filing a complaint was not intended to address this issue.

Civil Rule 15(c) generally addresses the question whether an amendment to a pleading "relates back" to the time of the initial pleading. Rule 15(c)(1) provides the most general rule: if "the

law that provides the applicable statute of limitations allows relation back," relation back is permitted. If federal law provides the statute of limitations, relation back can be addressed as a matter of federal law, supplemented if need be by Rule 15(c) paragraphs (2) and (3). If state law provides the statute of limitations, state-law relation-back doctrine is the first fall-back.

Rule 15(c)(2) allows a claim or defense asserted in an amended pleading to relate back if it "arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading." This is a nice functional provision that of itself creates few problems. It may raise a question when an attempt is made to add a new plaintiff, a separate issue described below. And it also poses an Erie-Enabling Act question when the claim is directly governed by state limitations law and state law does not permit relation back.

Rule 15(c)(3) deals with relation back when an amendment "changes the party or the naming of the party against whom a claim is asserted." The first requirement for relation back is that the claim satisfy Rule 15(c)(2) by arising from the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading. So far, so good. Beyond that point, the rule has been framed in response to the *Schiavone* ruling.

In the *Schiavone* case the plaintiff claimed that he had been defamed by an article in Fortune Magazine. Ten days before the last day that could be argued to be the end of the limitations period, he filed an action captioned against "Fortune." "Fortune" exists only as a tradename and as an unincorporated division of Time, Inc. The complaint was mailed to Time, Inc.'s registered agent, who refused to accept service because Time was not named as defendant. The plaintiff promptly

amended the complaint to name "Fortune, also known as Time, Incorporated." The amendment was not allowed to relate back, and the action was dismissed as time-barred.

The critical phrase in the 1966 version of Rule 15(c)(3) allowed relation back if the new or renamed defendant had notice of the action satisfying specified criteria "within the period provided by law for commencing the action against" the new defendant. The Court concluded that the "plain language" of the rule defeated relation back. The time permitted to commence the action — to file the complaint — is the limitations period. The complaint must be filed by the end of the limitations period. That is the period in which the "new" defendant must have notice of the action.

The difficulty with the *Schiavone* conclusion is that it requires notice to the "new" defendant at a time earlier than would be required if the new defendant had been properly identified in the initial complaint. As the practice then stood, if a complaint was filed on the last day of the limitations period, it sufficed to accomplish service on the defendant within a reasonable time. Time, Inc. had actual notice of the lawsuit — and surely knew exactly what was intended — at a time that satisfied all limitations requirements. There was an obvious reason to conclude that Rule 15(c)(3) should be amended to allow the action to proceed in such circumstances.

The amended version of Rule 15(c)(3) allows the amendment changing or renaming the defendant to relate back if the defendant had notice "within the period provided by Rule 4(m) for service of the summons and complaint." The base-line Rule 4(m) period is 120 days from filing. If the action is filed on the last day of the limitations period, it is good enough to effect notice within 120 days (or more, as discussed below). So far, so good. But it seems likely that the many questions that arise from this incorporation of Rule 4(m) were engendered by focusing on the "last-day" filing;

if the complaint is filed well within the limitations period, awkward results seem to follow. These results are discussed below after beginning with the "mistake" question that prompts the discussion.

b. Mistake

Notice to the new defendant must satisfy two Rule 15(c)(3) criteria that are crafted to reflect the major purposes of limitations statutes. Within the Rule 4(m) period, the new party must have:

> (i) * * * received such notice of the action that it will not be prejudiced in defending on the merits, and (ii) knew or should have known that the action would have been brought against it, but for a *mistake* concerning the proper party's identity.

The notice that obviates prejudice in defending responds to the purpose to protect the opportunity to gather evidence and to stimulate the gathering. Knowing that the new party would have been sued if only the plaintiff had known enough both helps to stimulate the evidence gathering and also defeats the sense of repose that arises with the end of a limitations period.

The *Worthington* case involved a not uncommon problem. The plaintiff was arrested. The plaintiff believed that the arresting officers had used unlawful force, causing significant injuries. The plaintiff did not know the names of the arresting officers. At the end of the two-year limitations period provided by Illinois law, the plaintiff sued the village and three unknown-named police officers. There was in fact no tenable § 1983 claim against the village, given the absence of respondeat superior liability in § 1983 actions and the inability to claim a village policy or the like. But the plaintiff was able to discover the names of two arresting officers and sought to amend to name them as defendants. It was conceded that the officers had notice of the action within 120 days, and that the notice satisfied the Rule 15(c)(3) requirements. Relation back was denied, however, because there was no "mistake." It was not as if the plaintiff thought that Sergeant Preston had

arrested him, and discovered only later that in fact it was Officers Wilson and Wall. The plaintiff knew from the beginning that he did not know the identity of the proper defendants. This was ignorance, not mistake.

On its face, the result in the *Worthington* case seems strange. The plaintiff very well may have faced insuperable difficulties in learning the identities of the arresting officers. Neither the arresting officers nor their police-department compatriots may have been willing to come forward. Many departments may lack sufficiently rigorous internal investigation procedures to ensure a reasonable opportunity to penetrate the wall of silence. Filing an action and discovery may be the only way to force production of the critical information. Why should the plaintiff be left out in the cold when state law does not provide a tolling principle that would invoke Rule 15(c)(1)?

If the result is in fact untoward, it would be easy to amend Rule 15(c)(3) to correct the result in a rough way. Subparagraph (2) could require that the new defendant "knew or should have known that the action would have been brought against it, but for a mistake or lack of information concerning the identity of the proper party." This approach is rough because it does not look to the diligence of the plaintiff who lacked information. It might be enough to add one more word: "but for a mistake or reasonable lack of information." But this too is rough, because the setting requires that the new defendant know that it is a reasonable lack of information, and how is the new defendant to know that? More complicated redrafting will be required to specify that the plaintiff's lack of information remained after diligent effort to identify the proper defendants, and that the new defendant knew it would have been named but for a mistake or lack of information.

That leaves, first, the question whether there is some principled ground to be more demanding when the plaintiff knows that he does not know the identity of one or more proper defendants. It can be argued that indeed there is. The plaintiff in these circumstances knows that if he waits to file until the end of the limitations period, it will not be possible to get notice to the proper defendants within the limitations period or even very soon after it has expired. Perhaps this plaintiff should be forced to file well before the limitations period has expired, to facilitate notice to the defendant within the limitations period or within a brief time after the limitations period. This argument could be bolstered by observing that it minimizes the intrusion on state law when that law supplies the limitations period. If state law does not allow relation back, why should a federal court, even if the federal court is enforcing federal law?

That argument may gain some force from a different consideration. The problem facing the plaintiff in the *Worthington* case is not easily met by filing an action well within the limitations period. Who is to be the defendant? The plaintiff escaped Rule 11 sanctions for suing the village only because the complaint was filed in state court, and under the version of Rule 11 then in effect the court concluded that it could not apply sanctions. The strategy of simply suing a pseudonymous defendant as a basis for invoking discovery to find a real defendant is not permitted in most federal courts. *See, e.g., Petition of Ford*, M.D.Ala.1997, 170 F.R.D. 504. Perhaps it would not do much good to allow correction when the defendant lacks information as to the identity of the defendant. But there will be cases in which the defendant has a claim against an identifiable adversary strong enough to meet the Rule 11 test and can proceed to attempt to use discovery to identify the more important defendants.

A different argument can be made, one that depends on a view of Rule 15(c)(3) more fundamental than the distinction between "mistake" and knowing lack of information. *Garrett v. Fleming*, 10th Cir.2004, 362 F.3d 692, 696-697, demonstrates this argument. The plaintiff complained of excessive force by prison officials, naming as defendants the Director of the Federal Bureau of Prisons and thirty John Doe defendants. Within the limitations period, the plaintiff sought information about the underlying incident from the Bureau of Prisons, which responded that it could not locate any related documents. After the limitations period expired the Bureau did find related documents. The plaintiff twice amended to substitute real defendants for the Doe defendants. The court began by stating that the substitution of named defendants for Doe defendants "amounted to adding a new party" and supports relation back only if Rule 15(c)(3) is satisfied. Then it agreed with the seven of eight circuits to address the issue that lack of knowledge does not satisfy the mistake requirement. Finally, it drew from the 1991 Committee Note to observe that amended 15(c)(3) addresses only an amendment that changes the name of a defendant. "A plaintiff's designation of an unknown defendant as 'John Doe' in the original complaint is not a formal defect of the type Rule 15(c)(3) was meant to address." This explanation is quite different from the distinction between lack of information and mistake. In essence it is that Rule 15(c)(3) should not apply to an amendment that brings in a new party — that this is more than "chang[ing] a party." That brings the rule very close to one that applies only to changing the name of what is in reality the same party. It may be asked whether all of the restrictions built into the rule are justified if it addresses only such circumstances, but the precarious nature of the effort to change substantive limitations doctrine by court rule provides real support for this view of what Rule 15(c)(3) should do.

An amendment supplementing the "mistake" language in Rule 15(c)(3)(B), in short, is attractive, but it may not reach very many cases. Drafting itself raises new problems. Any draft should confront — at least in Committee Note — the distinction between two problems. In one, the plaintiff can — within the limits of Rule 11 — identify one real defendant, but hopes to enhance the quality of notice to unidentified defendants by pleading that there are others who will be sued when they can be identified. Adding a "Doe" or "unknown-named" defendant, as an "unknown-named police officer," does carry a message to the unidentified defendant that the plaintiff wants to sue. That practice might well be blessed in the Note, to avoid Rule 10 questions. In the other, the plaintiff is unable to name any real defendant without violating Rule 11. What advice do we give for that situation? That it is, after all, proper to sue only unknown-named defendants, so long as Rule 11 is satisfied as to the existence of a claim against someone unidentifiable? Does an action against parties who are real but who cannot be identified satisfy Article III — is there a real case or controversy? If the only purpose of protecting the opportunity to sue is to provide a vehicle for discovery, would it be better to create a procedure for discovery in aid of framing a complaint? A lengthy proposal to create such a procedure, by analogy to Rule 27, is advanced in Howard M. Wasserman, "Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure," 2003, 25 Cardozo L.Rev. 793-862. If such a procedure is targeted toward the particular problem of certain civil rights plaintiffs, is a rule change that would apply to all cases appropriate?

c. Rule 4(m) Incorporation

The specification that the new defendant must know of the mistake within the period provided by Rule 4(m) for effecting service of the summons and complaint is easily understood when

the complaint is filed at the end of the limitations period. Suppose a two-year, 730-day limitations period applies. The complaint is filed on Day 730. If the proper defendant is properly named, the effect of Rule 4(m) — putting aside Erie complications for the moment — is that service up to Day 850 is proper. Because a properly identified defendant is exposed to actually learning of the suit as late as Day 850, it seems to make sense to say that it also is enough that the properly intended defendant, although not named, should be exposed to substitution if knowledge of the mistake was brought home at any time up to Day 850. That is the problem of the *Schiavone* case, and it is cured by incorporating Rule 4(m).

The snag is that Rule 4(m) begins to run with the filing of the complaint, not the expiration of the limitations period. If the complaint is filed on Day 180, the plaintiff has until Day 300 to effect service. If the new defendant learns of the mistake on Day 190, everything is fine, even if the plaintiff does not become aware of the problem until Day 735. But if the defendant learns of the mistake on Day 350, the Rule 4(m) period has expired and the condition of Rule 15(c)(3) seems not to be satisfied. Of course there is no problem if the plaintiff also learns of the problem before Day 730 and amends to bring in the new defendant — the limitations period is met without any need for relation back. But if the plaintiff learns of the problem on Day 735, it is too late. It is too late even though the plaintiff would have been protected if the plaintiff had waited to file until Day 730 and the new defendant had learned of the action on day 734, not day 350.

The problem of the new defendant who learned on day 350 of an action filed on day 180 is made more curious by comparison to the pre-1991 version of Rule 15(c)(3). Until 1991, it was enough that the new defendant have notice within the period provided by law for commencing the

action against him. With a two-year limitation period, notice on day 350 is adequate with more than a year to spare. Curiously, an amendment designed to make sufficient notice received on day 740 — so long as filing occurred on or after day 620 — bars relation back.

This consequence of incorporating Rule 4(m), gearing the time for notice to the new defendant to filing the complaint rather than expiration of the limitations period, may seem anomalous. Why should the new defendant have the benefit of the plaintiff's diligence in filing earlier than need be?

Again, there may be an answer. It can be argued that once a plaintiff has filed — as on Day 180 — the plaintiff becomes obliged diligently to pursue the litigation and to find out whether the defendants have been properly identified. Filing opens the opportunity for discovery, and so on. This is not a particularly satisfying argument. The time actually used to effect service may use up much of the 120 days. The defendant may manage to postpone filing an actual answer for some time. The Rule 26(d) discovery moratorium, geared to the Rule 26(f) conference, may delay matters still further. To expect diligent uncovering of the mistake within 120 days is to set a high standard of diligence.

This seeming anomaly may be subject to a cure through another aspect of the incorporation of Rule 4(m) into Rule 15(c)(3). Rule 4(m) allows an extension of the time to serve beyond 120 days. When the new defendant learns of the mistake on Day 350, 170 days after the filing on Day 180, the court might address the problem by allowing a retroactive extension of the time for service. But this solution generates great difficulties of its own.

There are yet other difficulties with incorporating Rule 4(m). One is that Rule 4(m) does not apply to service in a foreign country under Rule 4(f) or (j)(1). There is no period provided by Rule 4(m) for making service in those cases: so what are we to make of Rule 15(c)(3) relation back? Another is that Rule 15(c)(3) is deliberately drafted to refer not to a complaint, but to any pleading that states a claim for relief. If the complaint is filed on the last day of the limitations period, a counterclaim that grows out of the same transaction or occurrence may not be barred by limitations. So the counterclaim is made. Then after a time the counterclaimant seeks to change the party against whom the counterclaim is made: can Rule 4(m) apply in an intelligible way? Or the plaintiff files on the last day of the limitations period. A year later the defendant impleads a third-party defendant; there is no limitations problem because the limitations period has not even begun to run on the defendant's claim for contribution. The plaintiff, within the 120-day period allowed for the defendant to serve the third-party summons and complaint, amends to state an otherwise time-barred claim against the third-party defendant: does it relate back? (Relation back may not be particularly troubling — the third-party defendant must confront litigation of the common issues in any event, and in many settings may be exposed to no greater liability).

d. Extending Rule 4(m) Period

Rule 4(m) provides that if service is not made within 120 days after filing the complaint, the court shall either dismiss without prejudice or require that service be made by a specified time. Rule 4(m) further provides that the court "shall" allow additional time to serve if the plaintiff shows good cause for failing to make service within 120 days.

The 1991 Committee Note to Rule 15(c)(3) says explicitly that:

> In allowing a name-correcting amendment within the time allowed by Rule 4(m),[7] this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

It is difficult to know what to make of this Note. The only reason for incorporating Rule 4(m), rather than providing 120 days from filing the complaint, must be to take account of the flexibility that allows an extension of the time for service. But the context of Rule 15(c)(3) is quite different. Does it mean that the time by which the new defendant must learn of the action is extended only if the court has ordered an extension of time to effect service? If so, service on whom — service on someone else, as the Committee Note seems to suggest? But why should we care whether it was difficult to serve someone else, not the new defendant? Because the plaintiff is more easily excused when there was no defendant to tell it of the mistake, even though the new defendant has little concern with that? Or is it an extension of time for service on the new defendant? But if it is an extension of time for service on the new defendant, the scheme takes hold only when the plaintiff has learned of the new defendant and asks for an extension. By then, the determination of the extension period also will involve a discretionary determination of the extent to which the limitations period should be extended.

It may be possible to read the incorporation of Rule 4(m) in a still more expansive way. Although the Committee Note illustrates only an extension actually granted, it does not specify the time when the extension was granted. Perhaps invocation of the Rule 4(m) power to extend the time for service would support an ad hoc determination that the time when the new defendant learned of

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[7] This is an awkward locution. Rule 15(c)(3) does not say that the amendment must be made within the Rule 4(m) time. It says that the person to be brought in by amendment must have learned of the action, etc., within the Rule 4(m) time.

the action and the mistake was "soon enough," so the court will "extend" the time for "service" to include that time even though there is in fact no problem of service at all. This interpretation would create an open-ended power to suspend the statute of limitations in favor of a plaintiff who mistakes the proper defendant, even though there is no such power to favor a plaintiff who simply waits too long to sue (often in a layman's forgivable ignorance of the limitations period). That would be exceedingly strange, and directly contrary to the general belief that limitations periods should be held as firmly as possible.

Putting these problems together, the drafting decision to incorporate Rule 4(m) into Rule 15(c)(3) seems very strange. Only with brute force can the text of the two rules be made to generate sensible answers, supposing we know what the sensible answers are.

e. Adding Plaintiffs

The 1966 Committee Note observes that "[t]he relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. * * * [T]he attitude taken * * * toward change of defendants extends by analogy to amendments changing plaintiffs."

There is an ambiguity in the reference to "changing" plaintiffs. If one plaintiff is substituted for another plaintiff, each pursuing a single claim that remains unchanged as to the basis of liability and the measure of damages, the problem is indeed easier. A common illustration, invoked by the 1966 amendments of Rule 17(a), occurs when suit is brought by a plaintiff who is not the real party in interest. Substituting the real party in interest, even after the statute of limitations has run, is not likely to threaten repose or the opportunity to gather evidence.

If the original plaintiff remains and a new plaintiff is added, things are not so simple. Suppose the passenger in one car brings suit against the driver of the other car. After the limitations period expires, a motion is made to amend to add the driver of the passenger-plaintiff's car as a second plaintiff. The defendant is now exposed to greater liability, eroding the repose engendered when the driver did not sue within the limitations period. There will be evidentiary problems at least as to the cause, nature, and extent of the new plaintiff's injuries. And there may also be evidentiary problems as to liability — particularly if there is joint-and-several liability, the negligence of the new plaintiff-driver may play quite a different role in the litigation than it would have played had only the passenger been a plaintiff. Because Rule 15(c)(3) does not address these issues, it is possible to read Rule 15(c)(2) to allow relation back because the claim asserted by the new plaintiff-driver arises from the same "conduct, transaction, or occurrence" as the claim of the original plaintiff-passenger. The Rule may not be silent. *But see Young v. Lepone*, 1st Cir.2002, 305 F.3d 1, 16: "We, like other courts, flatly reject the proposition that relation back is available merely because a new plaintiff's claims arise from the same transaction or occurrence as the original plaintiff's claims."

A good illustration of the problems that may arise from adding a new plaintiff is provided by *Intown Properties v. Wheaton Van Lines, Inc.*, 4th Cir.2001, 271 F.3d 164. A Wheaton truck ran into Intown's motel-restaurant. Transcontinental paid Intown's losses and sued Wheaton. Eventually Intown sued Wheaton in state court for damages not covered by the insurance — loss of revenues and loss of reputation and good will. The state-court action was dismissed on limitations grounds. Then Intown and its insurer moved to amend the complaint in the insurer's action to add Intown as plaintiff. Days later, the insurer settled with Wheaton. The court of appeals ruled that a Rule 15 amendment cannot be used to effect a joinder that would be untimely if attempted by motion

to intervene. It suggested that if Intown had been named as plaintiff in the original complaint, its added claims for damages not covered by the insurance might well relate back under Rule 15(c)(2). "But Rule 15 has it limits." A new defendant can be brought in only if there is fair notice. "Similarly, courts have limited the applicability of Rule 15; a motion to amend the pleadings comes too late if it unduly prejudices the opposing party." Here "Wheaton had no timely notice that it faced liability above and beyond those damages sought by Transcontinental. * * * Wheaton might well have negotiated differently or refused to settle with Transcontinental had it been confronted with viable additional Intown claims." (Neither could Rule 17 substitution of Intown as real party in interest do the job. "Those courts that have permitted late amendment under Rule 17 have not exposed defendants to additional liability without notice; they have ordinarily confronted requests to exchange a plaintiff or plaintiffs for another plaintiff or plaintiffs with identical claims. * * * As with Rule 15, Rule 17's liberality evaporates if amendment would unduly prejudice either party.")

Another lengthy illustration is provided by *Young v. Lepone*, 1st Cir.2002, 305 F.3d 1, 13-17, denying relation back for added plaintiffs by invoking a "not well-defined" test that looks for "a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent." The class-action question is illustrated by *Cliff v. Payco Gen. Am. Credits, Inc.*, 11th Cir.2004, 363 F.3d 1113, 1131-1133, refusing to allow post-limitations expansion of a request to certify a Florida-wide plaintiff class to a request to certify a nationwide class.

The problems that arise from adding a new plaintiff may arise as well when one plaintiff is substituted for another. If the grievously injured driver of the automobile is substituted as plaintiff for the slightly injured passenger, there may be little difference from the addition of a new plaintiff while the original plaintiff remains in the action.

f. Erie

The problem addressed in *Walker v. Armco Steel*, cited above, arose from a state statute that holds it sufficient to file a complaint within the defined limitations period only if service is actually made within 60 days. The Court held that the 60-day service requirement binds the federal court in a diversity action. Rule 3, it concluded, is not intended to answer this question for diversity cases.

Rule 15(c)(3) is relevant only when state law does not permit relation back; if state law does permit relation back, Rule 15(c)(1) allows reliance on state law. If any attempt is made to amend Rule 15(c)(3), it will be important to decide how far to go in superseding state law. The question may yield one answer when state law would apply of its own force under Erie, unless preempted by a valid Civil Rule, and a different answer when state law is simply borrowed to fill the gap resulting from the lack of a federal limitations statute.

The *Erie* problem may be illustrated by a single example. The complaint in a diversity action is filed on day 730, the last day of the limitations period. State limitations law requires service within 60 days, by day 790. The new defendant learns of the action on day 850, 120 days from filing: should relation back be permitted, even though service on a properly named defendant would be defeated by state limitations law?

g. Redrafting Rule 15(c)(3)

For the moment, these alternative drafts are carried forward in the language of the present rule. The Style Rule variations are included in the single comprehensive draft set out after the Introduction. The purpose here is simply to identify a number of different approaches.

If an attempt were made to redraft Rule 15(c)(3), the first question to be resolved is the focus of the relation-back doctrine. One plausible focus is to permit relation back whenever a new defendant learned of the action at a time when timely service could have been made in an action naming the new defendant as an original party. This focus draws from a belief that limitations periods are designed to foster and protect the repose interests of defendants, and to protect both defendants and courts by facilitating the task of gathering, preserving, and presenting evidence. The draft might look like this:

Rule 15. Amended and Supplemental Pleadings

(c) Relation Back of Amendments.

* * * * *

(3) the amendment changes the party or the naming of the party against whom a claim is asserted and:

(A) Rule 15(c)(2) is satisfied;

(B) within the time specified in Rule 15(c)(3)(C) the party to be brought in by amendment (i) has received

such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (ii) knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against the party; and

(C) the notice described in Rule 15(c)(3)(B)(i) is received at a time when the party to be brought in by amendment could have been timely served with the summons and complaint in an action naming the party as an original party.

The same approach could be taken in simpler form, combining (B) with (C) and perhaps adding a requirement that the plaintiff have exercised due diligence:

> (B) within the time for effecting service on a correctly named defendant, [the party asserting the claim has acted diligently to identify the party to be brought in by amendment, and] the party to be brought in by amendment (i) has received such notice * * *

These time provisions still leave a question akin to the Rule 4(m) question: should the time be measured by hypothetical extensions of the time to serve process? A comment in the Committee Note might suffice to address this issue. One answer could be that an extension of time to serve

counts only if in fact an extension was granted to effect service on a party named in the original complaint. That answer would prevent fiddling with the limitations period based on the court's sense of fairness for the specific case. Other answers also could be given.

The "120-day" question could be approached more directly, giving up as a bad idea the incorporation of Rule 4(m):

> (B) the party to be brought in by amendment has received notice that meets the requirements of Rule 15(c)(3)(C) within 120 days after expiration of the limitations period for commencing the action, or within a shorter period for effecting service in an action filed on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action; and
>
> (C) the notice received within the time set by Rule 15(c)(3)(B) is such that the party to be brought in by amendment (i) will not be prejudiced in maintaining a defense on the merits, and (ii) knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against the party.

If a different focus is chosen, drafting would proceed in a different direction. There is something to be said for the view that a plaintiff should be required to proceed with dispatch once suit is actually filed, even though filing occurs long before expiration of the limitations period. This approach would require a structure quite different from present Rule 15(c)(3).

h. Quality of Timely Notice

Rule 15(c)(3) requires not only that the new defendant have notice of the action within the defined time, but also that the notice serve the purposes of limitations periods. The new defendant should recognize that the plaintiff wants to sue, and — recognizing that — be put into a position to gather and preserve evidence. As an abstract matter, it is nice to focus on the fact question whether the new defendant actually had notice of such quality as to substitute for actual service of the complaint and summons. Why stand on mere formality? But of course many cases will produce

tangled and uncertain fact issues — did the new defendant learn of the action at all before being served, when did the new defendant learn of it, what was the quality of the notice in relation to suggesting the mistake and stimulating preparation for eventual substitution as defendant, and so on.

In some cases it may be clear that the new defendant had notice of this quality. A named defendant may tell the new defendant about the litigation and the apparent mistake, and be prepared to say so. If the named defendant has some relationship to the intended defendant, it may be a natural reaction to notify the intended defendant. It also may be natural to notify the plaintiff, unless the named defendant hopes to protect the new defendant by working toward a limitations defense.

But there will be many cases in which there is some ground to surmise that the new defendant learned of the action, but no clear showing. Both versions of Rule 15(c)(3), pre- and post-1991, present this factfinding problem. One reason to restrain any enthusiasm about revising Rule 15(c)(3) is that even the clearest theory cannot alleviate the task of application. The *Singletary* case that prompted the Third Circuit to invite further work on Rule 15(c)(3) was in fact dispatched on the ground that the new defendant clearly had not had any notice of the action within the required time, no matter how the time might be measured. Cases that offer some circumstantial evidence of notice will be more difficult to dispatch.

One solution might be to discard the "notice" approach. The rule could require that a pleading stating the claim against the new party be served within the time allowed to serve the new party had it been named in the original complaint (or named in a complaint filed on the last day permitted by the limitations period). That would avoid the messy proof problem, and still

correspond to the argument that limitations should not bar a claim brought home to the new defendant within the time allowed for service on a properly named defendant.

II. C. Rule 26(a)(2)(B): Expert Reports from Employees Designated as Testifying Experts

Reported cases divide on whether an employee who is designated as a testifying expert must provide an expert report under Rule 26(a)(2)(B). The rule requires reports from any witness who is "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." The Committee Notes on the 1993 Amendments emphasize that the required report is part of the acceleration of the exchange of basic information about cases without the need for specific requests and to provide sufficient information that in some cases, an expert deposition could be avoided or its length reduced. The cases agree that an employee whose regular duties include providing expert testimony must give a report when designated as a testifying expert in a case. The cases divide as to whether an employee who does not regularly testify is exempt from the report requirement. Some cases – including the only appellate case directly on the subject – hold that such an employee must provide a report, noting that the rule should not be construed to create a category of expert trial witness for whom no written disclosure is required. *See Prieto v. Malgor*, 361 F.3d 1313 (11th Cir. 2004); *Day v. Consolidated Rail Corp.*, 1996 LEXIS 6596 (S.D.N.Y. 1996). Other cases rely on the plain language of the rule to provide an exception for employee-experts who are neither specially employed to provide expert testimony nor regularly give expert testimony as part of their duties as employees. *Navajo Nation v. Norris*, 198 F.R.D. 610, 612 (E.D. Wash. 1999). The division and the problem are summarized in Mickum & Hajek, *Guise, Contrivance, or Artful Dodging?: The Discovery Rules Governing Testifying Employee Experts*, 24 Review of Litigation 301-369 (Spring 2005).

The central argument of the article is that the distinction between an expert witness "whose duties as an employee of the party regularly involve giving expert testimony" – who must give a report – and an expert witness who is a party's employee but whose duties as employee do not regularly involve giving expert testimony – who is not required to give an expert report – is both confusing and without basis. The purpose of requiring disclosure of an expert witness report applies without regard to employee status. A secondary argument addresses a particular consequence of requiring a report. Most courts agree that the (a)(2)(B) direction that the report include "other information considered by the witness in forming the opinions" entails waiver of attorney-client privilege and work-product protection for anything furnished to the expert witness to be used in forming an opinion, "whether or not ultimately relied upon by the expert." If a report is not required, this basis for enforcing waiver is not available. A further advantage of requiring the report is to establish waiver.

The article emphasizes the absence of any Committee Note explanation of the implicit distinctions among the categories of expert witnesses. Rule 26(a)(2)(A) requires disclosure of the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705. (B) requires a report only for a witness "who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." The implication is that a report is not required for an employee whose duties as employee do not regularly involve giving expert testimony, or for a witness who is not an employee and who is not retained or specially employed to provide expert testimony in the case. The Committee Note identifies a treating physician as a witness who may testify as an expert without

having been retained or specially employed. It does not say anything about an employee whose duties do not regularly involve giving expert testimony.

The article describes several cases, beginning in 1996 and including the *Prieto* and *Day* cases cited above, that simply disregard the Rule's evident meaning. These cases proceed from the view that an (a)(2)(B) report is a good thing because it may foreclose the need to depose the expert and because it will make any deposition more efficient and more effective. In one way or another, they then conclude that an employee whose duties do not regularly involve giving expert testimony is one who is retained or specially employed to provide expert testimony. In effect, the Advisory Committee did not understand the consequences of its intended purpose, and misdrafted the rule. The cases that refuse to bend the rule this way – including the *Navajo Nation* case cited – are in the minority.

The recommendation presented in the article is that all testifying expert witnesses should be subject to the same requirements, regardless of their status as an employee or the scope of their employment. A report satisfying Rule 26(a)(2)(B) standards should be required. Attorney-client privilege and work-product protection should be waived as to all materials considered by the witness in preparing to testify. Although the focus is on employees, apparently this rule would hold also for such witnesses as the treating physician expressly referred to in the Committee Note. The recommendation is bolstered by the assertion that although it is not clear how frequently an employee must testify to be one whose duties "regularly involve giving expert testimony," most employee experts do not fall into this category.

Further research into the agenda books and minutes for 1990 to 1992 may show some explanation for exempting from (a)(2)(B) employees who do not regularly provide expert testimony. The reason for exempting treating physicians was clear. It is better to reduce the burdens that discovery imposes on them, leaving them free to devote more time to practicing medicine. There may have been some similar view about employees. Or there may have been a concern that employee witnesses are more likely than independent experts to testify to some combination of fact, expert appraisal not formed in anticipation of litigation, and litigation-focused expert opinions. A report requirement could become confused if limited by analogy to the for-hire expert report, or could impose undue burdens — or improper strategic disadvantage — if extended to all the employee's testimony.

This area must be approached carefully because it obviously relates to the evidence rules pertaining to experts and to questions of evidentiary privilege and protection. The employee's testimony may also be admissible as lay-witness opinion under Evidence Rule 701. The question of waiving attorney-client privilege and work-product protection also may be involved in the distinction. If the report is required to disclose all information considered, entailing waiver, there may be much more drastic inroads on privilege and protection than arise from the independent expert's report and ensuing waiver. There may in fact be good reasons to distinguish among categories of expert witnesses, protecting against waiver with respect to those who are not professional witnesses and who are closely identified with the party, even perhaps the party's main path of communication with counsel.

In one of the periodic bouts of charity toward local rules, the 1993 Committee Note concludes with this sentence: "By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702." One modest initial inquiry might be whether there are any such local rules.

The cases that reject the plain meaning of present Rule 26(a)(2)(B) are a humbling illustration of the ways in which perceived policy can overwhelm clear drafting. As rule interpretation they seem wayward. But they may disclose a real need to reconsider the distinctions that were deliberately adopted. In effect, the expert report seems to be regarded as a great success. Even some of the judges who adhere to the present rule seem to regret that expert reports are not uniformly required. It may be useful to consider further whatever reasons can be found for the distinctions.

In summary, there appears to be confusion and uncertainty about the Rule treatment of reports required from employees designated as providing expert testimony. The majority approach reads the Rule to mean something it does not say. If an amendment can bring the Rule in line with good practice, and not create additional problems, it may be desirable.

II. D. Rule 30(b)(6)

1. Overview

This memorandum supplements the critique of Rule 30(b)(6) practice contained in the submission from the Committee on Federal Procedure of the New York State Bar Association (No. 04-CV-B), which immediately follows in the agenda book. The goal is to provide background for a discussion drawing on members' experiences about whether the Committee should focus on possible changes to Rule 30(b)(6). To introduce those questions, it begins with background on the reason for inclusion of Rule 30(b)(6) in the 1970 amendments, and some consideration of the relevance of further amendments since 1970. It then canvasses and evaluates problems or concerns about Rule 30(b)(6) practice that have emerged in the last decade or so. Finally, it considers the possibility that caselaw could address these concerns, and also attempts to identify a variety of possible rule amendments that might be considered. No specific proposals are made, as this is purely intended to provide a basis for preliminary discussions. The various possible amendment ideas that are mentioned below all seem to have drawbacks, and they may not have corresponding values.

2. The Need for Rule 30(b)(6) in 1970

There seems now to be consensus that there was a need for Rule 30(b)(6) when it was adopted in 1970:

> Prior to the 1970 amendments to the Federal Rules of Civil Procedure, the only vehicle for taking a corporation's deposition was Rule 30(a), which required that any notice of a corporate deposition include the name and address of the person to be deposed or a general description of the deponent. For such a deposition to be used against the corporate defendant, the deponent must have been at the time of the deposition "an officer, director, or managing agent" of the corporation. The examining party was thus forced to determine which corporate officer, director, or managing agent might have sufficient knowledge to

respond adequately to proferred questions. To make this determination, the examining party had to utilize other discovery devices to identify knowledgeable corporate officials and employees. The identification of a knowledgeable corporate employee was not, however, the end of the examining party's dilemma. If the employee designated for deposition was not an officer or director, the corporation could challenge the employee's status as a "managing agent" who had authority to speak on behalf of the corporation. In such a case, the examining party then had the burden of establishing that the designee was a managing agent, an exercise that generally required additional discovery prior to taking the designee's deposition.

Even if an examining party cleared these hurdles, there was no guarantee that the deponent selected would actually possess any useful information. A witness's disclaimer of "personal knowledge" would therefore leave the examining party with no option but to notice the deposition of another officer, director, or managing agent, with the possibility that he too might plead ignorance. As one commentator has noted, "this dance of ignorant witnesses became so common that it earned a name: 'bandying.'"

Deming & McCurry, Mass Tort Discovery and the Precarious Position of the FRCP 30(b)(6) Witness, Drug and Medical Device Seminar (Defense Research Institute 1997). See also Frechette, Beware the Rule 30(b)(6) Deposition, 42 For the Defense No. 3 (2000) ("Gone are the days when a corporation could produce ten witnesses, each of whom claimed that someone else was more knowledgeable about the relevant facts. Gone, too, are the days when corporate deponents could get away with little more than a befuddled 'I don't know' in response to an examiner's questions. Rule 30(b)(6) now ensures that if those tactics are employed, it is the corporate defendant that suffers.").

3. The Rule 30(b)(6) Solution

As restyled, the rule reads:

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about

> information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed in these rules.

"[T]he underlying principle of the rule is to shift the burden of determining who is able to provide information from the requesting party to the corporation." Schenkier, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6), 29 Litigation 20, 22 (Winter 2003). The Advisory Committee Note explained the shift of this burden as follows: "This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that on the examining party ignorant of who in the corporation has knowledge." One could debate this proposition, but the nature of that burden seems to lie at the heart of much of the current concern about operation of Rule 30(b)(6).

Some enthusiasts for Rule 30(b)(6) say that it "revolutionized discovery of corporate entities." Solovy & Byman, Invoking Rule 30(b)(6), Nat. L.J., Oct. 26, 1998, at B13. Yet there may occasionally be post-1970 incidents that recall the pre-1970 days. For example, Judge Frank Theis remarked as follows regarding obstacles encountered by plaintiffs suing A.H. Robins Co. for injuries caused by the Dalkon Shield:

> The project manager for Dalkon Shield explains that a particular question should have gone to the medical department. The medical department representative explains that the question was really [in] the bailiwick of the quality control department. The quality control department representative explains that the project manager was the one with the authority to make a decision on that question. * * * [I]t is not at all unusual for the hard questions posed in Dalkon Shield cases to be unanswerable by anyone from Robins.

Lord, the Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord, 9 Hamline L. Rev. 7, 11 (1986). Courts repeatedly have found that organizations have failed to comply with the rule's preparation requirements, and have therefore ordered that further witnesses be designated. See 8A Fed. Prac. & Pro. § 2103 at 31-32 & nn. 2-3 (2d ed. & Supp. 2005).

4. Other Rule Changes That May Bear on Present Practice under Rule 30(b)(6)

Since 1970, other rule changes have occurred that may be relevant to the current operation of Rule 30(b)(6).

Initial disclosure: Rule 26(a)(1) requires that parties disclose the identity of parties they may use to support their claims or defenses. To a limited extent, this will call for identification of persons who may "speak for" the organization. But such identification does not necessarily respond to the subjects about which the adversary wants information.

Discovery conference: The Rule 26(f) discovery conference might supply some of the information sought by the 30(b)(6) technique because the adversary's attorney could at least inquire about who had information on various subjects. Indeed, one goal of adding discussion of electronically stored information to Rule 26(f) was to foster designation of Rule 30(b)(6) or other witnesses capable of describing a party's electronically stored information. More generally, the need sometimes to identify proposed deponents for the discovery plan might support productive exchanges about which people could provide information about given matters for the organizational litigant. But it may often happen that efforts to obtain this sort of information from the organizations's attorney during this conference are rebuffed, or at least inconclusive.

Scheduling order: The Rule 16(b) scheduling order may in some instances include details about which witnesses will testify as to which matters that could include designations similar to those called for by Rule 30(b)(6) and also provide for the timing of the Rule 30(b)(6) deposition.

Numerical and time limits on depositions: Since 1993, Rule 30(a)(2)(A) has limited each side to ten depositions. Since 2000, Rule 30(d)(2) has limited the duration of depositions to one day

of seven hours. The numerical limitation on depositions would place another hurdle in the way of a litigant remitted to the old fashioned hunt and peck method of obtaining the corporation's information via deposition. The Rule 30(d)(2) durational limitation contains a directive in the Committee Note that each Rule 30(b)(6) deposition should be considered a separate deposition for that limitation, which may deter organizational litigants from designating multiple deponents.

Second deposition prohibition: Since 1993, Rule 30(a)(2)(B) has said that leave of court is required when "the person to be examined has already been deposed in the case." Whether that would apply to an effort to depose a person who had been designated already as a corporate representative might be disputed, and that dispute might bear on the question noted below whether the deposition can go beyond the subjects specified in the Rule 30(b)(6) notice.

"Automatic" exclusion of information not disclosed or provided in response to certain discovery: Since 1993, Rule 37(c)(1) has provided that a party may not use information that it failed to disclose as required by Rule 26(a). In 2000, this rule was amended so that it applies to a failure to supplement a discovery response as required under Rule 26(e)(2), but Rule 26(e)(2) does not apply to Rule 30(b)(6) depositions.

5. Current Concerns about Use of Rule 30(b)(6)

Except for restyling, Rule 30(b)(6) has not been changed since 1970, and its operation was for a long time uncontroversial. Indeed, in 1992 it was described as "the forgotten rule." See Cymrot, The Forgotten Rule, 18 Litigation 3 (1992). But since then practice under the rule has received substantial adverse attention, most notably in a 100 page law review article, Sinclair & Fendrich, Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and

Alternative Mechanisms, 50 Ala. L. Rev. 651 (1999). The submission from the New York Bar Association draws considerably on the Sinclair & Fendrich article. Without meaning to supersede the discussion of problems contained in the New York Bar Association submission, it seems that there are at least the following concerns:

Inadequate specification of matters for examination: The rule says that the notice must "describe with reasonable particularity the matters for examination." This provision links directly to the obligation of the organization to designate and prepare a witness to testify about those matters. But on occasion parties do not do a sufficient job. In some instances, we are told, they are permitted to include the phrase "included but not limited to" with the list of topics. Arguably that means that the obligation to prepare is limited to the topics identified with particularity, but such a catch-all nonetheless creates ambiguities. If the witness is testifying "for" or "as" the corporation, and if the answer "I don't know" can be used against the corporation, such an open-ended designation invites unfairness.

Specification of too many matters for examination: Somewhat different issues are raised by an overlong specification, however particularized. Like all discovery, Rule 30(b)(6) is subject to the limitations of Rule 26(b)(2). "The more categories listed, the more likely the requesting party will buy itself a discovery dispute on the ground the request is unduly burdensome." Schenkier, supra, 29 Litigation at 22.

Questioning the witness about subjects not listed in the notice: The deposition is the deposition of the organization, speaking through the people it designates to address the specified topics. The organization can specify which person will address which topic. To allow the deposition

to veer into other topics, even though generally relevant to the litigation, appears inconsistent with what Rule 30(b)(6) was designed to do. It might also create an incentive for the organization not to designate somebody with personal knowledge of any other topic so to avoid this result. In any event, the party taking the deposition of the organization could always notice the deposition of this individual to pursue other topics in a slightly different setting. But in the context of an actual deposition, this line-drawing may seem artificial. The Moore treatise thus says that the "better" view is that a Rule 30(b)(6) deponent can be questioned as broadly as any other deponent. 7 Moore's Federal Practice § 30.25[4] at 30-56.5. Whether this is really better might depend in part on the application of the deposition time limit and second-deposition limits that have been adopted since 1970. If the party taking the deposition cannot re-depose the witness without leave of court, it seems more difficult to say that it also cannot pursue other relevant information during the 30(b)(6) deposition. On the other hand, if the seven-hour limitation applies to all the questioning, it might be to the advantage of the organization to have all topics covered at once.

Excessive preparation required of the witness: The clear purpose of the rule was to impose on the organization the burden of preparing the designated person to testify about "information known or reasonably available to the organization." In some instances, however, that burden may have been undue, particularly if the designation of matters for examination is overlong or not sufficiently specific. The burden may be large even if the listing is specific and not too long. Nowadays, litigation often focuses on events that occurred a fairly long time ago. And nowadays, corporate mergers and other such events may mean that few or no current employees were around when these events occurred. "Particularly in this age of 'downsizing,' it is not at all difficult to imagine a case in which the corporation no longer employs anyone having knowledge of the relevant

events." Frechette, supra. In the view of some, however, "even if the entity has no employees with any knowledge at all, * * * the entity must find some person to study the documents or otherwise to educate himself or herself to testify." Solovy & Byman, supra. In at least certain instances, this attitude seems overbearing; it goes well beyond protecting against "bandying" the party seeking information.

"Contention" questions and invading work product: This congeries of concerns is a bit difficult to unravel. The main concern is that the witness is expected to have mastered everything that the organization's lawyer has learned about the case. Contention questions pose particular but perhaps not unique concerns in that regard. It appears that a central question is whether the information the lawyer has gathered is "available to the organization" for purposes of preparing for the Rule 30(b)(6) witness. For some purposes, it is clear that such information is to be provided.

Contention interrogatories are one example. Until 1970, it was unclear whether "contention" interrogatories were permissible; in that year Rule 33 was amended to make it clear that they are. Similar inquiries may be attempted via Rule 30(b)(6). But there is no indication that this was contemplated for the new 30(b)(6) procedure that was adopted at the same time the Rule 33 was amended to provide explicit authorization for contention interrogatories. And permitting such inquiry not only may overburden the 30(b)(6) witness but also may approach a "deposition" of the organization's counsel, imperiling work product.

A somewhat different concern is that the 30(b)(6) deposition might, in effect, require the witness to master all the attorney's trial preparation to answer the questions being asked. Consider a question asking for "all facts supporting your allegation in paragraph 7 of the complaint." In

interrogatory form, such a question would seem unobjectionable. See Hickman v. Taylor, 329 U.S. 495, 504 (1947) ("A party clearly cannot refuse to answer interrogatories on the ground the information sought is solely within the knowledge of his attorney."). But is such information "reasonably available to the organization" for purposes of having its designated witness provide it in response to a Rule 30(b)(6) specification?

A related problem is that materials supplied the witness to assist in preparing for the testimony might be viewed as subject to production due to Fed. R. Evid. 612. If so, materials otherwise protected as work product (even opinion work product) could be subject to discovery. Whether the preparation process involved with a Rule 30(b)(6) witness should be viewed as using a writing "to refresh memory for the purpose of testifying" for purposes of Rule 612 is debatable. The designated person may, after all, actually have no personal knowledge regarding the events in question. Indeed, the organization may no longer have within its employ anyone who has such personal knowledge.

These problems become particularly difficult with regard to precluding the organization from offering evidence that was not revealed by the 30(b)(6) witness.

Requiring the witness to commit the corporation to its contention regarding factual matters on which there is competing evidence: This is a related sort of contention problem. Suppose that discovery has revealed that there is a dispute about a matter of historical fact -- for example, which of two drivers caused an accident in which the organization's property was destroyed. Should the Rule 30(b)(6) witness have to answer for the company on which testimony it accepts or rejects? Reportedly some efforts have been made to require Rule 30(b)(6) witnesses to review testimony of

other witnesses and declare the organization's position on which testimony is correct. As a matter of pleading, Rule 8(e)(2) permits a party to allege alternative versions of events; at least in many instances practicality compels the party to elect its version before trial. Can Rule 30(b)(6) be used to compel that choice much earlier, and in instances where the party could otherwise persist in offering varying versions (e.g., "either Defendant No. 1 or Defendant No. 2 caused plaintiff's injury")?

With an individual party, this sort of question would probably not arise because the party witness would have to testify to matters within his personal knowledge and not ordinarily be required to speculate about which version of matters beyond his personal knowledge he accepts. Even as to matters within the party's knowledge, it is likely that courts would not allow questions like "If he says the light was red, would he be lying?" Cf. Fed. R. Evid. 608(a) (permitting only very limited testimony about the reputation for truthfulness of another witness). But the question may be more difficult with an organizational party, and perhaps the problem really goes (again) to whether the organization has knowledge on the subject. If it does not, it would seem that its representative should be permitted to say "I don't know."

Precluding the organization from introducing evidence on a subject if its 30(b)(6) witness said "I don't know" when asked about the subject: This is evidently treated sometimes in the same guise as the "judicial admission" category discussed next. It seems really to be a sanctions issue regarding the organization's compliance with its obligation to provide a witness suitably prepared to provide its knowledge on the listed subjects. In recent years, courts have quite frequently found that designated witnesses were insufficiently prepared, and have imposed sanctions or required designation of additional witnesses. For examples, see 8A Federal Practice & Procedure § 2103 at

nn. 2 & 3 (Supp. 2005). At some point, courts impatient with such recalcitrance may order that the organization may not put on evidence on that issue. See Rule 37(b)(2)(B). Even the most enthusiastic supporters of vigorous use of Rule 30(b)(6) recognize that such a sanction should be used rarely: "If a party has acted in good faith to present a designee and has equally made bona fide attempts to educate the witness to give complete answers, a court is more likely than not to exercise its discretion to be lenient as it picks from its grab bag of potential sanctions for failing to have a fully prepared witness." Solovy & Byman, supra. But it may be that some courts have acted too aggressively in imposing sanctions.

Precluding evidence from the organization that varies from or adds to the version presented by its witness: Under Rule 8(d), failure to deny an allegation amounts to an admission, and under Rule 36, a party may seek a admission that certain facts are true. In either instance, these are "judicial admissions," and the jury should ordinarily be instructed that such admissions are taken to be true for purposes of the litigation. Some regard testimony of a Rule 30(b)(6) witness in the same light. "The whole point of Rule 30(b)(6) is that it creates testimony that binds the corporate entity. * * * It is extraordinary that there is so little case law on developing Rule 30(b)(6) as an offensive weapon to bind entities to their deposition testimony and bar contrary trial testimony." Solovy & Byman, supra. A similar notion is found in a leading treatise: "It should be kept in mind that a Rule 30(b)(6) designee testifies on behalf of the corporation, and binds the entity with its testimony." 7 Moore's Federal Practice § 30.25[3] at 30-56.3.

Whether courts often treat the "binding" effect of Rule 30(b)(6) testimony to foreclose evidence from outside the organization supporting a different version is unclear. Decisions that appear to do so may at heart reflect the view that the organization did not adequately prepare its Rule

30(b)(6) witness, and that information available to the organization was not presented as a result. In these circumstances, courts may order that information not presented during the 30(b)(6) deposition, when it should have been presented, cannot be presented later either. This view is consistent with Rule 37(c)(1).

Except as a sanction for failure to do proper preparation, however, it seems flatly wrong to say that the testimony of any party witness "binds" that party at trial and precludes it from offering otherwise admissible evidence that supports competing conclusions. *See e.g., Guenther v. Armstrong Rubber Co.*, 406 F.2d 1315 (3d Cir. 1969) (even though plaintiff testified at trial that he was injured by the explosion of a "black wall" tire, he could introduce evidence from other witnesses that he was actually injured by the "white wall" tire that plaintiffs produced at trial as the offending item). The magistrate judge's decision that is regularly cited as emblematic of overly broad application of the rule stops short of treating the testimony as a judicial admission. See United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("answers given at a Rule 30(b)(6) deposition are not judicial admissions"). And the district court's affirmance of the magistrate judge's decision appears to regard it as premised on the preparation obligation:

> The major thrust of UCC's appeal is its contention that it should not be held responsible for preparing its Rule 30(b)(6) deposition witnesses at the time of their depositions. Rather, it claims it should be allowed to continue their preparation after the depositions by being allowed to dribble in its final positions through Fed. R. Civ. P. 26(e) supplementations and Rule 26(a)(3) disclosures thirty days prior to trial, or else release them in a final deluge at trial. The impracticality of UCC's position is evident. The fact that this case involves events which occurred two or three decades ago does not alter the situation.

United States v. Taylor, 166 F.R.D. 367, 367-68 (M.D.N.C. 1996).

At least two recent court of appeals decisions appear to recognize that the organization is not forbidden from offering evidence different from that provided in the testimony of its Rule 30(b)(6) witness:

> Although Amana is certainly bound by Mr. Schnack's testimony, it is no more bound than any witness is by his or her prior deposition testimony. A witness is free to testify differently from the way he or she testified in deposition, albeit at the risk of having his or her credibility impeached by the introduction of the deposition.

R & B Appliance Parts, Inc. v. Amana Co., 258 F.3d 783, 786 (8th Cir. 2001); *see also A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) (rejecting the argument that Rule 30(b)(6) testimony constitutes a judicial admission).

Gamesmanship resulting from the numerical and durational limits: Under the current numerical and durational limits, it is said that the entity has an incentive to prepare a single witness minimally on all topics because designating more witnesses means that the other party may use up to seven hours to examine each one.

6. Controlling These Problems Through Case Law Rather than Rule Changes

An initial reaction to the above listing of problems is that judicial handling of current Rule 30(b)(6) should be sufficient to deal with many or most of them. Indeed, those who object to the way in which the rule is being used almost never say that the problem is what the rule or Advisory Committee Note say. To the contrary, they invoke the rule and Note against the decisional law they say distorts it. This point is made very frequently in the leading article by Sinclair and Fendrich, for example.

Trying to canvass the reported cases seemed not to be worthwhile at this time. As the New York Bar Association puts it, "[s]uch cases will necessarily present a distorted view of practice under

this Rule." (p. 5) Moreover, there seems considerable reason to suspect that overbroad judicial statements about the operation of Rule 30(b)(6) are not accompanied by overly aggressive rulings enforcing those statements. The Sinclair & Fendrich article says as much, and the New York Bar Association report recognizes that "imposition of any procedural sanctions other than ordering additional discovery have been rare" and that "some monetary sanctions appear so light that it is difficult to imagine them serving as a deterrent." (pp. 11-12)

Although it suggests one possible rule change, what the New York Bar Association largely seeks is therefore to promulgate practice guidelines. Nonetheless, it seems worthwhile to provide some suggestions about possible foci for rule changes to serve as background for a discussion whether Rule 30(b)(6) problems warrant serious consideration along these lines.

7. Possible Rule Amendment Ideas

At present, there is no proposal before the Committee to amend Rule 30(b)(6), and the following very tentative thoughts about possible areas on which it might focus are not meant to endorse any change but only to foster discussion.

Deleting Rule 30(b)(6): Since much of the criticism of current practice under this rule appears to focus on the undue burden on the organization, it is worth noting that the 1970 decision to impose this burden could be reconsidered. At least the assumption made then that the burden would be essentially the same as the burden imposed by responding to interrogatories seems debatable. Certainly one could argue that experience has shown that the burden of preparing a witness to answer deposition questions for seven hours about all information available to the organization (particularly if that includes all information gathered by the lawyer in preparing the

case) is significantly greater than the burden of preparing a written interrogatory answer embodying that information.

Accordingly, the Committee could consider whether the difficulties caused by Rule 30(b)(6) outweigh its advantages, and therefore whether it should be deleted. Arguably rule changes since 1970 have reduced this rule's importance. But the pervasive recognition that pre-1970 practice was unsatisfactory argues against such action, and the changes since then could well be seen as pale substitutes.

Adding "factual" to Rule 30(b)(6): The one rule amendment suggestion made by the New York Bar Association is to add the word "factual" so that the rule only requires the organization to designate a witness capable of testifying about "factual matters." (p. 32) This change is urged as responding to the problem of efforts to inquire into legal arguments or contentions during Rule 30(b)(6) depositions.

Whether this change would accomplish that purpose is uncertain. There is a considerable likelihood that adding the word "factual" would do little to curtail the activities to which objection has been made. It could also re-introduce some difficult questions that were deliberately avoided in drafting the pleading rules in the original Civil Rules. By the early twentieth century, the dividing line between "facts" and "conclusions" was a hotly debated and litigated focus of pleading decisions. For example, it was long debated whether the allegation that defendant drove "negligently" was an allegation of fact or a mere conclusion. The framers of the rules intentionally defined the sufficiency of a claim without using the word "facts" to bury this past. See Form 9 (stating that an allegation

that defendant drove "negligently" is sufficient). Restoring this distinction, but putting it into the discovery rules, is a dubious undertaking.

Moreover, making the change might well not solve most of the problems that have been cited. Questions about "all facts supporting plaintiff's allegations in paragraph 7 of the complaint" would seemingly not be affected by such a change. Efforts to force the organization to elect one of a number of different versions of the facts would not seem to be affected by such a change. In addition, this amendment would not seem to respond to the concern that courts may preclude the organization from offering any evidence supporting a view different from the testimony of its witness, or prohibiting it from offering any evidence on subjects on which the witness said "I don't know."

Providing by rule that the questioning of the Rule 30(b)(6) witness is limited to the matters specified in the notice, or the matters for which the witness was designated: Either in Rule 30(b)(6) or in Rule 30(d), a rule provision could be added providing such a limitation. Since 30(b)(6) says that the organization "may set out the matters on which each person designated will testify," it might be best to use that as the focus (rather than all matters on which the adverse party sought information). This change might perhaps be effected by adding "and the examination of the witness must be limited to the matters so identified" to Rule 30(b)(6).

Providing by rule that the witness's testimony is not a "judicial admission," and that the organization may offer evidence on any designated matter notwithstanding the Rule 30(b)(6) testimony: Such a change would respond to concerns about incorrect foreclosure of such evidence. It would probably be best inserted into Rule 30(b)(6), although it might be possible instead to include

it in Rule 32(a)(3). Effecting such a change by rule may be difficult, however. It seemingly should not guarantee admissibility of information that was "reasonably available to the organization" but was not provided; that is precisely the situation that courts may sanction by precluding such belated proffers of evidence. Limiting this assurance so that it does not apply to such information might be difficult to phrase, and it might not be sufficient. Suppose that the organization seeks to offer other evidence (not available to it within the meaning of Rule 30(b)(6)) on a matter on which it had but did not provide available information. Should the rule guarantee that it may do so even though it did not comply with its obligation to provide the information it had?

Revising the "reasonably available to the corporation" standard in Rule 30(b)(6): The application of this standard seems to lie at the heart of many of the objections to Rule 30(b)(6) practice. It is possible that a better phrase could be identified. But the current phrase seems well designed to focus on the proper criteria, and sufficiently flexible for addressing a variety of situations. It is dubious a better one could be found; the real problem seems to be with interpretation of the phrase.

Forbidding "contention" questions during 30(b)(6) depositions by rule: Rule 30(c) could be amended to add a provision regulating contention questions during Rule 30(b)(6) depositions. Defining what is forbidden might prove difficult. A starting point might be the definition of contention interrogatories in Rule 33(a)(2), but that would need close attention if borrowed for this purpose.

Explicitly invoking work product protection with regard to Rule 30(b)(6) depositions: Rather than trying to define and forbid "contention" questions, it might be preferable to provide an explicit

invocation of Rule 26(b)(3) in Rule 30(b)(6) to highlight the limitations of the Rule 30(b)(6) device. Cross-references designed to highlight such points have been added elsewhere. Consider, for example, the addition to Rule 26(b)(1) of a cross-reference to Rule 26(b)(2). On the other hand, there seems no reason why Rule 26(b)(3) is inapplicable in the Rule 30(b)(6) context without the cross-reference. This would directly raise the question of how Rule 26(b)(3) protection should apply to the duty to prepare the 30(b)(6) witness regarding information "reasonably available to the organization."

Providing by rule that a Rule 30(b)(6) deposition may be supplemented: Presently Style Rule 26(e)(1) — present Rule 26(e)(2) — makes no provision for supplementation of the deposition of a Rule 30(b)(6) witness. If greater flexibility regarding additional evidence were desired, it might be sensible to consider adding such an option. Such a change might be said to undercut the notion that the witness must be fully prepared at the time of the original deposition because it appears to permit the organization to provide the information later rather than at the time when it was supposed to be provided. That objection may be off the mark, however, for Rule 26(e) is not a permission to fail to provide discovery when due, and also because it seems that such later provision of information occurs with some frequency in Rule 30(b)6) depositions.

Making this change would lead to Rule 37(c)(1) consequences because that rule precludes use of information not provided as required by Rule 26(e). In that sense, then, the change would fortify the argument that the organization could not offer evidence not provided through the Rule 30(b)(6) deposition or Rule 26(e) supplementation.

This change would not seem to solve the problem of information that could not be said to be "reasonably available to the organization" but would otherwise be admissible if offered by the corporation. Supplementation is only required as to information there was a duty to supply in the first place, and Rule 30(b)(6) imposes no duty to provide information not "reasonably available to the organization."

Changing the numerical/time limitation provisions in the rules: Presently it appears that each Rule 30(b)(6) witness is counted as one against the total of ten, but that there is a full seven hours for each one of them. That situation would appear to create contrary incentives. A responding party wishing to game the use of Rule 30(b)(6) would be tempted to designate many to speak for it to exhaust the initial allotment of ten, but deterred from doing that by opening the door to a full day of questioning of each. Probably any set of specifics would invite gaming of some sort, and it is not clear that there is room for improvement.

Addressing the application of the "second deposition" rule to the 30(b)(6) witness: If the rules were amended to forbid questions going beyond the matters specified in the notice, it might be wise to specify in Rule 30(a)(2)(A)(ii) that a person designated as a Rule 30(b)(6) representative for an organizational litigant may be deposed another time in an individual capacity. Presently the last sentence of restyled Rule 30(b)(6) says that the rule "does not preclude a deposition by any other procedure allowed in these rules," but that does not appear to affect the one-deposition-per-witness limitation.

Providing a platform for a Committee Note: To the extent that concerns about present Rule 30(b)(6) practice do not lend themselves to rule amendments, making some amendment could

provide a platform for Committee Note discussion of a wider variety of issues. Of course, a Note must mainly explain the rule change being made, but it may also "set the scene" and comment on related matters. In that way, it might provide useful directions on topics that cannot readily be fit into rule changes.

8. Conclusion

The basic question for the present is whether problems with Rule 30(b)(6) warrant serious consideration of rule amendments. On the one hand, it does appear from published literature that there are strategies for dealing with many of these problems. See, e.g., Deming & McCarrey, supra (suggesting "methods to avoid possible pitfalls" and proposing "a three-step plan for addressing and meeting the Rule 30(b)(6) requisites"); Arledge, Pitfalls in Defending the Rule 30(b)(6) Witness, 46 Orange County Lawyer 20, 22 ("Counsel cannot afford to ignore vague or confusing 30(b)(6) categories. * * * [T]he corporation's counsel should be active in clarifying the 30(b)(6) categories; meet and confer with opposing counsel."); 7 Moore's Federal Practice § 30.25[4] at 30-56.6 (observing that counsel can note on the record which questions go beyond the scope of the 30(b)(6) designation). At the same time, it seems that the other side seeks to exploit the disquieting potential of Rule 30(b)(6). See, e.g., It's All in the Documents: Strategic Use of Rules 30(b)(5), 30(b)(6), and 34, ATLA Winter Convention Reference Materials, Jan., 2005 (emphasizing that the corporation has a duty to prepare the witness and that the inquiry is not limited to the matters specified).

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February 24, 2004 04-CV-B

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: New York State Bar Association
Commercial and Federal Litigation Section

Dear Mr. McCabe:

As you know, I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On February 12, 2004, the Section approved a report on Rule 30(b)(6). A copy is enclosed for consideration by the Advisory Committee on Civil Rules. If you need more copies or would like an electronic copy, please let me know.

Sincerely yours,

Gregory K. Arenson

GKA:sm
Enclosure

cc: Lewis M. Smoley, Esq. (w/encl.)
James A. Beha, II, Esq. (w/o encl.)

Report on Rule 30(b)(6)

Rule 30(b)(6) of the Federal Rules of Civil Procedure was introduced in 1970 to make specific changes in how information could be obtained from a corporation or other organization by deposition.[1] Where previously the examining party designated some officer or managing agent as the witness, taking the risk that the deponent might not have the desired information (and, incidentally, the risk that the person who did possess the information might not be an officer or managing agent whose testimony could "bind" the entity), Rule 30(b)(6) changed the process so that the examiner's burden was to identify by notice the topics on which testimony was sought with "reasonable particularity" (hereafter a "Notice"), at which point the burden shifted to the corporation to designate for examination one or more persons who would be prepared to convey the corporation's knowledge on the topics, speaking on behalf of the corporation (hereafter a "Corporate Witness").

This Report discusses the burdens on the examining party in terms of the specificity of the Notice and the obligation of the deponent corporation in terms of the preparation of the Corporate Witness. This Report also considers the proper scope of a Rule 30(b)(6) examination, and particularly the extent to which it may be used to elicit contentions or trial positions of a corporate party, giving particular attention to the much-cited 1996 case of United States v. Taylor, decided by Magistrate Judge Eliason of the Middle District of North Carolina.[2] The Report also addresses the evidentiary significance of Rule 30(b)(6) testimony, the extent to which such testimony should be given preclusive effect, the attorney work-product

[1] Rule 30(b)(6) applies to a variety of entities ("a public or private corporation or a partnership or association or governmental agency"); we use "corporation" here as a shorthand. In 1971, Rule 30 was further amended to make clear that deposition discovery of third-party entities by subpoena would follow a parallel procedure.

[2] United States v. Taylor, 166 F.R.D. 356 (M.D.N.C.) (Eliason, M.J.), aff'd 166 F.R.D. 367 (M.D.N.C. 1996) ("Taylor").

issues that are often presented in the preparation and examination of a Rule 30(b)(6) witness, and current practice (as reflected in reported cases) with respect to the imposition of sanctions where the witness presented is unable to fulfill the testimonial duties imposed by the Rule.

After such discussion the Report sets forth a series of recommendations for practice under the Rule as well as a recommendation for amendment of the Rule to eliminate the use of such depositions as a device to discover legal arguments, contentions and trial positions.

A. The Rule and An Overview of Common Practice Issues

Rule 30(b)(6) currently provides:

> A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

The Rule was adopted as "an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process." Rule 30(b)(6) Advisory Committee's Notes (1970 Amendments). The Rule offers a streamlined procedure for extracting information that may be dispersed throughout a corporation and in practice proves especially useful early in a case when locating particular information, identifying potential witnesses on particular points or obtaining explanatory information about particular documents may be essential to mapping out a pretrial plan. The requirement that the Corporate Witness shall "testify as to matters known or reasonably available to the organization," moreover, requires

a well-prepared deponent and thereby seeks to eliminate the prior situation in which an examining party had to proceed through a series of deponents who each professed that the person who knew the answer was someone else.[3] In complex cases, very specific Notices may also prove the only practicable method for extracting information about documents, policies or decisions that have emerged as significant in the case (such as accounting treatment of a particular event or a company policy), but for which individual deponents have not been knowledgeable or helpful. The burden on the corporation to produce a witness who "shall testify as to matters known or reasonably available to the organization" can be an invaluable tool for forcing a filling-in of blanks where memories seem to have failed the witnesses so far examined.

Anecdotal reports from practitioners indicate that Notices are often framed as seeking factual support for matter in the pleadings (e.g., "all facts that plaintiff contends support the allegations of paragraph x of the Complaint" or "the factual basis for defendant's assertion of a defense of estoppel," etc.). Even where the Notice is not framed in evaluative terms, Corporate Witness responses (and witness preparation) in the context of a Rule 30(b)(6) deposition also constantly present issues about privileged communications and work product, since counsel handling the case typically have the most thorough knowledge of the facts.[4]

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[3] Id. (referring to the practice as "bandying"). See generally Jerold Solovy & Robert Byman, Discovery: Invoking Rule 30(b)(6), NAT'L L.J., Oct. 26, 1998, at B13 (arguing that if a witness is not properly prepared and lacks knowledge which others in the corporation do have (e.g., as to what happened in a negotiation), the corporation should thereafter be bound by the professed lack of knowledge -- in opposing summary judgment, for example.)

[4] See, e.g., Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267, 279-80 (D.Neb. 1989) ("Protective Nat'l") (although documents may be protected work product, Rule 30(b)(6) witness must be prepared with "facts" contained in them and divulge such facts such facts at deposition; questions as to which facts "support" particular allegations did not necessarily seek counsel's mental impressions, and a deposition rather than contention interrogatories was an acceptable method insofar as it addressed allegations that were not simply legal conclusions). But see Am. Nat'l Red Cross v. Travelers Indem. Co., 896 F.Supp. 8, 13 (D.D.C. 1995) (in a complex case with extensive document discovery, requiring a description of documents that "support" affirmative defenses was barred by work-product doctrine).

Occasionally, too, parties may seek to force a corporation to take a litigation position with respect to specific issues or events through the medium of a Rule 30(b)(6) deposition. Since the Corporate Witness must "speak" for the corporation on the designated topics to the extent information is "reasonably available" to the corporation, it is argued, the witness may be asked for the corporation's "position" on factual questions, including, where testimony from other witnesses at deposition has proven to be conflicting, which version of events the corporation credits.[5] (Q: I have presented you with the depositions of Witness One and Witness Two [both, say, former employees] with respect to the circumstances surrounding the denial of plaintiff's application for promotion. Which version of such events does the company adopt?)

Use of Rule 30(b)(6) to seek "positions" that might alternatively be sought by requests to admit or contention interrogatories effectively requires the corporation, through its witness, to map out litigation positions in an oral exchange with adversary counsel with only minimal assistance from counsel -- who would have been heavily involved in framing responses to written discovery. Questions of specificity, scope and protection of work product are obviously interrelated: the more areas of inquiry and the more scope to ask about "positions," the more likely that counsel preparing a witness to answer "fully" will have to share not only factual information but counsel's assessment of the facts.

The Taylor decision and a number of others have approved the practice of seeking corporate "positions" from the Corporate Witness, often expressing a preference for compelling a corporation to speak through an individual employee rather than allowing counsel to present the

[5] See Kent Sinclair & Roger P. Fendrich, Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms, 50 ALA. L. REV. 651, 699 (1999) ("Sinclair & Fendrich").

corporation's position.[6] Other courts reject, or at least strongly disfavor, the use of a Rule 30(b)(6) deposition for this purpose, and Sinclair and Fendrich condemn the practice as a "very common misuse."[7] Although concerns about this practice may be mitigated by requiring very specific advance warning in the Rule 30(b)(6) notice, in the context of an on-going deposition (and in the context of very strong judicial disfavor of instructions to a witness not to answer), counsel for the corporation -- and the witness -- can be at a great disadvantage in a factually complex case if such questions are permitted -- a disadvantage several times compounded if the court treats the scope of Rule 30(b)(6) answers as preclusive of other evidence.[8]

Disputes about the use of Rule 30(b)(6) will surface in reported cases only in the context of motions to compel (or for sanctions), motions to preclude, or motions for protective orders.[9] Such cases will necessarily present a distorted view of practice under the Rule. Moreover, as some commentators have pointed out, analysis of decisions in such cases must sort out the court's general pronouncements about the Rule and the parties' obligations thereunder from the actual relief (including any sanctions) directed.

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[6] See, e.g., Canal Barge Co. v. Commonwealth Edison Co., 2001 WL 817853, at *2 (N.D. Ill. July 19, 2001) ("Canal Barge") ("Generally, inquiry regarding a corporation's legal positions are appropriate in a Rule 30(b)(6) deposition" (citing Taylor); although in some cases contention interrogatories may be the preferred method, in this case "there is both a legal and factual component to the interpretation of these contracts," so that a deposition was preferred); Ierardi v. Lorillard, Inc. 1991 U.S. Dist. LEXIS 11887, at *5 (E.D. Pa. Aug. 20, 1991) ("Ierardi") (with respect to documents, plaintiffs were "entitled to discover the interpretation [defendant] intends to assert at trial" and since such "interpretation" was factual, a Rule 30(b)(6) deposition was preferable to contention interrogatories).

[7] Sinclair & Fendrich, 50 ALA.L.REV. at 700.

[8] See Solovy & Byman, supra note 3 (arguing for this result). Compare Taylor, 166 F.R.D. at 365 (Rule 30(b)(6) testimony precludes additional evidence or argument absent showing of "extremely good cause" for omission from testimony) with Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co., 1993 U.S. Dist. LEXIS 1163, at *8 (S.D.N.Y. Feb. 4, 1993) (Francis, M.J.) ("Arkwright") (Rule 30(b)(6) testimony would not limit trial evidence since witness need not have "comprehensive" knowledge; contention interrogatories would be used to assure full disclosure prior to trial).

[9] Reported cases that consider the preclusive effect of Rule 30(b)(6) testimony appear to be extremely rare. The issue was presented so squarely in Taylor only because the corporation sought an advance ruling that its Corporate Witness' testimony would not limit the scope of proof and argument at trial.

Common, often interrelated, subjects in such disputes include the following:

1. How specific must the Notice be, and to what extent may a Rule 30(b)(6) witness be examined on matters outside the scope of a designated topic?

2. Where the Corporate Witness lacks personal knowledge (or sufficient personal knowledge) on the designated topic for which the witness is proffered, how much preparation is required, particularly as to (i) details of information available somewhere within the corporation, and (ii) information that might be "reasonably available" if the corporation is required to obtain information from former employees or from third parties?

3. Must a witness be prepared when the information is available to the corporation only through the investigative work of counsel (including both work product and attorney-client communications from former employees); if a witness must be prepared, how can this be managed consistent with protection of attorney work product?

4. To what extent may the witness be asked to take a position for the corporation with respect to third-party testimony, to summarize the corporation's evidence on a particular point, to muster evidence in support of pleadings that have been framed by counsel, or to state the corporation's current "interpretation" of documents or events, or the like?

5. What should be the relationship of Rule 30(b)(6) questions and other discovery devices, particularly contention interrogatories?

Responses to these questions reflect a continuum of views, from a position that Rule 30(b)(6)'s central function is to provide reliable leads to the identity of persons with actual knowledge on the topic (and perhaps to provide specific factual information about corporate documents) to the position that Rule 30(b)(6) may be used to require the Corporate Witness to assemble all critical information about the corporation's case and then to elicit corporate contentions and admissions limiting the proof at trial.

B. Particularity in the Notice and the Scope of the Examination

The requirement of reasonable particularity is the counterbalance to the corporation's duty of preparation and the role of the witness as spokesperson. When sanctions are sought for the shortcomings in the testimony of the Corporate Witness, courts are likely to start their analysis by testing the particularity of the Notice, concluding that if answers must be given "fully, completely, and unevasively" (the standard formulation), then "the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute."[10]

It is perhaps not surprising that a number of courts have been asked to consider whether introducing the list of noticed topics with the phrase "including but not limited to" renders the entire notice defective. While perhaps the corporation's counsel could simply have announced that the list of topics would be deemed exclusive, courts have indeed stricken such notices. [11] This construction is necessary because, on the one hand, the corporation is only required to prepare the Corporate Witness with the "corporation's" knowledge with respect to noticed topics but, on the other hand, examiners generally are permitted to go beyond such topics where the witness has knowledge on other relevant matters. [12] The distinction generally made is that on such other lines of questioning the witness testifies in his individual capacity; the effect of such testimony depends on that capacity rather than the effect of this Rule.[13] Accordingly,

[10] Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 638 (D. Minn. 2000) ("Prokosch").

[11] See, e.g., Reed v. Nellcor Puritan Bennett & Mallinckrodt, 193 F.R.D. 689, 692 (D. Kan. 2000). See also Innomed Labs, LLC v. Alza Corp, 211 F.R.D. 237, 240 (S.D.N.Y. 2002) (Ellis, M.J.). Wasteful disputes about such terminology might be avoided by a Local Rule deeming "but not limited to" to be surplusage for purposes of a Notice.

[12] See, e.g., Detoy v. City and County of San Francisco, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000).

[13] See, e.g., Primavera Familienstifung v. Askin, 130 F.Supp. 2d 450, 551 (S.D.N.Y. 2001) (Sweet, J.) (corporation "not limited" by testimony of Rule 30(b)(6) witness on topic outside specifics of notice). There seems to be disagreement as to whether the binding effect of Rule 30(b)(6) testimony is simply that accorded any "officers,

counsel for the corporation properly insists that the notice be both reasonable and particular and during deposition may want to state positions as to whether a particular line of questions falls within the notice.[14] Thus, a Rule 30(b)(6) witness may be questioned on topics outside the scope of the Notice and thereby required to give such information as the witness may have on such matters, but there is no duty to prepare the witness with the "corporation's" knowledge outside the enumerated topics.

A Rule 30(b)(6) Notice has been held unduly burdensome where it seeks a witness to identify relevant documents, and all nonprivileged documents have already been produced. In Magistrate Judge Katz's felicitous phrasing:

> No Rosetta stone is necessary to unlock their mysteries. Defendant and his counsel can read them and determine which documents pertain to an allegation, and to what degree, directly or indirectly.[15]

Presumably a witness might still be required for authentication or to establish business record status, if not stipulated to, and a Rule 30(b)(6) examination might still seek additional information about specific documents, suitably identified in the Notice.

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directors, or managing agents" of a corporation (whether or not the Corporate Witness is one), or is to some degree more preclusive. See, e.g., In re Vitamins Antitrust Litig., 216 F.R.D. 168, 174 (D. D.C. 2003) ("While the government submissions constitute admissions by Bioproducts, its Rule 30(b)(6) deposition is a sworn corporate admission that is binding on the corporation."); but see In re Puerto Rico Electric, 687 F.2d 501, 503 (1st Cir. 1982) (noting misconception that Rule 30(b)(6) testimony is conclusively binding). See also Sinclair & Fendrich, 50 ALA. L. REV. at 730; S.I. Schenkier, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6), LITIGATION, v. 29 note 2 (American Bar Ass'n, Winter 2003) 20, 62 (citing cases in both directions). See also discussion of Taylor in Part D below.

[14] Counsel may also want to insure in preparing the witness that counsel has only conveyed additional information to the witness with respect to the specific topics in the notice, so that if the questioner strays outside the notice the deponent may truthfully convey only such information as the witness already possessed. In one case the notice called for "a witness to testify as to any statement of fact set forth in the amended complaint to which defendant has denied," and the Court struck the notice for insufficient particularity. Skladzien v. St. Francis Reg'l Med. Ctr., 1996 U.S. Dist. LEXIS 20621, at *2 (D.Kan. Dec. 19, 1996).

[15] United States v. Dist. Council, 1992 U.S. Dist. LEXIS 12307, at *43 (S.D.N.Y. Aug. 14, 1992) (Katz, M.J.) ("Brotherhood of Carpenters").

Requiring particularity also allows better consideration of the potential burden of the notice in the context of the litigation as a whole. The Rule does not set an express limit on the number of topics, but Rule 26 allows the court to limit all manner of discovery.[16]

The balancing of the variety of noticed topics and the burden of response takes on additional complications where there are presumptive limitations on the number of depositions (Rule 30(a)(2)(A)). The more complex the case the more likely that different persons are the best source of information on particular topics, and the corporation may well prefer to designate several witnesses who have knowledge on different points rather than seek to prepare one witness for topics of which the witness is otherwise ignorant. On the one hand, the general rule has been that examination of multiple deponents produced in response to a single Rule 30(b)(6) notice is counted as one deposition. However, for purposes of the presumptive seven-hour time limit on a deposition, Rule 30(d)(2), the Advisory Committee's position is that each witness supplied in response to a Rule 30(b)(6) Notice should be treated as a separate witness.

This situation provides an incentive to a corporation to prepare a single witness to be minimally adequate on all noticed topics (thus preserving the seven hour limit), rather than provide several witnesses better-qualified on different aspects of the Notice (thereby permitting the examiner multiples of seven hours for examination), an incentive which is inconsistent with the purposes of Rule 30(b)(6). Applying the presumptive seven-hour limit retains a meaningful restraint on the scope of the topics noticed, and it should not matter significantly to the examiner (who has, after all, chosen the topics) whether the corporation provides responsive information through one or more than one witness, so long as the witness is properly prepared as to the

[16] Cf. Sinclair & Fendrich, 50 ALA. L. REV. at 682 (urging use of the "balancing and triage provisions of Rule 26 when considering the appropriate scope of burdens" on the corporation).

particular topic.[17] The examining party should, however, be allowed to reserve any unused time for subsequent Rule 30(b)(6) examinations.[18] Rule 30(d)(2) would still require the court to allow additional time whenever necessary "for a fair examination of the witness" or if the examination is impeded or delayed.

Finally on this point, the general practice appears to be that, where a witness is designated as a Rule 30(b)(6) representative and is also examined separately, the presumptive seven-hour limit applies separately to each portion of the examination.[19]

C. Sufficiency of Preparation Of, and Performance By, the Corporate Witness

The Corporate Witness must be properly prepared by the corporation with the information reasonably available to the corporation. How do the courts assess the witness's performance -- and by inference the sufficiency of preparation? A related question, addressed in a subsequent section, is what the consequences will be at trial if the corporation's counsel seeks to introduce evidence or arguments relating to the noticed topics which were not mentioned by the Corporate Witness. Cf. Rule 37(c), Fed. R. Civ. P. (failures to disclose).

Although the rhetoric of the courts in setting out what is expected of the corporation and the Corporate Witness is stern and expansive, the decisions indicate that, with rare but important exceptions, the relief or sanctions ordered when the Corporate Witness falls short of the pronounced standards have been modest and mild. Sinclair and Fendrich exhaustively review cases under the Rule and repeatedly note that broad rhetoric is typically

[17] An alternative, counting examination of multiple Rule 30(b)(6) witnesses provided in response to a single Notice as multiple depositions, each of a presumptive-seven hour length, would encourage tactical maneuvers by the corporation to eat into the presumptive ten-witness limit of Rule 30(a)(2)(A). A balance must be struck here, and the one presented in the text seems preferable.

[18] It is often good practice to seek additional Rule 30(b)(6) examinations at later stages in a case where very specific questions about documents or events have not been resolved by other witnesses.

[19] See, e.g., Sabre v. First Dominion Capital LLC, 2001 U.S. Dist. LEXIS 20637, at *4 (S.D.N.Y. Dec. 12, 2001) (Pittman, M.J.).

followed by narrowly focused, restrained relief. Where the witness is thoroughly unprepared to address noticed topics, courts may treat the situation as a failure to appear.[20] The case for sanctions may seem overwhelming in such circumstances, but even then most reported cases seem to give the entity a second chance with only a warning so long as the witness adequately responded on at least some topics.

Review of reported cases suggests that the imposition of any procedural sanction other than ordering additional discovery has been rare. One court has commented:

> The Court should diligently apply sanctions under Rule 37 both to penalize those who have engaged in sanctionable conduct and to deter those who might be tempted to engage in such conduct in the absence of such a deterrent.[21]

Nonetheless, and notwithstanding the near-mandatory language of Rules 37 (a)(4) and (d), Fed. R. Civ. P., monetary awards are quite uncommon. In some courts' view:

> In order for the court to impose sanctions, the inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas.[22]

Where imposed at all, monetary awards usually are limited to either a modest allowance for the cost of the motion or some portion of the cost of unproductive time at the initial deposition.[23] Indeed, some reported monetary sanctions appear so light that it is difficult

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[20] See, e.g., Resolution Trust Corp. v. Southern Union Co., 985 F.2d 196 (5th Cir. 1993).

[21] T&W Funding Company XII, L.L.C. v. Pennant Rent-a-Car Midwest, Inc., 210 F.R.D. 730, 733 (D. Kan. 2002) (affirming award of both motion costs and expenses of new deposition).

[22] Zappia Middle East Construction Co., Ltd. v. Emirate of Abu Dhabi, 1995 U.S. Dist. LEXIS 17187 at *25-26 (S.D.N.Y. Nov. 17, 1995) (Francis, M.J.).

[23] See, e.g., In re Vitamins Antitrust Litig., 216 F.R.D. at 174-75 (costs of motion); Mattel, Inc. v. Robard's Inc., 139 F.Supp. 2d 487, 498 (S.D.N.Y. 2001) (additional deposition ordered and expense of motion awarded); Arctic Cat, Inc. v. Injection Research Specialists, Inc., 210 F.R.D. 680, 683-84 (D. Minn. 2002) (small portion of costs of first deposition). However, in Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 78-80 (S.D.N.Y. 1991), Judge Leisure awarded full motion costs plus the time and expense of the initial deposition and made counsel jointly liable with the client for payment of the sanctions.

to imagine them serving as a deterrent,[24] and courts do not seem to have resorted at all to Rule 37(c), Fed. R. Civ. P. (allowing "other appropriate sanctions" for failures to disclose), in connection with unsatisfactory performances at Rule 30(b)(6) depositions.

Disputes about preparation of the witness tend to fall in three groups:

(1) whether the "most knowledgeable" witness must be produced and what remedies are available where the witness is sufficiently prepared to answer many of the questions posed but lacks information on some particulars;

(2) to what extent the witness must be prepared with information "reasonably available" to the corporation from outside sources, particularly former employees or existing discovery in the case; and

(3) how the preparation of the witness interplays with attorney work product and with privileges.

As Magistrate Judge Schenkier of the Northern District of Illinois advised practitioners in a recent article, "you can search high and low in Rule 30(b)(6) and not find a requirement that the corporation produce the 'most knowledgeable witness.'"[25] Indeed, there is no requirement that the corporation produce a witness with firsthand knowledge, even when it has one.[26] More generally, the examining party cannot select the witness to speak for and bind

[24] See, e.g., Koken v. Lederman, 2001 U.S. Dist. LEXIS 628, at *1 (E.D. Pa. Jan. 22, 2001) ($350 sanction for wrongfully terminating Rule 30(b)(6) deposition when questioning was proper).

[25] Schenkier, supra note 13, at 20.

[26] Solovy & Byman, supra note 3. See Gucci America Inc. v. Exclusive Imports Int'l, 2002 WL 1870293, at *10 (S.D.N.Y. Aug. 13, 2002) (Casey, J.) (upholding Magistrate Judge Maas's determination that, where a witness was "marginally adequate," plaintiff was not required to produce a witness with actual knowledge); Cruz v. Coach Stores, Inc., 1998 U.S. Dist. LEXIS 18051, at *17 (S.D.N.Y. Nov. 18, 1998) (Rakoff, J.) (Rule requires prepared witness, not one who is "most knowledgeable"). But see Reilly v. Natwest Mkts. Group Inc., 181 F.3d 253, 268-69 (2d Cir. 1999) (although defendant produced a Rule 30(b)(6) witness, it was proper for the trial court to preclude testimony from other witnesses not produced in response to a Notice).

the Corporation by operation of Rule 30(b)(6) by naming a specific person in the Notice; the Rule plainly allows the corporation to select the witness to be tendered for these purposes.

What is required is that the witness have a sufficient grasp of the information available to the corporation to give responsive answers on the noticed topics. Where the court feels the corporation has not adequately prepared the witness, it may order a new examination with specific preparation mechanisms.[27] As the cases cited in the preceding footnotes demonstrate, however, if the witness can give responsive answers much of the time and point to others persons who can address very detailed questions, most courts will find that sufficient compliance; if the witness does well enough in most areas but lacks knowledge on a particular topic when the court considers the topic important and the record insufficient, a court is likely to direct production of an additional witness or the use of alternative discovery devices, but the court may well not impose any sanctions. Despite constant repetition of the "full" and "complete" tests, moreover, a number of decisions have denied sanctions and refused to order additional preparation or a new witness where, although there were questions the witness could not answer, taking the deposition as a whole the witness' knowledge on each topic appeared reasonably adequate and his testimony included leads about where more detailed information could be obtained.[28]

By the Rule's terms, the witness need only know of "matters known or reasonably available to the organization." What non-privileged information held by third parties or former

[27] See, e.g., FDIC v. C.H. Butcher, 116 F.R.D. 196, 201-02 (E.D. Tenn. 1986) (FDIC to redesignate witnesses and provide them as part of their preparation with responsive documents including extensive investigative memorandum); Paul Revere Life Ins. Co. v. Jafari, 2002 U.S. Dist. LEXIS 5594, at *8 (D. Md. Mar. 28, 2002) (ordering new deposition at plaintiff's expense).

[28] Cf. Equal Opportunity Comm'n v. Am. Int'l Group, Inc., 1994 WL 376052, at *3 (S.D.N.Y. July 18, 1994) (Ellis, M.J.) (Rule 30(b)(6) examination is not a "memory contest"); Barron v. Caterpillar Inc., 168 F.R.D. 175, 178 (E.D.Pa. 1996) (in absence of bad faith, shortcomings would be handled by other discovery devices); United States v. Mass. Indus. Fin. Agency, 162 F.R.D. 410, 412 (D. Mass. 1995) ("Massachusetts Finance") (same).

employees is "reasonably available" to the corporation? Several cases indicate that if the only source of information on a topic is a former employee, the corporate designee must not merely provide that "lead," but attempt to gather the information from the employee. Indeed, a few cases suggest that if information pertaining to a topic has been made available elsewhere in discovery, in other depositions for example, the corporate designee must both be familiar with such testimony and be prepared to state the corporation's "position" with respect thereto (i.e., take a position as to the truthfulness, accuracy and completeness of the testimony). Several courts have stated that "reasonably available" information includes that which can be obtained from former employees[29] -- and this certainly implies that if the witness does not interview the former employees himself, he must be prepared with responsive information gathered by counsel.[30]

Cases recognize that even after exhausting what is "reasonably available," a corporation may have no information on topics counsel has included in the Notice, or have some information but be unable to answer as to some specifics. The resulting balancing act is demonstrated in an opinion involving discovery of the Iranian government:

> Iran has not proffered any witnesses regarding these items. If Iran is unable to locate, after a proper effort, any witnesses able to testify as to these issues, then so be it. However, the court may subject Iran to sanctions, such as a prohibition on the presentation of evidence on this issue, if Iran later discovers proper witnesses and fails to offer a sufficient explanation to the court. Accordingly,

[29] See, e.g., Bank of New York v. Meridian Biao Bank Tanzania, Ltd., 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (sources for matters reasonably available include "documents, past employees, or other sources"); Prokosch, 193 F.R.D. at 639. Several cases raise the threshold by stating that witness preparation on noticed topics must include prior fact witness deposition testimony, although -- except in Taylor itself -- results do not seem to turn on whether preparation went that far.

[30] See Calzaturficio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co., Inc., 201 F.R.D. 33, 37 (D.Mass. 2001) (reciting that requirement).

> Iran should engage in a genuine and thorough effort to identify an adequate deponent with regard to these items.[31]

Setting the scope of "reasonable particularity" for the notice, on the one hand, and what is "reasonably available" to the corporation's witness (or witnesses), on the other hand, can take on an entirely different level of complexity when the information lies with third parties or former employees, or is "available" to the corporation solely through the investigations of counsel. Consider the following hypothetical posed by Sinclair and Fendrich:

> . . . assume that an entity has been noticed for a deposition under the Rule. The events giving rise to the claims, let us assume, are complex and involve the actions of any number of participants over a course of time. Assume further that the events which are central to the lawsuit occurred long ago, so that some number of the people who were agents of the entity are no longer under its control. Other participants in the events may be dead or missing. Still others are third parties who are not, and perhaps were never, under the control of the organization. Documents that bear upon the events are extremely voluminous, scattered, and often ambiguous--especially when their authors or recipients do not remember them, not to speak of when they are no longer available to interpret them. Counsel for the entity is now faced with the task of helping the client select and prepare one or more designees to testify on its behalf on what is "known or reasonably available" about the subjects which have been identified in a Rule 30(b)(6) notice.[32]

In such cases attorney work product is inevitably at risk, as may be privileged communications from former employees to counsel, since such information is in some senses "reasonably available" to the client. (We return to the subject of witness preparation and work product below in Part E).

This Report focuses on the use of Rule 30(b)(6) in discovery of a corporate party to a litigation, although much of the discussion about witness preparation, specificity, and

[31] McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 81 (D.D.C. 1999) ("Republic of Iran").

[32] Sinclair & Fendrich, 50 ALA. L. REV. at 699 n.259.

privilege applies equally where the corporate deponent is a subpoenaed non-party. There is one distinction which should be noted at this point. Because the Corporate Witness testifies "on behalf" of the corporation, the deposition testimony is treated as admissible at trial against the corporation even if the testimony is given without direct personal knowledge (i.e., the witness is not personally competent but is conveying information supplied to the witness for purposes of the deposition).[33] What should be the admissibility of such incompetent or hearsay testimony gathered from a non-party corporation via Rule 30(b)(6)?

This question was presented very recently in the context of a summary judgment motion decided by Judge Casey, when the defendant moved to strike the testimony of a third-party Corporate Witness as not based on personal knowledge.[34] Referring to other decisions holding that a Rule 30(b)(6) witness is not required to have "personal knowledge on a given subject, so long as they are able to convey the information known to the corporation,"[35] Judge Casey denied the motion to strike. Judge Casey's opinion appears to be the only reported case on this point, and we must respectfully suggest that it is wrongly decided.

Cases certainly do routinely hold that the corporation may fulfill its Rule 30(b)(6) deposition obligations by providing a witness who can answer the pertinent questions but lacks personal knowledge. Hearsay testimony is obtained in all sorts of deposition contexts, however, and nonetheless will be admissible in court only if an evidentiary exception applies. Rule 30(b)(6) does not purport to create an evidentiary exception, although in almost all cases the fact that the corporate deponent is a party makes the testimony an evidentiary admission admissible

[33] In substance, the deposition testimony is treated as an evidentiary admission of the corporate party (but not a judicial admission). See note 37 below for discussion.

[34] Gucci America, Inc. v. Ashley Reed Trading Inc. 2003 WL 22327162 (S.D.N.Y. Oct. 10, 2003).

[35] Id., 2003 WL 22327162 at *3 (internal citation omitted).

against that party at trial. When the witness is not a party, however, or the testimony is otherwise offered against a party other than the corporation deposed (and thereby against a party that did not make the evidentiary admission), the rules about competence and hearsay should be applicable.

D. Taylor and The Trial Consequences of Rule 30(b)(6) Testimony

The decisions just discussed present a view of Rule 30(b)(6) as an exploratory tool of the examining party and focus on getting the examining party the information it reasonably needs. In this context courts rarely consider what the consequences should be if the corporation seeks to offer at trial evidence not mentioned by its designee. Because that was one of the two considerations about Rule 30(b)(6) most famously discussed in Taylor, we turn now to a discussion of that case. Because so much is often made of Taylor as a seminal case on the application of this Rule, it is worth reviewing in considerable detail what actually happened in that case.

Union Carbide ("UCC") was a defendant in a CERCLA "superfund" environmental clean-up case in which the government asserted that UCC was legally responsible both for its own contribution to the site's condition and for the conduct of a division, Grower Service, which had been sold years before the litigation commenced and as to which no current UCC employees had knowledge. Faced with a Notice from the government, UCC argued that it should only be required to provide its current internal corporate knowledge and to identify former employees who might have knowledge of earlier events and "leave it up to the government" to pursue that knowledge. UCC also sought to have the Court rule in advance that UCC could call such witnesses (or others) at trial and argue from their evidence even though the Corporate Witness had provided no information about the substance of such testimony.

Magistrate Judge Eliason held that it was UCC's obligation to gather all evidence reasonably available to it on the noticed topics, including information from past employees and information already available in discovery and that, absent explanation (such as later discovery of information despite initial due diligence), UCC would not be permitted to offer at trial evidence or argument, direct or rebuttal, on topics as to which its Corporate Witness had denied knowledge or not taken a position.[36] Thus, while most cases addressing Rule 30(b)(6) only consider whether the corporation has sufficiently "appeared" by a knowledgeable witness, Magistrate Judge Elaison took the further step of setting out a preclusive scheme that, absent explanation, limited the party's trial case to what was disclosed at the Rule 30(b)(6) deposition.

The Magistrate Judge expressly acknowledged that Rule 30(b)(6) testimony was not the equivalent of a judicial admission.[37] He cited earlier cases stating that a Rule 30(b)(6) witness must convey the "subjective beliefs and opinions" of the corporation and present its "opinion" on the noticed topics.[38] The Magistrate Judge also acknowledged that ascertaining a

[36] The opinion does not provide much information about the content or particularity of the Notice.

[37] The Court described it as "a statement of the corporate person which, if altered, may be explained and explored through cross examination," but noted that the designee could make admissions against interest "which are binding on the corporation." Taylor, 166 F.R.D. at 361 n.6. In many cases (including Taylor) the use of the term "binding" only heightens confusion, since the testimony of a corporate designee under Rule 30(b)(6) is already admissible as the statements of an officer or managing agent; whether such are evidentiary admissions "against interest" (Fed. R. Evid. 804(b)(3)) would seem to be beside the point. See also Industrial Hard Chrome, Ltd. v. Hetran Inc., 92 F.Supp. 2d 786, 791 (N.D. Ill. 2000) (Rule 30(b)(6) testimony "is not a judicial admission that ultimately decides an issue," it can be both contradicted and used for impeachment); W.R. Grace v. Viskase Corp., 1991 WL 211647 at *2 (N.D. Ill. Oct. 15, 1991) (Rule 30(b)(6) testimony is an evidentiary, not a judicial, admission and may be contradicted).

[38] Id. at 361. Taylor cited Lapenna v. Upjohn Co., 110 F.R.D. 15, 20 (E.D. Pa. 1986), for the proposition that a Rule 30(b)(6) inquiry could reach the corporation's "subjective beliefs and opinions," but the comment in Lapenna is an abbreviated aside and does not make clear whether this means relevant beliefs and opinions held in the context of the initial dispute (e.g., what did Y's supervisor think of Y's job performance) or opinions reached in the litigation (e.g, which witness is telling the truth). Ierardi is cited for the proposition that the corporation "must provide its interpretation of documents and events," but in fact Ierardi said merely that when the defendant argued that a document "could be interpreted in different ways... plaintiffs are entitled to discover the interpretation [defendant] intends to assert at trial" 1991 U.S. Dist. LEXIS 11320, at *5 (emphasis added). Finally, although Massachusetts Finance is cited for the proposition that a Corporate Witness must provide the corporation's "position," the case does not stand for that proposition and used the term "position" only when ordering a defendant to "clarify its position in response to certain interrogatories." 162 F.R.D. at 412.

party's "position" might be handled by contention interrogatory and that deciding which method "is more appropriate will be a case by case factual determination."[39] Nonetheless the Magistrate Judge concluded that if a corporation

> wishes to assert a position based on testimony from third parties, or their documents, the designee still must present an opinion as to why the corporation believes the facts should be so construed. The attorney for the corporation is not at liberty to manufacture the corporation's contentions. Rather, the corporation may designate a person to speak on its behalf and it is this position which the attorney must advocate.[40]

Few would quarrel with the first basic premise of the Taylor opinion, that the information "reasonably available" to a corporation on a particular topic includes what can be learned from prior employees, whether in interviews or in deposition transcripts, at least where the notice has been sufficiently specific as to topic. But many would challenge the clear message that within the confines of the Notice the Corporate Witness must be prepared to recite every bit of evidence the party's attorney will offer and to explain and justify every "position" counsel will take, even if such evidence was never known to the corporation until unearthed by counsel in discovery. That this was indeed how the Magistrate Judge viewed the situation is evidenced by the following response to UCC's argument that it could rely at trial on, or at least make arguments about, "the documents and testimony of others" where the Rule 30(b)(6) witness had offered "no knowledge or position:"

> This suggested procedure assumes that the attorneys can directly represent UCC's interest on their own as opposed to merely being a conduit of the party. This, of course, is not true. If a corporation has knowledge or a position as to a set of alleged facts or an area of inquiry, it is its officers, employees, agents, or others who must present the position, give reasons for the position, and, more

[39] 166 F.R.D. at 362 n.7.

[40] Id. at 361-62.

> importantly, stand subject to cross-examination . . . . Otherwise, it is the attorney who is given evidence, not the party.[41]

Most trial attorneys would not accept the proposition that they are "merely being a conduit of the party," but one can sense the point the Magistrate Judge was trying to make. Where most trial lawyers would surely disagree with the Magistrate Judge, however, is on the description of how the corporation's position will be presented at trial: most trial lawyers would agree that the corporation cannot call the Corporate Witness to testify as to topics or "positions" covered at the deposition outside the deponent's competent, personal knowledge. The corporation's counsel will have to call competent witnesses, and counsel will indeed present "positions" in the processes of briefing and jury presentations. Moreover, while the adversary may use the Rule 30(b)(6) testimony insofar as the Rules permit, we have located no case allowing the adversary to call the Corporate Witness at trial in order to cross-examine the witness about the hearsay bases for the "positions" taken.

As noted, Taylor did not introduce the reading of Rule 30(b)(6) as allowing questions about the corporation's "position." But it arguably misread the earlier cases, and it surely did suggest that position-seeking be given a wider ambit than in any preceding case. Rule 30(b)(6) requires testimony and that testimony is supposed to convey educated corporate knowledge; nothing is said about "positions." The angry tone of the response by Sinclair and Fendrich suggests just how much is at issue in terms of how a case may be proved at trial:

> ... there is no basis for imposing a requirement that the corporation take a "position" on all deposition testimony in a case . . . the proper mission of a deposition under the rule should be to provide the discovering party with advance warning about what persons within the entity know. It is not a device intended to provide reactions to or assessments of the myriad assertions in all depositions given by other witnesses . . .

[41] Id. at 362-63 (emphasis added).

* * *

> There are obviously many cases in which there are competing and inconsistent pieces of evidence. The notion that when the corporation has no knowledge through employees and documents in its possession, custody, or control, the company must select from, say, three nonparty witnesses' versions of the events the one it adopts as its knowledge or position is glib at best. To require the deposition designee to consider adversary witness testimony as part of the corporation's knowledge base is even less defensible.[42]

To be fair, Magistrate Judge Eliason several times stated that a corporation is not obligated to take a "position" as to every "set of alleged facts or area of inquiry;" his position was only that if a corporation passed on a particular topic it should not be allowed at trial to present evidence or argument on that topic. And in response to the Sinclair and Fendrich hypothetical, if the testimony of the three non-party witnesses concerns relevant conduct of the corporation, perhaps it is not unreasonable to require the corporation to take a "position" as to what it did or did not do that is informed by such evidence (although whether that position should be expressed in a deposition response or an interrogatory answer may be a different question).

Again, few would quarrel with the proposition that counsel should not be permitted to offer factual evidence on specific topics concerning the corporation's conduct where the deponent pleaded ignorance (e.g., did the manager approve this advance? Who prepared this memorandum?) without a clear explanation why such information was not "reasonably available" to the corporation at the time of the deposition or that it was only inadvertently omitted.[43] On the other hand, given the availability of contention interrogatories, it is difficult to

[42] 50 ALA. L. REV. at 694-95 (emphases in original).

[43] An interesting variation on this point is presented in Newport Electronics, Inc. v. Newport Corp, 157 F.Supp. 2d 202, 219-20 (D. Conn. 2001). There the corporate defendant opposed summary judgment with an affidavit from the person who had been its Rule 30(b)(6) designee; the affidavit supplied information on topics which, at the deposition, the witness said he lacked knowledge. The Court cited the Second Circuit practice that on a Rule 56 motion a material issue of fact cannot be created by affidavit testimony that contradicts the affiant's previous deposition testimony, and concluded that the Rule 30(b)(6) witness "was not at liberty to delay reviewing information on these topics until after the deposition" and later contradict his then-proffered lack of knowledge.

see what purpose is served by limiting the scope of trial evidence to what the Rule 30(b)(6) witness masters of the evidence, particularly evidence counsel expects to obtain from third parties who are not former employees, or limiting argument to "positions" taken by that witness on matters other than the factual characterization of the conduct of the Corporation. Nonetheless, in addition to the square holding in Taylor, several cases state in passing that the party will not be allowed to add information or "change its position."[44] Such blanket preclusive language appears inconsistent with the status of Rule 30 (b)(6) testimony as an evidentiary admission but not a judicial admission.[45]

There is an important distinction between the rules for interrogatory responses and those for depositions, moreover: the obligation to update the response. Rule 30(b)(6) imposes no obligations to follow up with information learned subsequent to the deposition, and many of these depositions occur at the early stages of a case. There is no provision for these (or other) depositions that is comparable to Rule 26(e)(2), Fed. R. Civ. P., dealing with the updating of responses to interrogatories, requests for production and requests to admit. Certainly there could be disputes about whether the information had been "reasonably available" to the corporation at the time of the deposition, but there may be sound reasons why it was not.[46] A party may even

[44] Canal Barge, 2001 WL 817853, at *2; Ierardi, 1991 WL 158911, at *8. See Solovy & Byman, supra note 3 (arguing that where information available to a corporation is omitted by a Corporate Witness the corporation should be prevented from offering other testimony on the point). By contrast, in Massachusetts Finance the Court ruled that the defendant would be allowed at trial to present "its position through witnesses who have already been deposed by the United States," even though the deponent apparently had not "sorted out" that testimony. 162 F.R.D. at 412. And in Arkwright, Magistrate Judge Francis concluded that the testimony of a sufficiently prepared Rule 30(b)(6) witness would not limit the corporation's presentation of evidence at trial because the witness need not have "comprehensive" knowledge; other discovery devices could be used to nail down the corporation's positions prior to trial. 1993 U.S. Dist. LEXIS 1163, at *8. See also In re Ind. Serv. Org. Antitrust Litig., 168 F.R.D. 651, 654 (D. Kan. 1996) (discovering "supporting facts" and marshalling proof not an appropriate use of Rule 30(b)(6); any legitimate discovery interests best accommodated by other methods).

[45] See cases cited at note 37.

[46] Cf. Republic of Iran, 185 F.R.D. at 81, where the court warned of potential sanctions "if Iran later discovers proper witnesses and fails to offer a sufficient explanation" of why these witnesses had not been consulted "in a genuine and thorough effort" to respond to the Notice.

conclude that the "position" taken by the witness was incorrect in light of subsequent information. This may be embarrassing at trial, but there appears to be no requirement that notice of the change of view be given (although one would expect that in practice something in the pretrial order would force disclosure).[47] A disclosure process (with mea culpa) is what Magistrate Judge Eliason put into place prior to resuming the Rule 30(b)(6) deposition process in Taylor -- but perhaps, absent UCC forcing the issue early on, this would have been dealt with there too in the pre-trial order.

The more complex the case, the more dispersed the information, and the more mixed the matters of fact and law, the more difficult these questions become. We appreciate that many local rules, including S.D.N.Y. Local R. 33.3, place interrogatories about "claims and contentions" at the end of the case, whereas a litigant may feel it critical at an early stage in the case to nail down the bases for a particular claim by the adversary or to find out what position an adversary will take on a critical factual issue. This is not, we argue, a reason to allow questions at a Rule 30(b)(6) examination which, if propounded as interrogatories, would be deferred until the close of discovery; rather it is a good argument in the particular case for accelerating the use of interrogatories on those particular points.

There is, moreover, a bit of irony in the professed concern that trial counsel not be able to ambush an adversary at trial with evidence or arguments not revealed at the Rule 30(b)(6) deposition. As several courts have pointed out, there are several pretrial mechanisms for blunting this threat, including contention-type interrogatories and pretrial orders. The real

[47] In Otis Eng'g Corp. v. Trade & Development Corp., 1994 U.S. Dist. LEXIS 3132, at *2-3 (E.D. La. Mar. 16, 1994), the Corporate Witness was the lead design engineer, a person with knowledge. Some months after her testimony, Otis informed defendant of a change in her view about the cause of the machine failure. Denying a motion to preclude the deponent from offering testimony at trial that differed from the deposition, the Court held that the trier of fact should deal with credibility: the witness could be impeached with her prior testimony, but would not be precluded from changing it.

unfairness lies in expecting a witness who lacks direct knowledge to retain comprehensive memory of, and accurately regurgitate in the context of oral questions and answers, all the witness has been told about a noticed topic in deposition preparation and perhaps also to handle questions, anticipated or unanticipated, about "interpretations," "opinions" or "positions" of the corporation in the litigation. At best a miscue or misunderstanding becomes something that once remedied comes back as impeachment material -- even though the witness had no direct knowledge and testified based on double hearsay. At worst the statement has some preclusive effect.

Moreover, the practical reality is that it can be extremely difficult to put reasonable objections about scope (is the question within the notice or not, and therefore "binding" or not) or privilege before the court while a deposition proceeds, and it is usually easier to rule on the sufficiency of objections and answers (and perhaps give answers preclusive effect) when interrogatories have been carefully propounded and responsibly answered.

Many courts have adopted at least the language of Magistrate Judge Eliason's opinion in Taylor, and that case has been repeatedly cited and quoted in rulings on Rule 30(b)(6) issues.[48] For example, in one recent case Magistrate Judge Pittman wrote:

> The Rule 30(b)(6) designee does not give his personal opinions. Rather, he presents the corporation's "position" on the topic. Moreover, the designee must not only testify about facts within the corporation's knowledge, but also its subjective beliefs and opinions. The corporation must provide its interpretation of documents and events. The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to

[48] By contrast, the actual remedy adopted in that case -- barring a corporation from offering evidence obtained from third parties in counsel's trial preparation to the extent such evidence was not disclosed at the Rule 30(b)(6) deposition absent an in limine showing of good cause -- does not appear to have been adopted by other courts. Sinclair and Fendrich describe Taylor as "setting a record for expansive reading of the rule." 50 ALA. L. REV. at 746.

> deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. Truth would suffer.[49]

Magistrate Judge Pittman made similar statements about the scope of Rule 30(b)(6) in another case a few months later.[50] It should be noted that in neither of these cases did Magistrate Judge Pittman actually compel a corporate witness to take a "position," provide "subjective beliefs and opinions," or offer "interpretation of documents and events." In Marvel, a corporate witness was required to produce an additional deponent with knowledge relating to specific items about a subsidiary. In AIA, Magistrate Judge Pittman required a corporation to produce a Rule 30(b)(6) witness even though its "principal" had already been deposed, unless the corporation could show that "its corporate knowledge is no greater than that of its principals." However other courts have followed similar language to the conclusion that "[g]enerally, inquiry regarding a corporation's legal positions is appropriate in a Rule 30(b)(6) deposition," at least where there is a mixed "legal and factual component."[51]

Such statements about the scope and use of Rule 30(b)(6) might be contrasted to these recent words from Judge Rakoff:

> In a nutshell, depositions, including 30(b)(6) depositions, are designed to discover facts, not contentions or legal theories, which, to the extent discoverable at all prior to trial, must be discovered by other means.[52]

This view finds strenuous support from Sinclair and Fendrich, who argue from analysis of the Advisory Committee Notes to the various 1970 amendments that the deposition device was a

[49] A.I.A. Holdings, S.A. v. Lehman Brothers, Inc., 2002 U.S. Dist. LEXIS 9218, at *15-16 (S.D.N.Y. May 20, 2002) (citations omitted).

[50] Twentieth Century Fox Film Corp. v. Marvel Enterprises Inc., 2002 U.S. Dist. LEXIS 14682, at *6-7 (S.D.N.Y. Aug. 6, 2002).

[51] Canal Barge, 2001 WL 817853 at *2.

[52] J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co., 209 F.R.D. 361, 362 (S.D.N.Y 2002).

minor convenience being created to avoid unnecessary guesswork at the outset of a case when the party litigating against the entity may lack information as to which of many officers and employees has personal knowledge of topics relevant to the lawsuit.[53] Those authors contrast the discussion of this change in the 1970 Notes and related discovery reports to the "extensive discussion of the difficulties attending contentions in the Rule 33 amendments" considered and adopted at the same time after "years of bickering over contention interrogatories," and concluded that, with nary a mention of contentions in the Notes to Rule 30(b)(6), the Committee could not have intended that oral depositions be used for this purpose.[54]

The corporation's "subjective beliefs and opinions" as these existed in connection with the controversy being litigated (e.g., evaluations of an employee, beliefs about the knowledge of the party with whom a contract was being negotiated, etc.) are themselves matters of fact at the time of trial. In the context just discussed, however, the discovery is directed to current beliefs, evaluation of the evidence of witness credibility or litigation positions. Rule 30(b)(6) should be amended to eliminate questioning of this sort, both because of the practical concerns discussed above and to protect attorney work product. This recommendation is discussed further after turning to the subject of work product.

E. Extent of Preparation -- Work Product Considerations

Of course factual information possessed by corporate personnel is not privileged merely because it was communicated by counsel,[55] but often only trial counsel (or -- very often -- only trial counsel and the in-house attorneys with whom trial counsel is working) has gathered,

[53] 50 ALA. L. REV. at 718.

[54] Id.

[55] Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981). Sinclair & Fendrich, 50 ALA. L. REV. at 719; WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2023 at 330-33 (1994) (collecting cases).

and possesses, the information. It may well be that much of such factual information might eventually have to be disclosed in responding to interrogatories, but counsel there (i) only has to assist the client in responding to questions posed in advance rather than having to prepare an otherwise uninformed witness with sufficient information to respond to a range of questions on a topic and (ii) has the opportunity to craft good-faith responses that minimize interference with privileges. Moreover, it is far more efficient to present the Court with privilege issues in reviewing written responses to interrogatories than on the fly as oral questions are posed.

Rule 612 (2), Fed. R. Evid., makes writings used prior to testifying "to refresh memory" discoverable "if the court in its discretion determines it is necessary in the interests of justice."[56] Assuming the Corporate Witness is not testifying from personal knowledge, one could argue that showing that witness attorney work product (such as investigative or interview memoranda) cannot "refresh" his recollection. Some courts have opined that showing work-product documents to a Rule 30(b)(6) witness does not make those documents discoverable.[57] Certainly there would be an apparent unfairness in requiring counsel to educate the witness with the fruit of counsel's investigation and then holding that by complying counsel has waived protection for the work product used in the process.

[56] The House Judiciary Committee wrote that it intended "that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory." Notes of the Committee on the Judiciary, H.R. Rep. No. 650, 93rd Cong., 1st Sess. 8 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7086.

[57] See, e.g., FDIC v. Butcher, 116 F.R.D. at 200. Butcher appears consistent with the cases that hold generally that attorney work product communicated to a witness, including the selection of documents, is not discoverable -- although, it bears repeated emphasis, factual information that thereby becomes known to the witness will be discoverable. See, e.g., Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985) (selection of documents); Ford v. Philips Electronics Instruments Co., 82 F.R.D. 359 (E.D.Pa. 1979) (may obtain witness knowledge but not counsel's impressions or evaluation of significance of facts); but see, e.g., James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144, 146 (D. Del. 1982) (binder of selected documents used to educate company's witnesses discoverable; work-product protection waived), and Sinclair & Fendrich 50 ALA. L. REV. at 7226 ("the argument exists that the examining counsel has a basis for requesting to know what material was reviewed").

If a Rule 30(b)(6) deposition is to be used to elicit "positions" on disputed issues of fact where direct corporate knowledge is limited or to ascertain the "bases" for pleaded claims or defenses, particularity in the Notice becomes critical, because in practice the corporate witness (in a perversion of Taylor's logic) must become the conduit for the attorney! As Sinclair and Fendrich note,

> In the case of litigation, the discovery and collation of what needs to be known is characteristically undertaken by lawyers. It is the lawyer who investigates the facts, reviews a mosaic of documents, weeds through recollections of participants in the central events, and then attempts to put together a coherent account of "what really happened."[58]

If the attorney is going to have to educate the witness not only on factual matters but also on "positions" the corporation will want to take at trial, attorney work product considerations will have to be parsed carefully. Requiring a very high level of specificity in the notice is reasonable in such circumstances to allow such considerations to be addressed in advance and to enable the court, if the corporate party seeks its aid, to determine whether the route of a contention interrogatory is preferable.

A number of decisions involving discovery of governmental agencies have denied Rule 30(b)(6) discovery of information gathered by attorneys or their investigators on behalf of the agency.[59] Private organizations, however, have been less successful in seeking protective

[58] 50 ALA. L. REV. at 656.

[59] SEC v. Rosenfeld, 1997 U.S. Dist LEXIS 13996, at *6 (S.D.N.Y. Sep. 10, 1997) (Patterson, J.) (where examinations of a Rule 30(b)(6) deponent prepared by SEC legal staff would reveal counsel's "legal and factual theories as regards the alleged violations . . . and their opinions as to the significance of documents," work product protection should be afforded); SEC v. Morelli, 143 F.R.D. 42, 47-48 (S.D.N.Y. 1992) (Leisure, J.) (Notice impermissibly sought attorney work product when it "intended to ascertain how the SEC intends to marshall the facts" and defendant sought to discover inferences SEC believes "properly can be drawn from the evidence it has accumulated"); Brotherhood of Carpenters, 1992 U.S. Dist. LEXIS 12307 at *43. But see FDIC v. Butcher, 116 F.R.D. at 200 (if only way to prepare FDIC deponent was to use protected investigative memoranda, FDIC nonetheless must prepare a witness and prepare that witness to answer "fully").

orders on such grounds.[60] Sinclair and Fendrich question the assumption

> that questions asking a witness about what facts she was aware of which supported a particular allegation in a claim or defense do not improperly tend to elicit the mental impressions of the entity's lawyers who participated in the preparation of the witness or advice to the company. . .[61]

Whether a fact "supports" a contention, claim, or defense is almost always a question that the witness can answer only by obtaining and revealing attorney work product -- as the inevitable follow-up question ("well, why do you contend that this fact supports your company's defense?") clearly reveals. The Corporate Witness' view of what "supports" an allegation is almost certainly rooted in counsel's analysis of the case -- counsel's selection of evidence and organization of issues -- and addressing such questions to the witness is an "easy window into what the attorney for the entity thinks is important . . . ."[62] As one court pungently put it, either the attorney thought the fact important "or, presuming rationality, the attorney would not have communicated the fact to the client."[63]

The examining party is entitled to discover facts (whether or not, incidentally, those facts "support" a particular contention), but the examining party should not be able to force counsel to supply evaluative work product to the client or the client to reveal such work product in order to comply with Rule 30(b)(6). Hence questions properly seeking facts should not be phrased in a manner that potentially calls for evaluative work product.

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[60] See, e.g., Protective Nat'l, 137 F.R.D. at 280 (appropriate to ask deponent for facts learned from counsel); In re Vitamins Antitrust Litig., 216 F.R.D. at 172 (corporation obligated to educate witness on facts even if through documents that are attorney work product).

[61] 50 ALA. L. REV. at 720.

[62] Id..

[63] Protective Nat'l, 137 F.R.D. at 280.

Questioning about what "supports" a particular allegation or defense can usually be rephrased to reduce offense to the work-product protection while still eliciting the necessary factual information. Questions about "positions" or the legal significance of documents, however, really are seeking case strategies. By and large, to the extent trial counsel eventually decides to take certain positions at trial, such conclusions are discoverable before trial to avoid unfair surprise or "sandbagging." But, as Magistrate Judge Eliason recognized, there may be many factual or other issues as to which the corporation decides not to take a position at trial, decides not to reveal counsel's analysis. Written discovery near the close of the process allows counsel to formulate "positions" or take a pass on an issue and live with the consequences. Oral depositions -- and particularly such depositions early in the case -- do not allow time for considered judgments before what was work product becomes a disclosed "position," and the deposition context makes it difficult in practice to seek the court's guidance on the line to be drawn. Other discovery tools provide a more balanced mechanism for spelling out claims and contentions, particularly if the responses are to have preclusive, or even impeachment, effect.

Rule 30(b)(6) should be amended to remove from the scope of such depositions questioning that evaluates the legal significance of facts, elicits positions or contentions, or pursues similar lines.[64] This change, coupled with greater flexibility in the timing of contention interrogatories where appropriate, will still permit appropriate and timely discovery of trial positions and contentions without the awkwardness, and potential prejudice, of pursuing such information in an oral deposition where the person who is charged with shaping trial strategy -- the party's counsel -- cannot properly assist the witness.

[64] Again, opinions or evaluations that existed in connection with the events being litigated (such as employee evaluations) are facts in the context of the later litigation.

In the absence of such an amendment, questioning of this sort should be disfavored and permitted only where the nature of the questions had been clearly specified in the Notice so that the corporation's counsel will have had an opportunity to raise work product concerns with the court.

F. Recommendations

Our recommendations fall into four general categories: (a) notices and burden of preparation; (b) sanctions; (c) the use of Rule 30(b)(6) to elicit a party's "positions" in contradistinction to contention interrogatories; and (d) the potential preclusive effect of Rule 30(b)(6) testimony.

(a) Notices and Preparation

(1) Absent stipulation or order, all Rule 30(b)(6) examinations of a party should be treated as one deposition with a presumptive cumulative limit of seven hours, whether the corporation tenders one or multiple witnesses to respond on its behalf on the noticed topics, and whether only one or more than one such deposition is sought during the course of discovery.

(2) When the phrase "including but not limited to" is used in a Notice the words "but not limited to" should be deemed surplusage.

(3) The obligation of Rule 30(b)(6) witness preparation should not generally extend to the review of testimony or documents from other parties or non-parties unless these are from present or former employees or agents of the corporation. Notwithstanding this, the examining party should be permitted to direct attention in the Notice to specific testimony about, or documents concerning, the corporation's conduct.

(b) Sanctions

(4) Courts should impose meaningful sanctions where counsel routinely instruct a deponent not to answer questions directed to factual information because the deponent learned the factual information from counsel as well as where the Corporate Witness is ill-prepared to answer factual questions about a noticed topic for which the witness has been tendered.

(c) "Positions" and Contentions

(5) Rule 30(b)(6) should be amended to insert the word "factual" before "matters" in the fourth sentence and thereby establish that such depositions should not be a vehicle for seeking discovery of legal arguments, "contentions" or "positions" that are not simply factual statements, seeking evaluations of the legal significance of facts, or the like. In order to allow parties timely disclosure of litigation positions or contentions, this change may require greater flexibility in allowing contention-style interrogatories at early stages of discovery, but this is preferable to allowing contentions to be explored by oral examination of a witness.

(6) Even in the absence of the proposed amendment, Rule 30(b)(6) notices should be stricken (and questions at such examinations should be deemed presumptively improper) as violative of the protection of attorney work product where phrased in terms of the evaluation of the evidentiary significance of factual information (e.g., "support," "prove," etc.), e.g., as it bears on a claim or defense. Examining counsel is entitled to full disclosure of factual information, but competent counsel can find many other avenues to elicit factual information relevant to a particular topic without framing questions that depend on the adversary counsel's evaluation of the facts.

(7) While Rule 30(b)(6) examinations may properly inquire about a corporation's "subjective opinions" insofar as these constitute facts relevant to the litigation, even in the absence of the proposed amendment the use of this discovery mechanism for inquiring into litigation positions and the application of law to the facts conveyed should be disfavored. In the absence of the proposed amendment, this should not preclude the examining party from specifically identifying in the Notice a factual issue on which the corporation's position or version of events is sought. Such advance specification allows the corporation, if it chooses, to offer alternative mechanisms of response (e.g., voluntarily tendering a statement to be treated as an interrogatory answer or response to written question) or to seek the court's intervention as to the discovery device.

(d) Preclusion

(8) So long as the court is persuaded that the Rule 30(b)(6) witness was properly prepared to provide responsive answers, Rule 30(b)(6) testimony generally should not be treated as preclusive with respect to either evidence or arguments. Rule 30(b)(6) testimony is not a judicial admission (and hence may be contradicted or rebutted), and the failure of a Corporate Witness to mention particular information, absent bad faith, should not be grounds to preclude the subsequent proffer of such information. Whether an omission was inadvertent or the evidence was only subsequently developed, the better view of a Rule 30(b)(6) deposition is that it is an exploratory tool, and other devices are better suited to limiting the evidence at trial. Notwithstanding this, because Rule 30(b)(6) testimony constitutes an admission, the omission of information or interpretations from a Corporate Witness's response may still be probative at times, e.g., to evidence when the corporation became aware of certain information or first took a certain position.

(9) Moreover, if the Corporate Witness inadvertently omitted factual information that was reasonably available to the corporation at the time of the deposition and this information is not otherwise disclosed during the discovery process (or if a court concludes that the omission or the extent of the delay in providing the information was a deliberate litigation tactic), the court should then consider preclusive sanctions under Rule 37(c), Fed. R. Civ. P., particularly where other parties have been prejudiced.

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Commercial and Federal Litigation Section
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February 12, 2004

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II. E. An Added Style Project Question: Who Signs Answers to Discovery Responses Under Rules 33 and 36

Professor Patrick Schiltz, Reporter of the Appellate Rules Committee, has pointed to an ambiguity among Rules 26(g), 33(b), and 36(a). The intended answer seems sufficiently clear to support consideration of resolving the ambiguity in the final stage of the Style Project.

Present Rule 26(g) provides that "[e]very discovery * * * response made by a party represented by an attorney shall be signed by at least one attorney of record * * *. An unrepresented party shall sign the * * * response * * *." The Committee Note to the 1983 amendment that added Rule 26(g) says explicitly that "[t]he term 'response' includes answers to interrogatories and to requests to admit as well as responses to production requests." It was intended that an attorney sign the answers to interrogatories.

Rule 33(b) begins in paragraph (1) with the direction that "[e]ach interrogatory shall be answered separately and fully in writing under oath * * *." Paragraph (b)(2) says that "[t]he answers are to be signed by the person making them, and the objections signed by the attorney making them." Plainly a represented party is required to swear to — and sign — the answers. The reference to objections, however, might seem to imply that the attorney is only to sign objections, not the answers.

A similar ambiguity by implication appears in Rule 36(a). The second paragraph says that each matter of which admission is requested is admitted unless the party addressed by the request serves "a written answer or objection addressed to the matter, signed by the party or by the party's attorney." These words might suggest that the attorney can sign the answer in lieu of the party, or that the party can sign an objection in lieu of the attorney.

Quick research shows that Rule 26(g) sanctions have been imposed on attorneys for false interrogatory answers. In *Legault v. Zambarano*, 1st Cir.1997, 105 F.3d 24, 26-27, two defendants gave false answers. Sanctions imposed on the two defendants and their attorney were affirmed, approving a finding that there was "a flat violation of * * * [Rule] 26(g)(2)." Other cases in which sanctions were imposed on both party and counsel for false interrogatory answers are noted in 8 Federal Practice & Procedure: Civil 2d, § 2052.

Discussion of sanctions for a filing to admit the truth of a matter as requested under Rule 36 generally focuses on Rule 37(c)(2), which requires the party failing to admit to pay the reasonable expenses incurred in proving the fact, including attorney fees. See 8A id., § 2265.

The history of these provisions suggests that it is safe to adopt the meaning of Rule 26(g)(2) clearly intended by its authors. The rules got revised at different times for different purposes. The Rule 26(g)(2) provisions are newest, and do not contradict any apparent purpose of the earlier-drafted rules.

Original Rule 33 provided both that interrogatories shall be answered separately and fully in writing under oath and that the answers "shall be signed by the person making them." It did not say anything about signing objections. 1970 amendments revised then Rule 33(a) to read exactly as present Rule 33(b)(2). The Committee Note does not reflect on the choice to have the attorney sign the objections, although the reasons seem obvious enough; there is no hint that the Committee anticipated the 1983 addition of Rule 26(g)(2).

Original Rule 36 provided that each matter of which admission is requested is deemed admitted unless the party addressed by the request "serves * * * a sworn statement either denying

specifically * * * or setting forth in detail the reasons why he cannot truthfully either admit or deny * * *." The Committee Note to the 1970 amendments does speak to the change that adopted the present rule language. "The requirement that the answer to a request for admission be sworn is deleted, in favor of a provision that the answer be signed by the party or by his attorney. The provisions of Rule 36 make it clear that admissions function very much as pleadings do. * * * Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent." The analogy to pleadings might bear out the reading that the Rule 36 response of a represented party can be signed by the attorney alone. But again there is no hint that the Committee anticipated the future adoption of Rule 26(g).

The relationship among Rules 26(g)(2), 33(b)(2), and 36 reflects a broader ambiguity in the concept of a discovery "response." There is no apparent thought that an attorney must sign the transcript of a party's deposition — indeed Rule 30(e) was amended in 1993 to provide for review by the deponent only if requested before completion of the deposition. The 1983 Committee Note seems to be all-inclusive in identifying as "responses" answers to Rule 33 interrogatories, Rule 34 "production requests," and Rule 36 requests to admit.

All of this suggests that the intent of the rules is sufficiently clear to justify clarification as part of the Style Project. Rule 34 is not a problem; Rule 34(b) provides for a "written response," a term directly captured in Rule 26(g)'s "response." Rather than depend on close integrated reading of Rules 26(g), 33, and 36, the safest approach may be to adopt what amount to cross-references in each. Rule 26(g) can require signature by the attorney and also by the party "when required by these rules." Rules 33 and 36 can each provide that an answer must be signed both by the party and — if the party is represented — by an attorney. The Style Rules can be used to illustrate:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name and [also] by the party when required by these Rules — or by the party personally, if unrepresented — and must state the signer's address. * * *

Rule 33. Interrogatories to Parties

* * * * *

(b) Answers and Objections.

* * * * *

(5) Signature. The person who makes the answers — and if the answering party is represented its attorney[8] —

[8] "person" is used in Rule 33(b) because the answers may be made by a representative when the party is an abstract entity. But it is better to refer to a represented party, avoiding the confusions that arise in determining whether — for example — a corporate officer who signs the interrogatories is represented by the corporate party's attorney.

must sign them, and the[9] attorney who objects must sign any objections.[10]

Rule 36. Requests for Admission

(a) Scope and Procedure.

* * * * *

(3) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter ~~and signed by the party or its attorney~~. The party must sign the answer. The attorney for a represented party must also sign the answer. An objection must be signed by the attorney or by an unrepresented party.[11]

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[9] The Style Rule does not pause to make nice distinctions between a represented party and an unrepresented party. Should we worry about that? Presumably the Style Rule reflects the failure of present Rule 33(b)(2) to draw any distinction. Would this be better in the passive:

> The answers must be signed by the person who makes them and by the attorney for a represented party. Objections must be signed by the attorney or by the party if the party is not represented.

[10] Why is this drafted in the plural? Style Rule 36(a)(3), set out below, is drafted in the singular.

[11] This could be made active more easily if we decide not to distinguish between represented and unrepresented parties: The answer must be signed by the party and — if the party is represented — by its attorney; the attorney who objects must sign the objection.

II. F. Rule 48: Polling the Jury

The Standing Committee suggested that the Civil Rules might consider addition of a polling provision similar to Criminal Rule 31(d). Drawing from Style Rule 48, the rule might look like this:

Rule 48. Number of Jurors; Verdict; Polling.

(a) Number of Jurors. A jury must have no fewer than 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

On informal inquiry, the Council of the ABA Litigation Section indicated that this approach seems desirable. They seem to prefer this version of new subdivision (c), taken verbatim from Criminal Rule 31(d), which requires a poll only on a party's request.

The question whether to add a polling provision seems direct enough. If the question is pursued further, there is likely to be some pressure to adopt the language of Criminal Rule 31(d), as

set out above. But there may be some reason to distinguish between the civil and criminal rules. Civil Rule 49(b) addresses verdicts that include answers to questions that are inconsistent among themselves or inconsistent with the general verdict. When that happens, the court is to "direct the jury to further consider its answers and verdict, or order a new trial." "Deliberate further" seems a good substitute for "further consider its verdict" because the problem is likely to be lack of unanimity. But "order a new trial" may be better than "declare a mistrial and discharge the jury" for purposes of a civil rule.

The question is whether to add this matter to the agenda for further work.

II. F. Rule 54(d) and Rule 58(c): Motions for Attorney's Fees and the Time to Appeal

1. Introduction

The Appellate Rules Advisory Committee has recommended that this Committee amend Civil Rule 58(c)(2) "to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees [under Civil Rule 54(d)(2)] have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59."

These three rules were shaped in reaction to the decision in *Budinich v. Becton Dickinson & Co.*, 1988, 486 U.S. 196, 108 S.Ct. 1717. After winning the jury verdict, the plaintiff "timely filed new-trial motions" and also filed a motion for attorneys' fees under the governing Colorado statute. The district court denied the new-trial motions, ruled that the plaintiff was entitled to attorneys' fees, and requested briefing and documentation to establish the amount of the fee award. Nearly three months later it entered the fee award. The plaintiff filed a notice of appeal 28 days later. The Supreme Court ruled that the decision on the merits was final for § 1291 appeal purposes before disposition of the fee motion. At least "as a general matter * * * a claim for attorney's fees is not part of the merits of the action to which the fees pertain." Nor does a fee motion count as a Rule 59(e) motion to alter or amend the judgment — it does not seek reconsideration of anything decided on the merits. Thus appeal must be taken in appeal time measured without regard to the pending fee motion. The appeal in the Budinich case, filed more than 30 days after disposition of the Rule 59 new-trial motions, was timely only as to the order on the fee motion; the merits must go unreviewed.

The "bright-line" rule established by the *Budinich* case, standing alone, means that appeals on the merits often must be taken or lost before disposition of attorneys' fee motions. The fee order

becomes the subject of a second appeal. Two appeals, often covering related ground, may not be efficient. Rules 54(d)(2), 58(c)(2), and Appellate Rule 4(a)(4)(A)(iii) were revised to enable the district court to suspend the time to appeal on the merits by ordering that the fee motion has the same time-suspending effect under Rule 4 as a Rule 59 motion. Rule 58(c)(2) directs that the court must "act before a notice of appeal has been filed and become effective." We do not have any information about the frequency of these orders. They may be routine, familiar although not routine, or rare.

The Appellate Rules Committee suggestion is designed to correct an inadvertent drafting gap in the present rule. The present rule can be read to permit an absurd result — allowing entry of an order that revives appeal time long after expiration. The only event that cuts off this authority is the actual filing of a notice of appeal. If no notice is filed, the court is acting before a notice has been filed. But a long-delayed and otherwise useless notice of appeal will cut off an order that for the first time would give the attorney-fee motion the effect of a Rule 59 motion.

This open-ended reading was not intended. Those who drafted the present provision that for the time being has become Rule 58(c)(2) had in mind a subtle but effective limit that would coordinate all of the appeal-time provisions in a way that would not disrupt clear limits or orderly transfer to the court of appeals. Subtlety and reliance on sophisticated understanding, however, may not be the best drafting approach to "no-excuses-accepted" rules such as the "mandatory and jurisdictional" appeal-time rules.

2. Suggested Solutions and Their Problems

An amendment responding to the direct language of the Appellate Rules Committee's suggestion might look something like this, drawing from the Style Rule 58(e) provision that is scheduled to supersede present Rule 58(c)(2):

> (e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if the court gives notice or a party moves within 14 days after a timely motion for attorney's [sic] fees is made [filed?] under Rule 54(d)(2), the court may ~~act before a notice of appeal has been filed and become effective to~~ order that the Rule 54(d)(2) motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

A more direct way of responding to the apparent drafting lapse would be to add a single word to the present rule: "the court may act before a timely notice of appeal has been filed and become effective * * *." "Timely" would include a premature notice that becomes effective under Appellate Rule 4(a)(4)(B)(i); "become effective" would incorporate the balance of the same rule. The objection to this approach is that it carries forward the complex scheme of cross-references in the present rule. Three rules have to be read together, one of them not always found in the same book as the Civil Rules. And at least one of them — Appellate Rule 4 — is intricate. Hence the alternative of a simple deadline expressed in days.

If a simple proposal can be identified, it remains to decide whether it is better to do something more complicated or to do nothing at all. The question comes to the agenda because one court had to work hard to achieve a correct result in one case. The result was loss of any opportunity to appeal a judgment on the merits, a common enough occurrence under the provisions of Appellate Rule 4. Many possible responses are possible. The materials prepared for the Appellate Rules

Committee and the relevant part of the Appellate Rules Committee Minutes for November 9, 2004, are attached. They cover most of the alternatives summarized below. They make rewarding reading, not only as an illustration of many possible approaches but also as a demonstration of the complexity that has invaded the rules that control appeal time.

Appellate Rule 4 has been frequently amended. It is designed, first and foremost, to ensure that the decision whether to appeal is made promptly after judgment is entered. A simple rule could ensure that. But it has proved useful to integrate appeal-time provisions with the procedures for self-correction by post-judgment motions in the trial court. Attorney-fee motions do not fit into the category of "self-correction," but may present similar reasons for suspending appeal time. The difficulties that arise from these provisions often have nothing to do with drafting intricacy. For good reason, only "timely" motions suspend appeal time. Often, alas, a party relies on a motion that was not timely, only to find that appeal time was not suspended. It seems likely that most of the remaining difficulties arise not from rule 4's intricacy but from careless reading (or no reading at all). The Appellate Rules Committee no doubt is right that it is better to work on the Civil Rules than to further amend the oft-amended Appellate Rule 4, unless all attorney-fee motions are to be given the same time-suspending effect as Rule 59 motions. And the Appellate Rules Committee can be forgiven for not reconsidering the well-settled rule that appeal time is "mandatory and jurisdictional," an alternative that would protect the unwary but at a real cost in repose for the wary.

This question came to the agenda by way of a plea made in the opinion in *Wikol ex rel. Wikol v. Birmingham Public Schools*, 6th Cir.2004, 360 F.3d 604, 610. The court could "not help but express dismay over the complexity of the rules regarding the timeliness of an appeal * * *. There

should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. * * * Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure." (Rule 59 was included in the count of four rules.)

The circumstances of the *Wikol* case were these:

Date Unspecified: Jury verdict for the plaintiffs.

March 22, 2002: Plaintiffs move for attorney fees.

March 27, 2002: Judgment entered.

May 15, 2002: Fee motion denied.

May 24, 2002: Plaintiffs move for a 58(c)(2) order.

June 14, 2002: Plaintiffs file a notice of appeal.

July 11, 2002: Rule 58(c)(2) order extending time.

The court ruled that the June 14 notice of appeal was timely as to the May 15 order denying the fee motion, but was not timely as to the judgment on the merits. It reached this result by what may seem a linguistic tour de force: the June 14 notice of appeal was "effective" when filed, so the July 11 Rule 58(c)(2) order was made after a notice of appeal was filed and became effective. At best, this result depends on the happenstance that the notice of appeal was timely — thus "effective" — with respect to the order denying the fee motion. The notice was not "effective" to appeal the

judgment on the merits. The court further says that Appellate Rule 4(a)(4)(B)(i) "suggests * * * that the concept of 'effectiveness' is limited to delaying the transfer of jurisdiction to the appellate court from an otherwise timely filed notice of appeal until the relevant post-judgment motion is decided."

The result of the *Wikol* decision seems right, at least within the well-settled tradition that Appellate Rule 4 time limits must be applied without accepting any excuses. The intended working of Rule 58(c)(2) can be illustrated by a few variations on the circumstances.

(1) No Other Post-Judgment Motion. If no party has made any of the timely Rule 50, 52, 59, or "60" motions that suspend appeal time under Appellate Rule 4(a)(4)(A), a notice of appeal must be filed 30 days after March 27 unless an extension is obtained. A timely notice of appeal cuts off the opportunity to enter a Rule 58(c)(2) order — the case has been transferred to the court of appeals. An untimely notice of appeal cannot revive the forfeited opportunity to appeal the judgment on the merits, whether by direct operation or by reviving the opportunity to enter a Rule 58(c)(2) order that the fee motion have the appeal-time-suspending effect of a timely Rule 50, 52, 59, or "60" motion.

(2) Premature Notice of Appeal, No Other Post-Judgment Motion. A notice of appeal is filed in March 21; it is premature because judgment has not been entered. It apparently becomes effective on March 27 under Appellate Rule 4(a)(4)(B)(i), and the lack of any timely 4(a)(4)(A) motion means that its effectiveness is not suspended. This seems a bit surprising — the plaintiffs could preserve the opportunity to seek a Rule 58(c)(2) order by making a timely 4(a)(4)(A) motion, but otherwise the premature notice cuts off any opportunity for a 58(c)(2) motion. [The language of 4(a)(4)(B)(i) is incomplete. It says that "if a party files a notice of appeal after the court announces or enters a

judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order * * * when the order disposing of the last such remaining motion is entered." If there is no such motion, there is no order disposing of the last such remaining motion. Presumably the result is that the notice becomes effective on the day judgment is entered, not on the day after the last day to timely file any of the 4(a)(4)(A) motions.]

(3) Premature Notice of Appeal, Timely Post-Judgment Motions. This one seems clear. The time to enter a Rule 58(c)(2) order expires upon disposition of the last remaining Rule 4(a)(4)(A) motion. That is when the notice of appeal "has been filed and has become effective."

(4) Notice Filed After Judgment, Before Timely Post-Judgment Motions. Same result as (3). Although the notice seemed to "become effective" when filed, it did not really transfer the case to the court of appeals. Under 4(a)(4)(B)(i) it "becomes effective" on disposition of the last 4(a)(4)(A) motion.

(5) Notice Filed While Timely Post-Judgment Motion Pending. This is the easiest one of them all. The notice is not effective when filed, and does not even seem to be effective. It becomes effective upon disposition of the last remaining 4(a)(4)(A) motion.

(6) No 58(c)(2) Order, Merits Appeal Time Lapses While 54(d)(2) Motion pending;

(7) Timely Appeal after Fee order. This is the *Wikol* case. Nothing happened to suspend the time to appeal judgment on the merits, just as in the Supreme Court's *Budinich* case. No notice of appeal can become "effective" to appeal the merits. If a notice of appeal is filed within the Rule 4 period after entry of the fee order, the fee ruling can be reviewed. (It may be difficult to review the

fee order with respect to matters on which the judgment would have been reversed on timely appeal, but it does not seem likely that the Appellate Rules, much less the Civil Rules, will be amended to address the scope of the appeal. But this question raises some doubt as to the present rule. An appeal on the fee motion remains possible. The litigation has not concluded. If the district judge believes that the merits should be open for review, does the need to protect the appellee require that this authority be denied?)

(8) No Rule 58(c)(2) Order, No Timely Notice of Appeal Ever. This is the horrid monster that might be conjured out of the present language of Rule 58(c)(2). It is no longer possible to file a notice of appeal that will "become effective." The district court retains power to act at any time to permit a belated appeal by entering an order that the fee motion has the effect of a timely Rule 59 motion. Presumably few district judges would do this. (It would be really strange to seize on the partial-effectiveness of the notice in the Wikol case to argue that a notice that is not timely to appeal anything is an effective means of cutting off the Rule 58(c)(2) authority — it becomes, when filed, as "effective" as it ever can be. How many parties will think to file an untimely notice of appeal — often with no desire to appeal — simply to cut off the faint prospect that an adversary might persuade the court to enter a belated 58(c)(2) order to revive expired appeal time?)

The alternative draft amendments set out above are designed to close the possible linguistic gap in Rule 58(c)(2). The draft that would require a "timely" notice of appeal does nothing to reduce the intricacy bewailed by the *Wikol* court. Its only potential contribution is to cut off the remote prospect that Rule 58(c)(2) might be read, as sketched in example (7) above, to make an untimely

notice of appeal the only means of terminating an otherwise perpetual power to revive expired appeal time. That does not seem a great advance in rulemaking.

The first draft amendment would change the subtle integration of attorney-fee motions with Appellate Rule 4 that Rule 58(c)(2) now attempts. Instead it would adopt an uncomplicated rule. An attorney-fee motion suspends appeal time only if the court gives notice that it is contemplating an order or if a party moves for an order within 14 days after the fee motion is made. No time limit is set for the court to act. The provision for court notice is included to enable the court to act on its own, but without requiring that it act to enter the order within 14 days (compare Rule 59(d), which allows a court to order a new trial on its own only if it makes the order within 10 days). The 14-day period is chosen because it allows some time but still integrates with the appeal-time provisions in most circumstances. Rule 54(d)(2) sets a presumptive motion time at 14 days after entry of judgment; an additional 14 days fits within the general 30-day appeal period. But the fit becomes awkward if a statute or court order sets a time different than 14 days, as Rule 54(d)(2) allows. Perhaps a shorter period should be set. The shorter the period, the greater the difference from the present rule. As the rule now is, the court can consider the best integration of the fee proceedings with an appeal during the perhaps extended period required to decide timely post-judgment motions. Consideration of the other motions may give a much better sense of the advantages and disadvantages of deferring any appeal until the fee motion has been decided. As usual, it turns out that there is a reason for the subtle intricacy of the present rules.

Many other approaches are available. They can be described rather briefly. Full development would be warranted only on the basis of reliable information about the impact of present Rule 58(c)(2). The assumption that underlies 58(c)(2) is clear enough. Sometimes it is good that the merits appeal be taken while the fee motion remains pending in the district court. Sometimes it is good that appeals be deferred until the district court has resolved the fee motion. The district court is in a better position than the court of appeals to make this determination. And, given the rigorous enforcement of intricate appeal-time rules, there must be a clear integration of the time for district-court action with the appeal-time rules.

Rule 58(c)(2) may be working as intended. The result may be that appeal-time-suspending orders are routine, common, or rare. These orders may be entered when they ease the burdens on the parties and appeals courts, and denied when they might aggravate the burdens on the parties and courts. Trial courts may experience little difficulty in making wise decisions on these matters. The converse of each of these propositions may be true. If there are problems, quite different rules are possible.

One alternative, and a simple one, would be to provide that a timely fee motion always suspends appeal time, just as a timely Rule 59 motion does. Appellate Rule 4(a)(4)(A)(iii) would be simplified to refer only to a Rule 54(d)(2) motion. Rule 58(c)(2) would be abolished. Among the problems with this approach are the delay of appeal, the importance of the appeal disposition for intelligent decision of the fee motion, and the prospect that fee disputes may be resolved among the parties once the outcome on appeal is known. There may be some small technical problems as well.

It is not quite true that the 14-days allowed to file a fee motion is never longer than the 10-days allowed for a Rule 59 motion. It is possible that a judge will accept a judgment for filing on a Sunday; under present time-counting rules the time for a Rule 59 motion expires on Friday 12 days later. The 14 fee-motion days would expire on Sunday, allowing filing on Monday. that quirk is likely to be fixed in the time-counting project. Far more importantly, the Rule 54(d)(2) authority to set a different time than 14 days may mean that a timely motion is filed well after expiration of the Rule 59 time. These problems could be addressed by changing the requirement that the fee motion be timely to a requirement that it be filed within the period allowed for a Rule 59 motion. Or the Time-Counting Project might set the same time for attorney-fee motions as for other post-judgment motions.

A different alternative would be effectively to overrule the *Budinich* decision by providing in Rule 54(b) that a judgment that does not dispose of attorney-fee issues is final only upon express entry of judgment. This would be simple, and would take advantage of the flexibility that allows a premature appeal on the merits to be saved by retroactive entry of a Rule 54(b) judgment. Whether this approach is attractive depends on how often it is desirable to defer appeal on the merits until fee issues have been resolved. It is worth pursuing if serious inquiry — most likely by the Federal Judicial Center — shows either that this is how Rule 58(c)(2) is implemented now or that experience with appeals taken before disposition of fee motions proves the need to defer appeal until fee motions are decided.

Yet another possibility would be to adopt a rule that a fee motion never suspends appeal time. This one is reasonably simple. Rule 58(c)(2) and Appellate Rule 4(a)(4)(A)(iii) would be rescinded. After the *Budinich* decision, the fee request is not a "claim," and remains outside Rule 54(b). It is not a Rule 59(e) motion. Two appeals will be common — but that fits the reported experience of Appellate Rules Committee members that "appeals of fee orders are usually brought separately from appeals of underlying judgments, and for good reason."

3. Tentative Recommendation

The only sign of distress with the present set of rules is the Sixth Circuit's accurate suggestion that it would be better to avoid this much intricacy if a good rule can be drafted in less intricate terms. Read intelligently in context, present Rule 58(c)(2) — and also its translation in Style Rule 58(e) — relies on district-court discretion to accomplish a sensible case-specific integration of fee motions with appeal time. There is no evidence that discretion is not working. Any rules amendments in this setting must be framed with great care and foresight, as witness the linguistic opportunity to misread the present rules. The next step might well be to report to the Appellate Rules Committee that the case for amending the rules seems weak in the absence of better information about actual experience. If the Appellate Rules Committee continues to believe that potential problems deserve further study, the two Committees can work together to determine the need to gather additional information and the means of gathering any information that may be needed.

DRAFT

Minutes of Fall 2004 Meeting of
Advisory Committee on Appellate Rules
November 9, 2004
Miami, Florida

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, November 9, at 8:30 a.m., at the Wyndham Grand Bay Coconut Grove Hotel in Miami, Florida. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Judge T.S. Ellis III, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Dr. Timothy Reagan and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

II. Approval of Minutes of April 2004 Meeting

The minutes of the April 2004 meeting were approved.

III. Report on June 2004 Meeting of Standing Committee

Judge Alito reported that, at its June 2004 meeting, the Standing Committee gave final approval to all of the proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"), with one exception. Those proposals were subsequently approved by the Judicial Conference and now are awaiting Supreme Court action.

The exception was proposed Rule 32.1 on the citation of unpublished opinions. Judge Alito reported that the Standing Committee had returned the proposal to this Advisory Committee for further study. Judge Alito said, and Prof. Coquillette agreed, that the decision of the Standing Committee did not signal a lack of support for the proposal. Rather, given the strong opposition to the proposal expressed by many commentators, and given that some of the claims of those commentators can be tested empirically, the Standing Committee wanted to ensure that every reasonable step is taken to gather information before it makes a final decision on the proposal.

A member moved that Item No. 04-02 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

2. Item No. 04-03 (FRAP 4(a)(4)(A)(iii) — tolling effect of Civil Rule 54 motions)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that this item was added to the Committee's study agenda at the request of Judge Ronald Gilman, writing in *Wikol ex rel. Wikol v. Birmingham Public Schools Board of Education*, 360 F.3d 604 (6th Cir. 2004). In *Wikol*, the parents of an autistic child (the Wikols) sued their local school district in an attempt to enforce their child's rights under federal law. The district court entered judgment on March 27, 2002. The Wikols timely moved for attorney's fees under Civil Rule 54(d)(2). That motion was denied on May 15, 2002. On May 24, 2002, the Wikols moved the district court to exercise its authority under Civil Rule 58(c)(2) to order that the Rule 54(d)(2) motion that they had filed (and that had already been denied) would have "the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under [Civil] Rule 59" — i.e., that the Rule 54(d)(2) motion would toll the time to appeal the underlying judgment. While their motion was pending, the Wikols filed a notice of appeal from the underlying judgment on June 14, 2002. The district court granted the Wikols' Rule 58(c)(2) motion on July 11, 2002, ordering that their Rule 54(d)(2) motion had tolled the time to appeal the underlying judgment until that motion had been denied on May 15.

The Sixth Circuit held that the district court's July 11 order was ineffective and that the notice of appeal had been filed too late to confer jurisdiction to review the underlying judgment. Judge Gilman, author of the Sixth Circuit's opinion, reasoned as follows:

1. Under Rule 4(a)(1)(A), parties generally have 30 days to appeal in a civil case.

2. Under Rule 4(a)(4)(A), the time to appeal is automatically tolled by the timely filing of various post-judgment motions, including a motion under Rule 59 for a new trial. If a party files a motion for attorney's fees under Rule 54(d)(2), however, that motion tolls the time to appeal only "if the district court extends the time to appeal under Rule 58."

3. Under Rule 58(c)(2), a district court may "order that [a Rule 54(d)(2)] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59" — that is, the district court may order that, like a timely Rule 59 motion for a new trial, a timely Rule 54(d)(2) motion for attorney's fees will toll the time to appeal under Rule 4(a)(4). But the district court may do so only "before a notice of appeal has been filed and has become effective."

4. A notice of appeal generally becomes "effective" at the moment it is filed, with one exception: Under Rule 4(a)(4)(B)(i), a notice of appeal that is filed after a court announces or enters a judgment — but before the court disposes of one or more of the "tolling" motions listed in Rule 4(a)(4)(A) — becomes effective on entry of the order disposing of the last such remaining motion.

5. Applying these rules to the *Wikol* case: The Wikols' Rule 54(d)(2) motion for attorney's fees did not toll the time to appeal because the district court did not "extend[] the time to appeal under Rule 58." As a result, the Wikols' notice of appeal was both "filed" and "effective" on June 14. After June 14, then, the district court no longer had power to order that the Wikols' motion for attorney's fees would toll the time to appeal. Because the July 11 order was ineffective, the 30-day deadline to appeal the underlying judgment began to run when the underlying judgment was entered on March 27. The notice of appeal filed on June 14 was thus untimely, and the court did not have jurisdiction to review the underlying judgment (although it did have jurisdiction to review the May 15 order denying the motion for attorney's fees).

Understandably, the Sixth Circuit took no pleasure in its holding. The court expressed its "dismay over the complexity of the rules" and suggested that Advisory Committees consider simplifying the process, perhaps by amending the rules to provide that a timely Rule 54 motion, like a timely Rule 59 motion, automatically tolls the time to appeal under Rule 4(a)(4)(A).

The Reporter said that, in light of *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (which held that a judgment is final and appealable even if a motion for attorney's fees is pending), this Committee and the Civil Rules Committee essentially have three options if they wish to address the problem raised by *Wikol*:

First, the Committees could decide that a party should *never* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion for attorney's fees is always treated like a timely Rule 59 motion for a new trial. Under this approach, a Rule 54 motion would toll the time to appeal, and, if a notice of appeal was filed while a Rule 54 motion was pending, the notice of appeal would not take effect until the court disposed of the Rule 54 motion.

Second, the Committees could decide that a party should *always* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion is never treated like a timely Rule 59 motion. Under this approach, a Rule 54 motion would not toll the time to appeal, and a notice of appeal filed while a Rule 54 motion was pending would be effective immediately (unless one of the post-judgment motions listed in Appellate Rule 4(a)(4)(A) was pending).

Finally, the Committees could decide to maintain the "hybrid" approach. Under this approach, a default rule is established — at present, the default rule is that a motion for attorney's fees under Rule

54 is not treated like a Rule 59 motion — but then the district court is given authority to make exceptions to the default rule. At present, Civil Rule 58(c)(2) gives district courts authority to "order that [a Rule 54] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." To solve the *Wikol* problem, though, the rules would have to be amended to impose a deadline by which a district court must act. For example, a deadline could be patterned after Criminal Rule 35(a), under which a court has authority to correct a sentence within seven days after the sentence is imposed, but loses such authority after the seventh day.

The Committee discussed the options described by the Reporter. Most Committee members said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would always be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits would always have to be brought together with the appeal on the fees. In the experience of Committee members, appeals of fee orders are usually brought separately from appeals of underlying judgments, and for good reason. A decision on fees can be much more difficult than a decision on the merits. District court judges often do not want to have to make a decision on fees until they know for certain that the decision on the merits will stand. Also, once the appeal on the merits is over, parties often settle the fees dispute.

Most Committee members also said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would never be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits could never be brought together with the appeal on the fees. Members pointed out that the Federal Circuit has held that, in patent infringement cases, appeals on the merits must always be packaged together with appeals on the fees. Sometimes there is good reason to present the appellate court with the merits and the fees in the same appeal.

In sum, Committee members favor maintaining the current hybrid approach, under which the assumption is that the appeals will proceed separately, unless the district court orders otherwise. Committee members believe, however, that a time limit should be added to Civil Rule 58(c)(2) so that the *Wikol* facts are not repeated. Item No. 04-03 should be referred to the Civil Rules Committee, so that it can consider approving such an amendment.

A member moved that Item No. 04-03 be referred to the Civil Rules Committee, along with the recommendation of this Committee that Civil Rule 58(c)(2) be amended to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59. The motion was seconded. The motion carried (unanimously).

VI. Additional Old Business and New Business

There was no additional old business or new business.

MEMORANDUM

DATE: October 15, 2004

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 04-03

Some of you may recall that the Appellate Rules Committee, later joined by the Civil Rules Committee, spent almost five years working on the 2002 amendments to Appellate Rule 4(a)(7) and Civil Rules 54(d)(2)(C) and 58. Those amendments addressed incredibly complicated questions — questions that spawned at least four circuit splits — about how Appellate Rule 4(a)(7)'s definition of when a judgment or order is "entered" was intended to interact with the requirement in Civil Rule 58 that, to be "effective," a "judgment" (defined by an obscure provision of Rule 54(a) to include all appealable orders) must be set forth on a separate document. For those of you who regret that you were unable to participate in that effort, welcome to *Wikol ex rel. Wikol v. Birmingham Public Schools Board of Education*, 360 F.3d 604 (6th Cir. 2004). The opinion is attached, but the following summary (which I wrote for the 2005 Supplement to Volume 16A of *Federal Practice and Procedure*) may suffice:

> The parents of an autistic child (the Wikols) sued their local school district in an attempt to enforce their child's rights under federal law. The district court entered judgment on March 27, 2002. The Wikols timely moved for attorney's fees under Civil Rule 54(d)(2). That motion was denied on May 15, 2002. On May 24, 2002, the Wikols moved the district court to exercise its authority under Civil Rule 58(c)(2) to order that the Rule 54(d)(2) motion that they had filed (and that had already been denied) would have "the same effect under Federal Rule of Appellate Procedure

4(a)(4) as a timely motion under [Civil] Rule 59" — i.e., that the Rule 54(d)(2) motion would toll the time to appeal the underlying judgment. While their motion was pending, the Wikols filed a notice of appeal from the underlying judgment on June 14, 2002. The district court granted the Wikols' Rule 58(c)(2) motion on July 11, 2002, ordering that their Rule 54(d)(2) motion had tolled the time to appeal the underlying judgment until that motion had been denied on May 15.

The Sixth Circuit, in a careful opinion by Judge Ronald Gilman, held that the district court's July 11 order was ineffective and that the notice of appeal had been filed too late to confer jurisdiction to review the underlying judgment. Judge Gilman reasoned as follows:

1. Under Rule 4(a)(1)(A), parties generally have 30 days to appeal in a civil case.

2. Under Rule 4(a)(4)(A), the time to appeal is automatically tolled by the timely filing of various post-judgment motions, including a motion under Rule 59 for a new trial. If a party files a motion for attorney's fees under Rule 54(d)(2), however, that motion tolls the time to appeal only "if the district court extends the time to appeal under Rule 58."

3. Under Rule 58(c)(2), a district court may "order that [a Rule 54(d)(2)] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59" — that is, the district court may order that, like a timely Rule 59 motion for a new trial, a timely Rule 54(d)(2) motion for attorney's fees will toll the time to appeal under Rule 4(a)(4). But the district court may do so only "before a notice of appeal has been filed and has become effective."

4. A notice of appeal generally becomes "effective" at the moment it is filed, with one exception: Under Rule 4(a)(4)(B)(i), a notice of appeal that is filed after a court announces or enters a judgment — but before the court disposes of one or more of the "tolling" motions listed in Rule 4(a)(4)(A) — becomes effective on entry of the order disposing of the last such remaining motion.

5. Applying these rules to the *Wikol* case: The Wikols' Rule 54(d)(2) motion for attorney's fees did not toll the time to appeal because the district court did not "extend[] the time to appeal under Rule 58." As a result, the Wikols' notice of appeal was both "filed" and "effective" on June 14. After June 14, then, the district court no longer had power to order that the Wikols' motion for attorney's fees would toll the time to appeal. Because the July 11 order was ineffective, the 30-day deadline to appeal the underlying judgment began to run when the underlying judgment was entered

> on March 27. The notice of appeal filed on June 14 was thus untimely, and the court did not have jurisdiction to review the underlying judgment (although it did have jurisdiction to review the May 15 order denying the motion for attorney's fees).
>
> Understandably, the Sixth Circuit took no pleasure in its holding. The court expressed its "dismay over the complexity of the rules" and suggested that Advisory Committee consider simplifying the process, perhaps by amending the rules to provide that a timely Rule 54 motion, like a timely Rule 59 motion, automatically tolls the time to appeal under Rule 4(a)(4)(A). The suggestion is worth considering. It does seem silly that the Wikols would have preserved their appeal if they had filed their notice of appeal on July 12, but forfeited their appeal by filing on June 14. There is something odd about a June appeal being too late but a July appeal being timely.[1]

Taking off my treatise author's hat, and putting on my Reporter's hat, I want to agree with me: I believe that this Committee and the Civil Rules Committee should consider addressing the problem that Judge Gilman brought to our attention. That said, I am not certain what a solution to the problem should look like.

Back in June, Prof. Edward Cooper (the Reporter to the Civil Rules Committee) and I engaged in an extensive e-mail conversation about the *Wikol* problem. (Several others, including Judge Alito, were included in that conversation.) Prof. Cooper and I tentatively identified several possible approaches to *Wikol*. For those who have interest, I have attached copies of our correspondence.[2] In addition, the *Wikol* problem was brought to the attention of the Committee by Prof. Philip A. Pucillo in a letter that I did not receive until after discussing the problem with Prof. Cooper. Prof. Pucillo's letter

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[1]16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & PATRICK J. SCHILTZ, FEDERAL PRACTICE AND PROCEDURE (3d ed. Supp. forthcoming 2005) (footnotes omitted).

[2]Prof. Cooper has graciously given me permission to share his messages. This is our raw e-mail correspondence, so please excuse the informal tone, brief excursions down blind alleys, typos, and other errors.

is also attached. As you will see, Prof. Pucillo has a somewhat different "take" on the problem than either Prof. Cooper or I.

Because I do not know whether this Committee will decide that the *Wilcol* problem is worthy of further attention, I do not want to discuss all of the potential solutions and their complications at this point. Perhaps it will suffice to say the following:

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), the Supreme Court held that a judgment is final and appealable even if a motion for attorney's fees is pending. After *Budinich*, then, the advisory committees basically had three choices (I'm oversimplifying somewhat):

First, the advisory committees could have decided that a party should *never* appeal the underlying judgment separately from the order on attorney's fees. The advisory committees could have accomplished this by amending the rules so that timely Rule 54 motions for attorney's fees were *always* treated like timely Rule 59 motions for a new trial. Under this approach, a Rule 54 motion would toll the time to appeal, and, if a notice of appeal was filed while a Rule 54 motion was pending, the notice of appeal would not take effect until the court disposed of the Rule 54 motion.

Second, the advisory committees could have decided that a party should *always* appeal the underlying judgment separately from the order on attorney's fees. The advisory committees could have accomplished this by amending the rules so that timely Rule 54 motions were *never* treated like timely Rule 59 motions. Under this approach, a Rule 54 motion would not toll the time to appeal and a notice of appeal filed while a Rule 54 motion was pending would be effective immediately (unless one of the post-judgment motions listed in Appellate Rule 4(a)(4)(A) was pending).

Third, the advisory committees could have decided to take a "hybrid" approach. Under this approach, a default rule would be established — a timely Rule 54 motion either would or would not be treated like a timely Rule 59 motion — but the court could, either on motion of a party or on its own motion, decide that a particular Rule 54 motion would be treated differently than the default rule provided.

The hybrid approach is, of course, the approach that the advisory committees took. Under Rule 4(a)(4)(A), a motion for attorney's fees under Rule 54 is not treated like a Rule 59 motion unless the court orders otherwise. Civil Rule 58(c)(2) gives district courts that authority; it provides that a district court may "order that [a Rule 54] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59."

The advantage of the hybrid approach is that it allows the district court to determine how an appeal should be packaged. The advisory committees concluded that sometimes it would be wise to allow an appeal of the underlying merits to go forward before the fee question was resolved, and other times it would be wise to defer the appeal of the underlying merits until the fee question was first resolved. The hybrid approach allows district judges to decide which cases are which.

The disadvantage of the hybrid approach is that it is complicated. It is not just inherently more complicated in the sense that, rather than setting forth a uniform rule, it instead sets forth a presumption that a court can reverse in particular cases. It is also complicated because it does not contain a deadline by which a party must ask for the presumption to be reversed, nor does it contain a deadline by which a court must make a decision on the party's request. The result is *Wikol* — and the potential

Wikol-related problems that Prof. Cooper and I discussed in our correspondence. (See especially "Message 5.")

There are several possible solutions to the *Wikol* problem. Prof. Pucillo, for example, argues that the rules should be amended to reverse the default rule — i.e., that Rule 54 motions should presumptively be treated like Rule 59 motions unless the district court orders otherwise. Another possible solution would be to maintain the current approach, but to impose a deadline by which the district court must decide whether a Rule 54 motion will be treated like a Rule 59 motion. Perhaps the easiest, clearest, and most effective solution, though, would be to reject the hybrid approach and instead choose one of the absolute approaches. The rules could be amended so that Rule 54 motions are *always* treated like Rule 59 motions, or the rules could be amended so that Rule 54 motions are *never* treated like Rule 59 motions.

Before the advisory committees can decide on the wisdom of these approaches, they will have to assess the value of the ability to package appeals — discretion that only the hybrid approach provides. If most parties now ask that their Rule 54 motions be treated like Rule 59 motions, and if courts routinely grant those requests, then it may be wise to amend the rules so that *all* Rule 54 motions are treated like Rule 59 motions. Conversely, if few parties ask that their Rule 54 motions be treated like Rule 59 motions, and if the few requests that are made are rarely granted, then it may be wise to amend the rules so that *no* Rule 54 motion is treated like a Rule 59 motion. But if parties and judges are making careful and judicious use of Rule 58(c)(2) — sometimes packaging the merits with the fee question, and sometimes not — then the cost of adopting one of the absolute approaches may be too high. If this Committee decides that the *Wikol* problem deserves further study, the Committee may

want to seek the assistance of the Administrative Office or the Federal Judicial Center with gathering empirical evidence on these questions.

Addendum: Cooper-Schiltz Correspondence Regarding *Wikol* Issues

Message 1 (from Schiltz)

The recent opinion of the Sixth Circuit in *Wikol ex rel. Wikol v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004), complains about the complexity of the interaction of the Civil Rules and Appellate Rules on the question of when a motion for attorney's fees under Civil Rule 54 tolls the time to appeal under Appellate Rule 4(a)(4)(A). The Sixth Circuit explicitly invites the attention of the Advisory Committee on Appellate Rules to the issue.

The facts are complicated, and I won't try to summarize them here. The Sixth Circuit's opinion is clear and concise. Essentially, the Sixth Circuit appears to be proposing that a timely motion for attorney's fees under Civil Rule 54 should *automatically* toll the time to appeal (as does, for example, a timely motion for a new trial under Civil Rule 59), rather than toll the time to appeal only if the court so decides under Civil Rule 58. Specifically, the Sixth Circuit wrote:

"As a final comment on this issue, we cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) automatically extend the time to file an appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure."

Because the problem cited by the Sixth Circuit implicates both the Civil Rules and Appellate Rules, I am copying this message to Judge Rosenthal and Prof. Cooper. Prof. Cooper has forgotten more about Civil Rule 54 than I will ever know, so I will be particularly interested in getting his reaction to the Sixth Circuit's suggestion. . . .

Message 2 (from Cooper)

Professor Schiltz is right at least as to this — I regularly suppress anything I learn about Rules 54 or 58. Out, out faint glimmer!

John can verify this much from the minutes, if I have it right. Rules 54(d)(2) and 58 were amended together, effective December 1, 1993. The impetus no doubt was the ruling in Budinich v. Becton Dickinson & Co., 1988, 486 U.S. 196, establishing a bright line rule that a decision on the merits is a final judgment whether or not a claim for attorney fees remains to be decided. The rule has all the

advantages of a bright line and some of the disadvantages. In some circumstances it is more convenient for all concerned to have a single appeal that presents both the merits and the fee award.

My recollection is that the system we now have was primarily the invention of Sam Pointer. Rule 54(d)(2)(B) deliberately set the time to move for attorney fees at 14 days after judgment, a period that does not exclude intervening Saturdays, Sundays, and Legal Holidays (no comment) and thus is no longer — and may be shorter — than the 10-day periods for all of the other motions that suspend appeal time under Appellate Rule 4(a)(4)(A). Then the part of Rule 58, now 58(c)(2) that still causes some consternation. The trial court may order that a timely motion for attorney fees has the same effect under Rule (4)(a)(4) as a timely Rule 59 motion if the court acts "before a notice of appeal has been filed and has become effective." That means that the trial court can act before a notice of appeal has been filed, or after a premature notice of appeal has been filed, or after a notice of appeal is filed but then suspended by a timely motion. (Or something like that.) It is, in its own way, a rather neat scheme. The district court is given discretion to determine what makes most sense as an appeal package; compare Rule 54(b).

I assume, without really remembering, that what now is Appellate Rule 4(a)(4)(A)(iii) was added at the same time. It may be that this is one of those ideas that is good, but too good to be administered effectively. That is to say, it may fit within a long chain of Appellate Rule 4 amendments designed to simplify perfectly workable rules to a point where the bar can actually understand and use them. But I offer no advice on whether the hint should be taken up, apart from the observation that if it is taken up the Civil Rules Advisory Committee will once again have the pleasure of addressing something in tandem with the Appellate Rules Committee. No matter who takes the lead, it will be an exhilarating experience. . . .

Message 3 (from Schiltz)

I'm of two minds on the issue.

The system is somewhat complicated, but it is not unclear. Every one of the rules parsed by the Sixth Circuit was clear. Ten minutes of careful reading by either the plaintiffs' attorney or the district court would have taken care of the problem. I'm generally not inclined to amend rules that are clear and that are not inherently unfair because they require a few minutes' work to understand. (If I was otherwise inclined, I'd be looking for ways to undo the work that we did on Civil Rule 58 and Appellate Rule 4(a)(7) in 2002 — work that is complicated but clear.)

That said, the plaintiffs' attorney and district court are probably not atypical. (I say that with particular confidence about the attorney. I know that the "special ed" bar takes most IDEA cases for free or at a heavy discount.) Everyone hates to see an appeal forfeited on a technicality, and it does seem silly that the plaintiffs would have preserved their appeal if they'd filed their notice of appeal on July 12, but

forfeited their appeal by filing on June 14. There is something odd about a June appeal being too late but a July appeal being timely.

Might not there be merit in the Sixth Circuit's suggestion that timely Rule 54 motions automatically toll the time to appeal? Not only would fewer appeals be forfeited, but, in general, a single appeal would bring to the court both the decision on the merits and the decision on attorney's fees. In the typical civil case, would that not be preferable — or at least not less preferable?

Message 4 (from Cooper)

It is easier to react quickly, hoping to prod Pat into thinking things through, than to try to untangle the Rule 54(d)(2)/Rule 58(c)(2)/Rule 4(a)(4)(A)(iii) muddle on my own.

My first reaction at odd moments last evening was surely — well, come to look at it, no. There is nothing in these rules that actually belies the superficially "plain meaning": if there is no other complication, there is no stated limit on the time when the trial court must act under Rule 58 to give the attorney-fee motion the same effect as a timely Rule 59 motion. So in the *Wikol* case, it would be proper to make a timely attorney-fee motion, then do nothing more until the court has ruled on the motion. After that — perhaps months after judgment was entered — the intending appellant can still ask for, and the court can still grant, an extension. Perhaps the 4(a)(4)(A) provision that appeal time starts to run from the order disposing of the motion imposes an implicit limit that the court must act within appeal time as measured from that order. Perhaps not? So one obvious question is whether we need to put a time limit somewhere, with cross-references (further complicating the system).

Then I skimmed through *Wikol* and became even more thoroughly confused. The event that really confounds thinking is this: Order denying attorney-fee motion: May 15. Motion to give motion the effect of a timely Rule 59 motion: May 24. Protective notice of appeal filed: June 14. Order giving the effect of a timely Rule 59 motion: July 11. As in the paragraph above, it seems to be assumed that the May 24 motion was timely; had the plaintiffs not filed the protective notice of appeal on June 14, but instead waited to file a notice on or after July 11, the appeal would have been effective. But, in an astonishing bit of double-talk, the court concludes that it must dismiss the appeal based on the June 14 notice because the notice "became effective" on June 14. Say what?

Although I was involved only tangentially and lackadaisically as a new committee member, I can come close to warranting that no one gave any thought to this possible application, much less interpretation, of the "become effective" term in Rule 58. If anything is done, we have to do something to correct the bizarre result. Penalties should not be imposed for filing a protective notice of appeal. Compare the 4(a)(4)(B) provisions for premature notices.

That sense of the bizarre does not automatically translate into a vote to do anything about it. We have a long history of not reacting to a single decision that either is wrong or is right because of an unanticipated but probably exotic failure in drafting a present rule. Much depends on whether we can come up with a clear and right fix that at least does not add to the complication-trap aspects of these rules.

Because 4(a)(4)(A)(iii) relies on cross-reference to Rule 58, Rule 58 might be a place to begin thinking. One possibility would be to amend (c)(2) to permit an extension of appeal time only if a party moves or the court acts within the appeal period measured from the judgment, and before a notice of appeal has been filed and has become effective. That would mean that a notice of appeal must be filed if there is no timely motion to extend time or action sua sponte. I'm not at all sure that is a good idea. But at least it could be drafted, and avoids the risks of loosely guided discretion that arise if the request to extend appeal time can be deferred until the court has ruled on the fee motion.

Already this is longer than I had intended. Pat?

Message 5 (from Schiltz)

I, too, thought about this last evening. (It says something about our respective wives that they stay married to men who think about Rule 58 in the evenings.) I'm far from confident that I've got this figured out, but, at this point, I guess I lean toward believing that there is a problem here that needs to be fixed.

My first reaction was the same as Ed's: We have an unusual case here; it's important not to overreact, especially when the cure is likely to result in more complications than the disease. (I am not as critical of Judge Gilman as Ed is, though. I think he just applied the rules as they were written. I don't know what other choice he had.) My second reaction, though, is that although *Wikol* is an unusual case, and although the attorney screwed up, there is a rather serious problem that is at the root of all this, and that is the lack of any time limitations on Rule 58(c)(2). Rule 58(c)(2) puts no time limitation on when a motion must be *made* and no time limitation on when a motion must be *decided*. Think about this in reverse order:

1. First, as to the lack of a limitation on when a motion must be *decided*: Let us say that a judgment is entered against me. Under Rule 54(d)(2)(B), I have to move for attorney's fees within 14 days. Let us say that I do so. And let us say that, along with moving for attorney's fees under Rule 54(d)(2)(B), I move for a Rule 58(c)(2) order.

If I do not hear anything from the court, I will have a difficult decision to make when my judgment becomes 29 days old. At that point, I can either file a notice of appeal or not file a notice of appeal. If I file a notice of appeal, then I forfeit any chance of having my Rule 58(c)(2) motion granted, as my

notice of appeal will have been "filed" and become "effective." But if I do not file a notice of appeal, then I am taking a big gamble. It could be that, months from now, my Rule 58(c)(2) motion will be granted. If it is, I can bring my appeal. But it could be that, months from now, my Rule 58(c)(2) motion will be denied. If it is, I'm out of luck.

This is a rather unsettling situation to put attorneys in. More importantly, note that Rule 58(c)(2), by putting no time limitation on when the court must decide the motion, essentially permits a court to extend to forever the time to bring an appeal. Nothing would keep the judge from sitting on my Rule 58(c)(2) motion for two or three years — and, if the judge eventually granted my motion, I'd be free to bring my appeal. In the meantime, my opponent is in limbo, and there is absolutely nothing that it can do to speed things along.

2. Second, as to the lack of a limitation on when a motion must be *brought*: Suppose that, like the attorney in *Wikol*, I do not move for a Rule 58(c)(2) order when I move for attorney's fees. My opponent and I wait for months — years — for my motion for attorney's fees to be decided.

It seems to me that, as long as I don't file a notice of appeal, I can bring a Rule 58(c)(2) motion any time during this waiting period. I could bring it a month from now — a year from now — two years from now — as long as the motion for attorney's fees is still pending. And, if my Rule 58(c)(2) motion is eventually granted, I can appeal the underlying judgment months or years after it was entered. (Indeed, I could file my Rule 58(c)(2) motion even *after* the motion for attorney's fees is decided, although, after 30 days pass, it will be too late for Rule 58(c)(2) to do me any good.)

If I've thought this all through correctly, then it seems to me that the lack of any time limitation on when Rule 58(c)(2) motions must be brought or decided has the potential for creating a lot of mischief and uncertainty. That makes me ask again a question that I do not know enough about Civil Procedure to answer: Would it not be better if we simply provided that a timely Rule 54(d)(2) motion will always be treated like a timely Rule 59 motion: It will automatically suspend the time to appeal until the motion is decided?

Message 6 (from Cooper)

I agree with Pat on each of the two points he makes: (1) As the rules now stand, even a party who moves at the same time for a fee award and to have a fee motion treated as a Rule 59 motion must file a protective notice of appeal within the original appeal period if Rule 59 treatment has not been granted before the period expires. Otherwise the right to appeal may be lost. (2) There is nothing in the rules that prohibits making a motion to treat the fee motion as a Rule 59 motion while the fee motion remains pending (and, accepting *Wikol*, so long as no notice of appeal has been filed by any party). Apparently the motion can be filed even after disposition of the fee motion. That seems a bit extreme.

One fix might be as suggested — any fee motion made within 54(d)(2) time has the same effect as a timely Rule 59 motion. That would lead us to ask again why we should not set the 54(d)(2) period at 10 days. More importantly, it would reverse or confuse the Budinich clear line: judgment on the merits is not final and nothing can be appealed, or else judgment on the merits still is final and can be appealed or not at the option of the parties, or else judgment on the merits is final but any notice of appeal filed before disposition of the fee motion takes effect only on disposition of the motion. If I have not got confused again, we would have to make a choice. Present Rule 58(c)(2) created a discretionary system in the belief that often it is desirable to have an appeal on the merits before fee questions are resolved. Was that a wrong idea?

Separately, Pat has pointed out that not all questions would be answered by the alternative of requiring that the Rule 58(c)(2) question be raised during the initial appeal period. What happens if the judge acts on the fee motion but delays acting on the appeal period until the appeal period runs out as measured from the order deciding the fee motion? We could draft an answer, but we would have to figure out what we want.

Our spouses stay with us because we're obviously having fun with Rule 58. Glee is contagious. So keep the messages coming.

Message 7 (from Schiltz)

I think we now understand the problem. As an aside, and following up on one of Judge Rosenthal's comments: When two reporters to federal rules committees — one of whom is a legendary procederalist — have to work this hard to figure out what the rules mean and what problems they pose, it suggests that the rules are too complex for the typical lawyer and even the typical judge.

At this point, I suggest that, if Judge Alito and Judge Rosenthal agree, we ask our committees to react to the following suggestion: (1) Civil Rule 54(d)(2) be amended so that motions for attorney's fees must be brought within 10 days. (This first suggestion is easily "severable" from the next two.) (2) Civil Rule 58(c)(2) be amended — actually, deleted — so that district courts will no longer have discretion to certify which Rule 54(d)(2) motions toll the time to appeal and which do not. And (3) Appellate Rule 4(a)(4)(A) be amended so that all timely motions for attorney's fees under Rule 54(d)(2) toll the time to appeal, just as all timely Rule 59 motions do.

I think it would be worthwhile to get input from the two committees on this possibility. It might also be worthwhile to ask someone in the A.O. to do a little digging into the "legislative history" so that we can know exactly why such a scheme was rejected by the rulemakers in 1993 in favor of the current discretionary approach.

Ed, I do not think that this approach would undermine *Budinich*. We are not talking about the finality or appealability of judgments here; we are talking about tolling the deadline for filing a notice of appeal seeking review of final and appealable judgments. When a Rule 59 motion is timely filed — or a Rule 60(b) motion is filed within 10 days — they do not render the underlying judgment non-final. That judgment is still final and appealable; parties can still file notices of appeal, and those notices are "good." Rule 59 or 60 motions merely toll the time to file a notice of appeal from that final judgment. Likewise, under this approach, a Rule 54(d)(2) motion would not render the underlying judgment non-final, and thus would not "overrule" *Budinich*.

I suppose that other "fixes" are possible — such as putting time limits on bringing or deciding Rule 54(d)(2) motions — but, frankly, every other "fix" that I've been able to identify would make an already overly complicated set of rules even more complicated. Maybe Ed can do better.

Message 8 (from Cooper)

I'm still confused. I thought the point of Rule 4(a)(4)(B) is that although there is a final judgment, the notice of appeal does not become effective until disposition of the last remaining timely motion described in 4(a)(4)(A). So under the present system, a fee motion made after final judgment is entered does not postpone the effect of a timely appeal notice, nor suspend the time for filing the notice, unless the district court acts under Rule 58(c)(2). The purpose of 58(c)(2), as I had thought, is to carry forward the basic proposition that sometimes it is better to take and resolve the appeal on the merits before deciding the fee questions. If we routinely suspend appeal time until disposition of the fee questions, we are making a real change.

That may be OK if the only purpose of *Budinich* is to establish a bright line; any old bright line will do. It may be OK if *Budinich* chose the wrong bright line — appeal on the merits before resolution of fee issues is so seldom useful that we are better off defeating the opportunity (absent possible entry of a Rule 54(b) judgment on everything but the fee issue — that depends on whether the fee demand is a "claim" separate from the "claim" on the merits). But don't we need to make those decisions in order to justify always treating a Rule 54(d)(2) motion in the same way as a Rule 59 motion?

Message 9 (from Schiltz)

It has been a couple of years since I read *Budinich* (and I'm heading out the door), but I recall it as a finality case — a case that held, in essence, that a motion for attorney's fees does not render the underlying judgment non-final. I could be wrong. . . . But all I meant to say is that *Budinich*'s holding regarding finality would not be affected by the proposed change. Whether we keep the discretionary system or go to an automatic system, the underlying judgments would still be final and appealable whether or not motions for attorney's fees were filed.

Message 10 (from Cooper)

You are right that *Budinich* is only a finality ruling. But the finality ruling explicitly entails the proposition that unless the Civil and Appellate Rules get in the way, the appeal on the merits must be taken within appeal time measured by the rules that apply to a final judgment that resolves the entire dispute. A Rule 59 motion addressed to the merits defers appeal time, and so on. A separate appeal must be taken after disposition of the fee motion. My concern is that the present structure rests on the view that sometimes it is good to have an appeal on the merits before the fee question is resolved, while at other times it is good to defer the appeal on the merits until the fee question is resolved. There are lots of ways that can be accomplished. But my understanding is that if we simply make a timely fee motion equal to a timely Rule 59 motion, the appeal on the merits will always be deferred until the fee motion is decided. Unless, perhaps, Rule 54(b) can be pressed into duty to recreate the discretionary authority to sever the appeals.

So still: do I miss something?

Message 11 (from Schiltz)

I don't think you've missed anything. My assessment is the same as yours.

If we made the change that I propose — propose in the sense of, "we should think about this," not in the sense of, "we should do this" — then it is likely that, in almost all cases, the appeal of the underlying judgment would wait until the motion for attorney's fees was decided, and then a single appeal would bring both decisions up to the court of appeals. And you are right that someone at sometime decided that there is a benefit to going forward with the appeal of the underlying judgment without awaiting disposition of the attorney's fees motion. The question with which I'm struggling — because I don't know enough to answer it — is exactly what this benefit is and in how many cases is it realized.

Suppose, for example, that we learned that Rule 54 motions for fees are almost always accompanied by Rule 58(c)(2) motions, and those Rule 58(c)(2) motions are almost always granted. That would argue in favor of moving forward with the proposal. Suppose, on the other hand, that we learned that the appeals of the underlying judgments almost always go ahead first, and decisions on attorney's fees are usually not made until months later, and either the courts or the parties reap substantial benefits by being able to move the appeal several months along before the attorney's fees motion is decided. That would argue against moving forward with the proposal. The point is that it is impossible to know whether the proposal is advisable without first getting a sense of the day-to-day realities of practice under Rules 54 and 58. One way to get a sense of these day-to-day realities is to talk to the members of our committees who are in court every day. There may be others; perhaps the FJC could help with this. . . .

Message 12 (from Cooper)

So we are in exactly the same place after all. Sorry to have been obtuse about understanding your position.

The empirical questions you suggest are the ones easiest to answer, at least in the sense that someone like the FJC could find the answers. The more uncertain questions may not deserve our concern. Suppose, for example, we found that district courts almost invariably act under Rule 58(c)(2), so all issues await a single appeal: how do we figure out whether that is a good thing? By looking at the affirmance rate as compared to remands that require further fee determinations and potential second appeals? Or suppose we found out that district judges almost never act under Rule 58(c)(2): does that tell us that the experienced judgment of district courts is that dual appeals are better (whatever appeals courts may thing about it), or only that lawyers and courts have not yet learned about all this? And so on.

There well may be a point at which we need not worry over-much about all of that. Getting a rule that is clear and easily remembered by courts and lawyers may be more important than abstract dithering. On the other hand, it would be interesting to know whether there are any signs of distress other than this one case. If we do go into all of this, perhaps we may be pardoned if we decide to do nothing about the parallel finality rule with respect to sanctions. At least some courts have adopted the *Budinich* rule for sanctions — pending sanctions proceedings do not suspend the finality of an otherwise final judgment on the merits. We do not now cover this in 58(c)(2) or 4(a)(4)(A). So why go into it?

Message 13 (from Schiltz)

These are all good questions. I'm inclined to think that, to use your words, "[g]etting a rule that is clear and easily remembered by courts and lawyers may be more important than abstract dithering," but I'm anxious to hear from lawyers and trial judges, who have a lot more relevant experience.

the marijuana was seen "near" to the residence does not necessarily imply a connection between the two, particularly when Lawson knew that the plants were in fact approximately 900 feet from the Carpenter residence. Unlike *Malin*, when the marijuana grew in a fenced-in yard directly adjacent to the house, the marijuana "near" the Carpenters' trailer was far enough away that no officer could draw a firm connection between the two, or between the marijuana and any other residence in the neighborhood for that matter. If the marijuana had been growing next to the trailer or in the patch of corn behind the trailer, the officers' belief in the warrant's validity might have been more reasonable. Furthermore, the road "connecting" the residence to the marijuana plants was in reality a dirt path leading from the Carpenters' trailer to a separate tractor path that may have served as the connection between the city road and a homestead behind the Carpenters' trailer that had burned down several years before. The good-faith exception cannot apply here because Lawson's affidavit was based on two extremely inconclusive connections between the marijuana and the house, and therefore Lawson could not have reasonably believed that probable cause existed.

Because there was no probable cause to justify the search and because I do not believe that a law enforcement officer could form the objectively reasonable belief that the warrant was valid when so little linked the Carpenter residence to the marijuana plants growing "near" the residence, I would reverse the district court and exclude the evidence gathered from the illegal search.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting.

I join Judge Moore's very persuasive dissent and add only the following. Given the sophisticated technologies that the police now have at their disposal, as well as the wide discretion that they currently enjoy, it is especially important that we are careful not to expand their powers beyond what is authorized by the Constitution. In this case, the Constitution has been set aside in the name of expediency. Regrettably, we have descended further down that slippery slope of post-hoc rationalization, where everything that the police do becomes acceptable when viewed in retrospect.

For the reasons set forth by Judge Moore and for these reasons, I respectfully dissent.

Anika WIKOL, by and through her next friends, Murray and Nanette WIKOL, Plaintiff–Appellant/Cross–Appellee,

v.

BIRMINGHAM PUBLIC SCHOOLS BOARD OF EDUCATION, Defendant–Appellee/Cross–Appellant.

Nos. 02–1798, 02–2047.

United States Court of Appeals, Sixth Circuit.

Argued Feb. 5, 2004.

Decided and Filed March 10, 2004.

Background: Parents of autistic child brought Individuals with Disabilities Act (IDEA) action against school district, seeking reimbursement for child's home-based educational program. The United States District Court for the Eastern District of Michigan, Marianne O. Battani, J., entered judgment on jury verdict awarding parents

portion of costs being sought. Cross appeals were taken.

Holdings: The Court of Appeals, Gilman, Circuit Judge, held that:

(1) appeal from underlying judgment was untimely, and

(2) denial of attorney fees was abuse of discretion.

Dismissed in part; vacated and remanded in part.

1. Federal Courts ⇐668

Thirty-day time limit for filing notice of appeal in civil case is mandatory and jurisdictional. F.R.A.P.Rule 4(a)(1)(A), 28 U.S.C.A.

2. Federal Courts ⇐669

When timely post-judgment motion for attorney fees is filed, and district court exercises its discretion to extend time for filing notice of appeal, motion for attorney fees is given same effect as motion to amend or alter judgment, i.e., time to file notice of appeal is reset until attorney fee motion is disposed of. Fed.Rules Civ. Proc.Rules 54, 58, 59, 28 U.S.C.A.; F.R.A.P.Rule 4(a)(4)(A), 28 U.S.C.A.

3. Federal Courts ⇐669

Notice of appeal, filed after district court's post-judgment ruling on attorney fee motion but before filing of motion to extend time for filing notice of appeal, was effective when filed, and thus deprived district court of authority to rule on extension motion; thus, appeal was timely only as to issues decided within thirty days of filing of notice of appeal. Fed.Rules Civ.Proc. Rules 54, 58, 28 U.S.C.A.; F.R.A.P.Rule 4(a)(1, 4), 28 U.S.C.A.

4. Schools ⇐155.5(5)

District court abuses its discretion with regard to attorney fee award in IDEA suit when it relies upon clearly erroneous factual findings, applies law improperly, or uses an erroneous legal standard. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B).

5. Schools ⇐155.5(5)

IDEA's fee-shifting provision is to be interpreted consistent with attorney-fees provision for civil rights actions. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B); 42 U.S.C.A. § 1988.

6. Schools ⇐155.5(5)

Parent of disabled child, who prevails in IDEA suit, is entitled to award of attorney fees unless there are special circumstances militating against such award. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B).

7. Schools ⇐155.5(5)

Parents' submission of allegedly false or misleading billings to school district did not constitute special circumstance that would justify denial of attorney fees after parents prevailed in their IDEA suit. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B).

Richard J. Landau (argued and briefed), Dykema Gossett, Ann Arbor, MI, for Plaintiff–Appellant in 02–1798, 02–2047.

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Before: DAVID A. NELSON, GILMAN, and ROGERS, Circuit Judges.

OPINION

GILMAN, Circuit Judge.

Anika Wikol is a child with autism who is eligible for special education and related services under the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400–1487. She resides within the Birmingham Public School District in Birmingham, Michigan. At issue in this case are her parents' attempts to secure reimbursement from Birmingham for Anika's educational program for the 1998–99 and 1999–2000 academic years.

The Wikols have appealed what they regard as an inadequate award by the jury. They also seek to recover attorney fees, costs, and prejudgment interest, all of which the district court denied. In its cross-appeal, Birmingham challenges the timeliness of the Wikols' appeal with respect to all but their claim for attorney fees and costs. For the reasons set forth below, we agree that the Wikols' appeal was untimely except for these latter items. We accordingly dismiss the bulk of the Wikols' claims for lack of appellate jurisdiction. With regard to their claim for attorney fees and costs, we vacate the decision of the district court denying such relief and remand for reconsideration.

I. BACKGROUND

When Anika was approximately two-and-a-half years old, her parents enrolled her in the preprimary impaired program in the Birmingham public schools. The Wikols soon became dissatisfied with the program. They consequently removed Anika from the public school system and established a full-time home-based alternative program recommended by the Lovaas Institute, a non-profit organization that specializes in educating children with autism. After approximately three years in the Lovaas home-based program, the Wikols decided to partially transition Anika back into the Birmingham public schools.

An "individualized education program team" comprised of the Wikols and members of Anika's school thus convened, pursuant to the IDEA, to develop an individualized education program (IEP) for Anika. At the meeting, Birmingham and the Wikols could not agree upon Anika's educational program because, according to the Wikols, Birmingham refused to (1) provide Anika with an IEP that would support her home-based education, and (2) reimburse the Wikols for their past expenses in providing Anika with the Lovaas program.

This impasse led the Wikols to request a due process hearing pursuant to 20 U.S.C. § 1415(f). The due process hearing did not occur, however, because the parties reached a settlement. Under the settlement agreement, dated April 8, 1998, Birmingham agreed to pay the Wikols $115,000 "as reimbursement for necessary educational services actually incurred or reasonably anticipated to be incurred during the 1994–95 through 1997–98 school years." The agreement further provided that Birmingham and the Wikols would meet to determine Anika's IEP for the following school years, and that if a Lovaas or Lovaas-style program were implemented, Birmingham would pay "one-half of the costs of any such program." Despite the settlement for these prior years, disputes continued between the Wikols and Birmingham regarding reimbursement for the Lovaas program in the 1998–99 and 1999–2000 school years.

In December of 1999, the Wikols again requested a due process hearing to resolve the outstanding reimbursement issues. A local hearing officer was appointed in early 2000, but Birmingham objected to the hearing officer's jurisdiction and requested that the matter be dismissed. Birmingham and the Wikols ultimately stipulated

to the dismissal of the Wikols' request for a due process hearing regarding the two school years in question, opting instead to "seek judicial resolution of the issues."

The Wikols brought suit in May of 2000 against Birmingham in the United States District Court for the Eastern District of Michigan. Eight months later, the Wikols moved for summary judgment, arguing that they were entitled to reimbursement from Birmingham for Anika's home-based Lovaas program. The district court granted the Wikols' motion in part with regard to the 1998–99 school year. It concluded that, pursuant to the settlement agreement, Birmingham owed the Wikols fifty percent of the "costs" of the Lovaas program, but that a genuine issue of material fact existed as to what constituted those costs. With regard to the 1999–2000 school year, the district court denied the Wikols' motion for summary judgment in its entirety.

The case then proceeded to trial, at the end of which the jury awarded the Wikols approximately $5,000 for costs incurred in providing Anika's home-based program for the 1998–99 school year. As for the 1999–2000 academic year, the jury determined that Birmingham's school-based educational program had provided Anika with a "free appropriate public education," and therefore declined to award the Wikols any reimbursement for that year.

Following the district court's entry of judgment on March 27, 2002, the Wikols timely moved for the recovery of attorney fees and costs pursuant to 20 U.S.C. § 1415, which the district court denied. The Wikols appeal from the district court's partial denial of their motion for summary judgment, the jury's verdict concerning the 1999–2000 school year, the district court's denial of their motion for attorney fees and costs, and the district court's denial of prejudgment interest. Birmingham cross-appeals, challenging the timeliness of the Wikols' appeal as to all issues other than their claim for attorney fees and costs.

II. ANALYSIS

A. Timeliness of the Wikols' appeal

We must determine, as a threshold issue, whether we have jurisdiction to hear the bulk of the issues raised in this appeal. On cross-appeal, Birmingham argues that we do not have such jurisdiction because the Wikols filed their notice of appeal late, outside of the time limits imposed by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

[1] Determining the timeliness of the Wikol's notice of appeal requires an analysis of the interplay between Rule 4 of the Federal Rules of Appellate Procedure and Rules 54, 58, and 59 of the Federal Rules of Civil Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides the generally applicable limitation that a notice of appeal in a civil case must be filed "within 30 days after the judgment or order appealed from is entered." A litigant's compliance with this "mandatory and jurisdictional" requirement is of critical importance. 16A Wright et al., Federal Practice and Procedure § 3950.1 (3d ed.1999).

Exceptions to the 30–day rule exist, however. If a party timely files any one of the six post-judgment motions enumerated in Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, other than the one for attorney fees, the time to file an appeal automatically runs for all parties from the entry of the order disposing of the last such remaining motion. The post-decisional motion relevant to this case is of course the one for attorney fees, which was filed pursuant to Rule 54 of the Federal Rules of Civil Procedure. When a liti-

gant files a Rule 54 motion for attorney fees, the time to file a notice of appeal will run from the disposition of that motion "*if* the district court extends the time to appeal under Rule 58." Fed. R.App. P. 4(a)(4)(A)(iii) (emphasis added). The plain language of Rule 4 thus stipulates that in order for the time to file an appeal to be tolled when a party moves for attorney fees under Rule 54, the district court must affirmatively act pursuant to Rule 58 of the Federal Rules of Civil Procedure. Rule 58, in turn, provides that

> [w]hen a timely motion for attorney fees is made under Rule 54(d)(2), the court may act *before* a notice of appeal has been filed and has *become effective* to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Fed.R.Civ.P. 58(c)(2) (emphasis added).

Rule 58's reference to "a timely motion under Rule 59" is initially puzzling, given that Rule 59 neither mentions the filing of a notice of appeal nor refers back to Rule 58. A number of cross-references are necessary to divine Rule 59's place in the Rule 4, 54, 58, 59 quagmire. The only part of Rule 59 that appears relevant to the timeliness of a notice of appeal is 59(e), which provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after the entry of the judgment." If we then look back to Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, we see that a Rule 59 motion to alter or amend the judgment is one of the five enumerated motions that automatically resets the time to file a notice of appeal "from the entry of the order disposing of the . . . motion."

[2, 3] We therefore conclude that when a timely motion for attorney fees is filed under Rule 54, and the district court exercises its discretion under Rule 4(a)(4)(A) to extend the time for filing a notice of appeal, the motion for attorney fees is given the same effect as a Rule 59 motion to amend or alter the judgment, which, pursuant to Rule 4(a)(4)(A), automatically resets the time to file a notice of appeal until the newly characterized Rule 59 motion, formerly a Rule 54 motion for attorney fees, is disposed of. *See Mendes Junior Int'l Co. v. Banco do Brasil,* 215 F.3d 306, 312 (2d Cir.2000) ("Rule 58 expressly describes some of the temporal limitations on the district court's authority to order that a timely Rule 54 fee motion have the same effect as a timely motion under, for example, Rule 59 (which we will sometimes refer to as a 'Rule 58/54/59 order')."). Rule 58 imposes no time limit on when the district court must rule on the Rule 54 motion, except that it must act *before* "a notice of appeal has been filed and has become effective. . . ." This is the nub of the problem, because here the district court acted on the Wikols' Rule 54 motion *after* they had filed their notice of appeal.

On March 22, 2002, the Wikols moved for attorney fees and costs, which the district court denied on May 15, 2002. The Wikols then attempted to take advantage of the tolling provision of Rule 4(a)(4) in a May 24, 2002 motion to extend the time for filing a notice of appeal. Their motion provided in pertinent part as follows:

> 4. Plaintiffs hereby request that pursuant to Fed.R.Civ.P. 58, the Court order that the parties' motions for costs and attorneys' fees have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.
>
> 5. In the alternative, Plaintiffs request that pursuant to Fed.R.Civ.P. 58 and 59(e), the Court amend its May 15, 2002 Order to include a provision stating that the parties' March 22, 2002 motions to assess fees and costs shall be given the

> same effect under Rule 4(a)(4) of the Federal Rules of [Appellate] Procedure as a timely motion under Rule 59.

While this motion was pending in the district court, the Wikols filed their notice of appeal on June 14, 2002. On July 11, 2002, the district court granted the Wikols' motion for an extension of time in which to file a notice of appeal, ruling in pertinent part that

> the court grants the plaintiff's request and pursuant to Fed.R.Civ.P.[ ] 58, the March 22nd motion for costs and attorney fees shall have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Therefore, the time for filing a notice of appeal shall run from the date of the entry of the Court's order on the motion for attorney fees, May 15, 2002.

Birmingham argues that the district court's July 11, 2002 grant of an extension of time to file the notice of appeal was ineffective because it was entered *after* the Wikols filed their June 14, 2002 notice, contrary to the language contained in Rule 58 of the Federal Rules of Civil Procedure that limits the district court's power to act to the time "*before* a notice of appeal has been filed and has become effective...." (Emphasis added.) It contends that when the Wikols filed their notice of appeal on June 14, 2002, the notice became effective immediately; therefore, "[b]y the express terms of Rule 58, the District Court had no authority, on July 11, 2002, to enter its Order Extending the Time for Filing the Notice of Appeal."

In response, the Wikols argue that although they had *filed* their notice of appeal before the district court entered its Rule 58/54/59 order, "it is indisputable that the notice of appeal as to the underlying judgment had not yet become effective." They reason that because the notice of appeal was filed outside of Rule 4(a)(1)'s prescribed time period, it could only become effective upon some action of the district court triggering one of the exceptions to the 30–day limit. The Wikols conclude that their notice of appeal "became effective upon the district court's entry of its July 11, 2002 Memorandum and Order." For the reasons that follow, we respectfully disagree.

The key issue is whether the notice of appeal became effective prior to the time the district court issued its July 11, 2002 order. We look to Rule 4(a)(4)(B)(i) of the Federal Rules of Appellate Procedure for guidance as to the meaning of the word "effective." This portion of Rule 4 provides as follows:

> If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

Rule 4(a)(4)(B)(i) does not apply here because the Wikols' notice of appeal was filed *after* the entry of the order disposing of their Rule 54 motion, not before. The rule suggests, however, that the concept of "effectiveness" is limited to delaying the transfer of jurisdiction to the appellate court from an otherwise timely filed notice of appeal until the relevant post-judgment motion is decided. Supporting this interpretation are the advisory notes to Rule 4, which explain that

> [a] notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.... [A] notice of appeal will ripen

> into an effective appeal upon disposition of a posttrial motion....

Fed. R.App. P. 4(a)(4) advisory committee's notes.

Based upon this understanding of the word "effective," we hold that the Wikols' notice of appeal was effective on the day that it was filed, given that the judgment had been entered and that no motions that automatically toll the time to file a notice of appeal were pending. We therefore agree with Birmingham that the district court's July 11, 2002 order did not comply with the time requirements of Rule 58.

As a final comment on this issue, we cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. *See generally,* Kenneth J. Servay, *The 1993 Amendments to Rules 3 and 4 of the Federal Rules of Appellate Procedure—A Bridge Over Troubled Water—Or Just Another Trap?,* 157 F.R.D. 587, 605 (1994) (noting that the amended Rule 4 "concerning the effect of post-judgment motions for attorney's fees" on the timeliness of a notice of appeal creates a "jurisdictional trap."). The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) *automatically* extend the time to file an appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure.

In any event, we have no choice but to dismiss the Wikols' appeal as untimely with respect to all but their claim for attorney fees and costs. "[E]ven where the attorney's fee motion is filed before the notice of appeal, under the wording of [Rule 58], that motion would not extend the appeal time unless the district court also extended the appeal time before the notice of appeal was filed." Servay at 606. This leaves us with the remaining issue regarding the Wikols' request for attorney fees and costs, as to which the appeal was indisputably timely. We now turn our attention to this issue.

B. The district court's denial of attorney fees and costs to the Wikols

Following the district court's entry of judgment, the Wikols filed a motion for the recovery of attorney fees and costs pursuant to 20 U.S.C. § 1415. The district court denied the Wikols' motion, reasoning that although they were technically the prevailing parties, they did not prevail on the bulk of their case and they were therefore not entitled to attorney fees or costs. On appeal, the Wikols argue that the district court erred because they were undeniably the prevailing party and because there were no "special circumstances" justifying a denial of fees.

The IDEA provides that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. 1415(i)(3)(B). To be considered a "prevailing party" for the purpose of attorney fees, a plaintiff must "succeed on any significant issue in litigation which achieves some of the benefit the part[y] sought in bringing suit." *Berger v. Medina City Sch. Dist.,* 348 F.3d 513, 526 (6th Cir.2003) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The district court found that the Wikols were a prevailing party because they had obtained a favorable judgment regarding reimbursement for Anika's schooling during the 1998–99

academic year. Birmingham does not contest the Wikols' prevailing-party status.

[4] We review a district court's decision of whether to award attorney fees under the "abuse of discretion" standard. *Phelan v. Bell*, 8 F.3d 369, 373 (6th Cir. 1993). A district court abuses its discretion when it relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard. *Id.*

[5, 6] The IDEA's fee-shifting provision is to be interpreted consistent with 42 U.S.C. § 1988, the attorney-fees provision for civil rights actions. *Id.* Sixth Circuit case law requires that a district court award attorney fees to a prevailing party where no special circumstances militate against such an award. *Berger v. City of Mayfield Heights*, 265 F.3d 399, 406 (6th Cir.2001) ("[W]e have previously observed that although the Supreme Court has held [that] ... it is within the district court's discretion to award attorney's fees under section 1988, in the absence of special circumstances a district court not merely may but must award fees to the prevailing plaintiff.") (quotation marks and citation omitted).

The Ninth Circuit has adopted a two-prong test to determine whether special circumstances exist, presumably in an effort to define "special circumstances" more precisely. Under this test, a court must consider "(1) whether awarding fees would further the congressional purpose in enacting [the IDEA], and (2) the balance of the equities." *Barlow–Gresham Union High School v. Mitchell*, 940 F.2d 1280, 1285 (9th Cir.1991). Although the use of such a test gives the appearance of a systematic approach to defining "special circumstances," we question whether the Ninth Circuit's factors, due to their vagueness, render the test any more useful than the customary case-by-case analysis.

The Fourth Circuit has rejected the *Mitchell* test, reasoning that it "contains no real standards and provides no legitimate reason for departing from the usual rule of awarding reasonable fees to prevailing plaintiffs under fee-shifting statutes." *Doe v. Bd. of Educ. of Baltimore County*, 165 F.3d 260, 264 n. 2 (4th Cir. 1998) (holding that an attorney-parent's representation of his own daughter in an IDEA proceeding constituted special circumstances that justified the denial of an award of attorney fees). *But see Borengasser v. Arkansas State Bd. of Educ.*, 996 F.2d 196, 199 (8th Cir.1993) (holding that the district court abused its discretion in not awarding attorney fees to the parents of a disabled child in an IDEA action where the school district had argued a lack of effort to resolve the dispute on the part of the parents' attorney). We agree with the Fourth Circuit's approach that attorney-fees awards should be analyzed on a case-by-case basis, without attempting to apply any predetermined formula.

[7] Birmingham argues that the Wikols' allegedly "false and misleading" billings to Birmingham constitute special circumstances that justify denying their request for attorney fees. But this court has rejected the argument that a plaintiff's bad acts are special circumstances warranting the denial of attorney fees. *Price v. Pelka*, 690 F.2d 98, 101 (6th Cir. 1982) (holding that the plaintiff's perjury was not a special circumstance that warranted a denial of attorney fees in a housing discrimination case). Given this precedent, the record does not support a finding of special circumstances warranting the denial of attorney fees to the Wikols, even if we assume that some billings were false or misleading. We therefore remand the issue of attorney fees and costs to the district court.

On remand, the district court should take into consideration the extent to which the Wikols succeeded on their claims. *See Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) ("[W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.") The Wikols may well receive reimbursement for only a fraction of their total legal fees under the *Eckerhart* standard but, under this court's precedents, their "limited success" should not have acted as a total bar to recovery.

Birmingham also argues that the Wikols are barred from attorney fees under 20 U.S.C. § 1415(i)(3)(D), which provides that a plaintiff will not be awarded attorney fees where he or she rejects a written settlement offer and the court finds that the relief obtained by the plaintiff is not more favorable than the offer of settlement. The settlement-offer exception to an award of attorney fees might indeed bar the Wikols from recovery, but the district court did not make the requisite finding that the relief obtained by the Wikols was less favorable than whatever offer Birmingham may have made. On remand, the district court should therefore consider 20 U.S.C. § 1415(i)(3)(D)'s potential applicability to this case.

III. CONCLUSION

For all of the reasons set forth above, we conclude that the Wikols' notice of appeal was untimely as to the bulk of their claims. We therefore have jurisdiction only over the district court's denial of attorney fees and costs, which decision we vacate and remand with instructions to reconsider.

Raymond ZIMMERMAN, Individually and on behalf of a Class of Similarly Situated Soybean Farmers, et al., Plaintiffs–Appellants, Cross–Appellees,

v.

CHICAGO BOARD OF TRADE, Patrick H. Arbor, Thomas R. Donovan, et al., Defendants–Appellees, Cross–Appellants.

Nos. 02–3844, 02–3997.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 25, 2003.

Decided Feb. 9, 2004.

Background: Soybean farmers brought class action against board of trade, alleging that board violated Commodity Exchange Act in adopting Emergency Resolution requiring holders of futures contracts in soybeans to reduce their positions. At trial, following close of evidence, the United States District Court for the Northern District of Illinois, Wayne R. Andersen, J., granted judgment as matter of law to board. Farmers appealed.

Holdings: The Court of Appeals, Cudahy, Circuit Judge, held that:

(1) board did not act in bad faith in adopting Emergency Resolution, and

(2) there was no evidence that board adopted Emergency Resolution to advance directors' own private interests.

Affirmed.

1. Federal Courts ⇐698.1

Motion to strike matter from appellate record on ground that it is not proper-

04-AP-C

AVE MARIA
SCHOOL OF LAW

May 24, 2004

Peter G. McCabe
Secretary
Standing Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

Please refer this proposal for amendment to Rule 4(a)(4)(A)(iii) of the Federal Rules of Appellate Procedure to the Advisory Committee on Appellate Rules.

In *Wikol v. Birmingham Public Schools Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004), the U.S. Court of Appeals for the Sixth Circuit addressed an interesting issue of federal appellate procedure, expressly inviting consideration by the Advisory Committee on Appellate Rules. *See id.* at 610. I write at this time to elaborate on the issue and to offer proposals.

Ordinarily, a party to a civil action must file a notice of appeal within 30 days of entry of the order or judgment to be challenged on appeal. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1). However, if a party timely files one of the six post-judgment motions listed in Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Fed. R. App. P. 4(a)(4)(A). The motions in question are: (1) a Rule 50(b) motion for judgment as a matter of law; (2) a Rule 52(b) motion to amend the judgment or to make additional factual findings; (3) a Rule 54 motion for attorney fees; (4) a Rule 59 motion to alter or amend the judgment; (5) a Rule 59 motion for a new trial; and (6) a Rule 60 motion for relief from the judgment. *See* Fed. R. App. P. 4(a)(4)(A)(i)-(vi).

At issue in *Wikol* was the effect that a timely post-judgment motion for attorney fees had on the time to appeal from the underlying judgment. Under Rule 4(a)(4)(A)(iii), the time to appeal such a judgment does not begin to run until after the district court disposes of a timely motion "for attorney fees under Rule 54 *if the district court extends the time for appeal under*

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Rule 58." Fed. R. App. P. 4(a)(4)(A)(iii) (emphasis added). Because of the presence of the emphasized language, a timely motion for attorney fees, unlike the other five motions listed in Rule 4(a)(4)(A), does not automatically prolong the time for appeal from the judgment. Rather, the motion will prolong the time for appeal if, and only if, the district court affirmatively acts. The basis for affording such discretion to a district court is that the attorney-fees determination might be best left until after the appeal concludes, especially when the decision on appeal could obviate the need to address the attorney-fees issue in the first place. *See* Fed. R. Civ. P. 58, 1993 Advisory Committee Note.

When a district court confronted with a motion for attorney fees acts to extend the time for appeal from the underlying judgment, a court of appeals must work through a number of interrelated provisions to determine whether the action had the desired effect. The process begins, of course, with Rule 4(a)(4)(A)(iii). Read in conjunction with Rule 4(a)(4)(A), the provision states that a timely motion for attorney fees will delay the time for appeal "if the district court extends the time for appeal under Rule 58." Fed. R. App. P. 4(a)(4)(A)(iii). First and foremost, therefore, the court must determine whether the motion was timely, which involves a review of Rule 54(d)(2)(B) (requiring that such a motion for attorney fees be brought within 14 days after entry of judgment). If the motion was indeed timely, the court must then consult Rule 58 to understand the manner in which a district court is expected to effect an extension of the time for appeal. In particular, Rule 58(c)(2) provides that "[w]hen a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under [Rule 4(a)(4)(A)] as a timely motion under Rule 59." Fed. R. Civ. P. 58(c)(2). Given Rule 58(c)(2)'s reference to Rule 59, the court must return to Rule 4(a)(4)(A) to ascertain the effect of a timely Rule 59 motion. *See* Fed. R. App. P. 4(a)(4)(A)(v).

Only after examining the various provisions can a court of appeals derive the governing principle: a timely motion for attorney fees will prolong the time to appeal from the underlying judgment only if the district court renders an order to that effect before a notice of appeal has been filed and becomes effective. The question for the Committee is whether the current framework imposes unnecessary difficulty upon the courts of appeals, as well as the litigants. The Sixth Circuit in *Wikol* made its view on the matter abundantly clear:

> As a final comment on this issue, we cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) *automatically* extend the time to appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure.

360 F.3d at 610 (internal citation omitted) (emphasis in original).

If the Committee finds merit in the *Wikol* court's sentiment, there are various alternatives for reform. Of course, motions for attorney fees could be easily synchronized with the other Rule 4(a)(4)(A) motions were the "if the district court extends the time to appeal under Rule 58" language of Rule 4(a)(4)(A)(iii) simply abrogated. But such an approach would fly in the face of sound policy by depriving the district court of the flexibility to take a wait-and-see approach in connection with an attorney-fees determination. *See* Fed. R. Civ. P. 58, 1993 Advisory Committee Note.

A preferable solution would bring motions for attorney fees into line with other Rule 4(a)(4)(A) motions, while permitting district courts to continue determining the ultimate effect of a timely motion for attorney fees. Under this approach, Rule 4(a)(4)(A)(iii) would be amended to shift the current default rule—that a timely motion for attorney fees has no effect on the time to appeal—to one under which a timely motion for attorney fees *automatically* extends the time for appeal. If, however, the district court would prefer to consider the motion for attorney fees only after the appeal of the underlying judgment concludes, it would retain discretion to do so. Below is proposed language reflecting this suggested amendment:

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * *

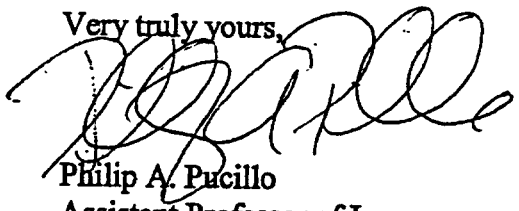
(iii) for attorney's fees under Rule 54 ~~if the district court, extends the time to appeal under Rule 58~~ unless the district court orders that the motion shall not affect the time to appeal, in which event the time to appeal shall run from the later of the date of such order or the order disposing of the last remaining motion under this Rule 4(a)(4)(A);

The revised provision must set forth some point at which the time for appeal will begin to run in the event that the district court defers adjudication of a timely motion for attorney fees until after conclusion of the appeal from the judgment. It follows that the district court's order to that effect would trigger the time for appeal. At the same time, the revised provision must account for the possibility that other Rule 4(a)(4)(A) motions will be pending when the district court enters its order. If such motions are indeed pending, the time to appeal cannot run until the district court has entered its order disposing of the last such remaining motion. *See* Fed. R. App. P. 4(a)(4)(A).

I note in closing that the proposed amendment to Rule 4(a)(4)(A)(iii) would require coordination with the Advisory Committee on Civil Rules. Specifically, Rule 58(c)(2) (providing that "[w]hen a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under [Rule 4(a)(4)(A)] as a timely motion under Rule 59.") would be irreconcilable with the revised framework.

I hope that the Committee finds this analysis to be helpful.

Very truly yours,



Philip A. Pucillo
Assistant Professor of Law

Enclosure

II. H. Indicative Rulings

1. The Problem

The specific problem addressed by the Solicitor General's proposal described below is one illustration of the more general proposition that a pending appeal ousts district-court jurisdiction to act on the same matter. A common example is a motion for relief from a judgment under Civil Rule 60(b) filed after an appeal is docketed. A district court cannot grant relief from a judgment that is pending on appeal, and for good reason. At the same time, only the district court should decide the questions that may be raised by the Rule 60(b) motion. And to complicate matters further, a pending appeal does not toll the time to file a Rule 60(b) motion -- it must be made within a reasonable time, and for the more common grounds enumerated in (1), (2), and (3) no more than one year after the judgment was entered. The result is that the motion should be filed in the district court, and often will be timely only if filed while the appeal is pending. What is the district court to do with a motion that it cannot grant?

Almost all of the circuits have converged on a common answer. The district court may consider the Rule 60(b) motion notwithstanding a pending appeal. This makes sense. The issues may be better resolved if they are explored promptly. And if the district court believes that the judgment should be vacated, further appellate proceedings may prove pointless. At the same time, the district court may be wrong in thinking that relief should be granted, or -- although right -- may not be in a good position to proceed further without disposition of the issues that remain open on appeal. Once the district court has considered the motion, it may do one of two things. It can deny

the motion; the denial is a separate final decision that can be appealed by filing a new notice of appeal. Or the district court can "indicate" that it would grant the motion (or would want to explore the question further) if the case were remanded from the court of appeals. The court of appeals, once informed that the district court believes that relief should be granted or at least explored further, then decides whether to remand for that purpose. Appellate control is ensured, but an efficient and effective procedure is provided to inform the court's exercise of discretion.

If there is indeed a workable procedure, why consider a Civil Rules amendment? One reason is that the courts of appeals are not unanimous. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2873. The Ninth Circuit follows a variant approach that insists the district court lacks jurisdiction either to grant or deny the motion; it can consider the motion and indicate what it would or might do if it had jurisdiction, but no more. The Ninth Circuit has not given any sign of distress with this approach, however, and standing alone the variation does not suggest a pressing need for revision. Lawyers who practice on a national scale -- including the Department of Justice -- would benefit from a uniform national approach, but the practical need may not be great.

A more pressing reason for considering a new rule provision is that although a clear practice is rather well established, many lawyers and not a few district judges do not know of it. Nor, apparently, do they always think to consult a treatise or practice manual for advice. Cases continue to appear in which a district court either believes that it cannot consider a Rule 60(b) motion while an appeal is pending or undertakes to grant relief when it cannot. An explicit rule provision may avoid missteps that can result in significant delays. For example, if a district court believed it could

not consider the merits of a Rule 60(b) motion, the appellate court would have to remand for the limited purpose of enabling the district court to indicate whether it might grant the motion or would want to consider it further, even before the appellate court could decide whether to remand for that purpose. At a minimum, an explicit rule would bring attention to the proper practice.

An explicit rule also can provide a clear procedure for coordinating proceedings in both courts. It can require that the court of appeals be notified when a motion is filed in the district court, providing an opportunity to defer consideration of the appeal or -- although it seems less likely-- to direct that consideration of the motion be stayed while the court of appeals concludes its own proceedings. The court of appeals also should be notified when the district court has either denied the motion or indicated that it would like to have the case remanded so that it can proceed further; an explicit procedure will expedite this step, and again ensure the court of appeals's coordinating control.

Similar questions arise outside the Rule 60(b) context. District courts retain authority to do many things while an interlocutory appeal is pending, but ordinarily the appeal defeats authority to modify the very order that is the appeal subject. The approach to possible revisions will depend on whether it seems desirable to expand the new rule to include such settings. For example, it has been ruled that a district court cannot vacate a preliminary injunction that is pending on appeal -- as with a final judgment and a Rule 60(b) motion, it can only indicate that it would do so if the case were remanded. *See N.W. Enterprises Inc. v. City of Houston,* 5th Cir.2004, 372 F.3d 333, 338. A

decision to draft a rule that reaches these settings might lead to a new rule -- tentatively dubbed Rule "62.1" -- rather than an addition to Rule 60.

2. The Solicitor General's Proposal

On March 14, 2000, Solicitor General Seth P. Waxman proposed to Judge Garwood, as chair of the Appellate Rules Advisory Committee, an amendment to the Appellate Rules to set out the "indicative ruling"procedure.

The background to the proposal is set out in Solicitor General Waxman's letter. As noted, the differences among the circuits and widespread lack of awareness of this procedure -- the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals" -- make a consistent and clear national rule helpful. In addition, the Supreme Court's ruling that a court of appeals need not vacate a district court judgment when an appeal is mooted by settlement may create a new need for advice from the district court. The parties to an appeal may be able to settle only if they can persuade the district court to vacate the judgment; providing a procedure for an indication by the district court will lead to settlement of more "cases on the docket of the appellate courts."

The proposal was limited to civil actions because "post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters."

The Appellate Rules Committee considered this proposal in April 2000 and April 2001. Judge Garwood reported that although committee members "seemed to have a variety of views on

the merits of the proposal and on the drafting of the proposed rule," "the committee concluded unanimously" that any rule should be included in the Civil Rules, not the Appellate Rules. Reliance on the Civil Rules makes sense because the court of appeals plays only a minor role in the process. The first line of action is in the district court. The court of appeals becomes involved only if the district court indicates a desire to grant relief, and then "a routine motion to remand is made in the appellate court."

3. A Rule 60-Only Proposal

The draft rule submitted by the Solicitor General is long; the draft Committee Note is even longer. It is framed as a new Appellate Rule. In drafting Civil Rules alternatives it has seemed better to absorb the central ideas without attempting direct adaptation to the Civil Rules context. The simplest alternative is to frame a procedure only for Rule 60 motions.

Present rules provide some models for consideration. The closest is Civil Rule 60(a), which allows correction of clerical mistakes and mistakes arising from oversight or omission. The relevant part, as expressed by the Style Project, says: "But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave." Although there have been no suggestions to revise this provision, it may be desirable to modify it to conform to whatever "indicative ruling" model is adopted for more general purposes.

The other model is Criminal Rule 33(b)(1), which sets a three-year limit on a motion for a new trial grounded on newly discovered evidence, and adds: "If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case." At least one court has

adopted an indicative ruling procedure for this rule that parallels the most common practice for Civil Rule 60(b) motions: the district court can entertain and deny the new-trial motion while an appeal is pending, or indicate that it is inclined to grant the motion so that the movant can seek remand from the court of appeals. *U.S. v. Camacho*, 2d Cir.2002, 302 F.3d 35. (There is no apparent need to draft a Civil Rule for new trial motions. A timely new-trial motion suspends appeal time and also suspends a notice of appeal filed before the motion. It is difficult to imagine a timely new trial motion made while an appeal is pending from the judgment that would be affected by the motion. The most likely event that might counsel remand from the appellate court would be an appeal from a partial final judgment under Rule 54(b), followed by a new trial motion that involves different claims or parties but that also calls into question the judgment that is pending on appeal. That situation seems best addressed by a Rule 60 motion addressed to the judgment pending on appeal.)

These two models are rule-specific. The most modest approach would be to add something similar to Civil Rule 60(b), perhaps combining a modified version of present Rule 60(a) in provision that governs all Rule 60 motions. For example, a new paragraph (3) could be added to Style Rule 60(c), deleting the somewhat similar provision now in Rule 60(a). The simplest version would mimic Criminal Rule 33(b)(1):

Rule 60. Relief From a Judgment or Order

* * * * *

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time -- and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order of the date of the proceeding.

(2) Effect on Finality. ~~The~~ A motion under Rule 60(b) does not affect the judgment's finality or suspend its operation.

(3) Appeal Pending. If an appeal [has been docketed and[12]] is pending, the court may entertain an otherwise timely motion under Rule 60 and deny the motion or indicate that it [might][would[13]] grant the motion if the appellate court remands [for that purpose[14]].

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[12] "Has been docketed and is pending" is taken from Style Rule 60(a), which indeed uses many more words: "But after an appeal has been docketed in the appellate court and while it is pending * * *." Apparently "has been docketed" is used to set a clear rule for the time between filing a notice of appeal in the district court and docketing in the court of appeals. "Is pending" is used to restore district-court authority after the appeal concludes.

[13] The choice between "might" and "would" probably should favor "might." The district court may prefer not to commit itself, to indicate that the motion raises important issues that will require further work that does not seem justified unless it has clear authority to grant the motion.

[14] We may not need "for that purpose." It may be implicit that the district court is addressing a remand before the appeal is decided and remanded -- perhaps by a mandate that seems to conclude all proceedings.

A lengthier alternative would come closer to the Solicitor General's all-purpose model, describing notice to the court of appeals and a remand procedure:

> **(3) Appeal Pending.** If a motion under Rule 60 is made while an appeal is pending:
>
> **(A)** the movant must notify the clerk of the appellate court[15] when the motion is filed and when the district court rules on the motion;
>
> **(B)** the district court may deny the motion, or indicate that it [might][would] grant the motion if the appellate court remands for that purpose; and
>
> **(C)** if the district court indicates that it [might][would] grant the motion, the movant may ask the appellate court ~~[in its discretion]~~[16] to remand the action to the district court.

Committee Note

Paragraph 60(c)(3) is added to make uniform the practice followed by most courts of appeals. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60 motion. But it can entertain the motion and either deny it or indicate that it might grant the motion if the action is remanded.

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[15] In the Style Rules we say "circuit clerk," a term also used in the Appellate Rules. It has met some resistance, but might be used here for the sake of uniformity. On the other hand, review may be pending in the Supreme Court. ("appeal" seems loose enough to include certiorari -- it is the word used Rule 60(a), and also in Criminal Rule 33(b)(1).)

[16] The Style Project conventions probably weigh against an explicit recognition that remand is a matter of appellate discretion. This may be an "intensifier."

[To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court when the motion is filed in the district court and again when the district court rules on the motion. If the district court indicates that it might grant the motion, the movant may ask the appellate court to remand the action so that the district court can make its final ruling on the motion. Remand is in the appellate court's discretion. The appellate court may remand all proceedings, or may remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to do so. The district court is not bound to grant the motion after indicating that it might do so; further proceedings on remand may show that the motion ought not be granted.]

4. A Proposal Reaching Beyond Rule 60 Motions

The Solicitor General's proposal deliberately reached beyond the Rule 60 setting. There are many other circumstances in which a pending appeal casts doubt on the trial court's authority to act in a case. One given special attention by the Solicitor General involves settlement pending appeal from a final judgment. The district court has discretion to vacate its judgment, a matter not covered by Rule 60. The Solicitor General believes that it is important to facilitate settlements pending appeal by allowing the parties to obtain an indicative ruling that the district court will vacate the judgment if the action is remanded.

Many other circumstances arise in which an action remains pending in the district court while an interlocutory appeal is pending. The permissive interlocutory appeal statute, § 1292(b), and the similar class-action appeal provision in Rule 23(f), expressly provide that an appeal does not stay district-court proceedings unless a stay is ordered by the district court, the appellate court, or – in § 1292(b) – a judge of the appellate court. Those provisions seem to obviate the need for an indicative

ruling rule. But there are no similar provisions for interlocutory appeals under § 1292(a), much less for the elaborations that permit final-decision appeals under § 1291 before final judgment. District courts do retain authority to act in the case, and there is no apparent reason to limit these existing district-court authorities. An interlocutory injunction appeal, for example, does not oust district-court jurisdiction to carry on many proceedings, including entry of judgment on the merits. But collateral-order appeals present special questions: immunity appeals, for example, are designed to protect against the burdens of trial and even pretrial proceedings, while a security appeal may have quite different consequences. Drawing by analogy on the procedures crafted to permit continuing proceedings in a criminal prosecution pending a frivolous pretrial double-jeopardy appeal, at least some courts permit continued district-court proceedings if the district court "certifies" that the immunity appeal is frivolous. It does not seem feasible to draft a rule that comprehensively and accurately restates district court authority to act while some aspect of a case is pending on appeal. It is important to draft in a way that does not interfere with this authority by implication. The best approach may be to refer in general terms to principles that exist outside the rules.

The following draft is simply a sketch to illustrate the form a comprehensive rule might take. It is described as Rule 62.1, bringing it within Civil Rules Part VII (Judgments). An alternative might be to resurrect the appeals numbers beginning with Rule 74.

Rule 62.1 Indicative Rulings

(a) A district court may entertain an otherwise timely motion [under these rules[17]] to alter, amend, or vacate a judgment[18] that is pending on appeal [and that cannot be altered, amended, or vacated without permission of the appellate court][19] and

(1) deny the motion, or

(2) indicate that it [might][would] grant the motion if the appellate court ~~should~~ remand<u>s</u> for that purpose.

---

[17] These words attempt to foreclose the risk that Rule 62.1 might be read to imply a new and independent authority to challenge a "judgment." Is there a better way?

[18] "judgment" is used because of Rule 54(a). In the Style version: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." If the district court's action is pending on appeal, it is a judgment unless the appeal should be dismissed for lack of appeal jurisdiction. (It does not seem worthwhile to draft an exception that allows a district court to act when there is no appeal jurisdiction. In most situations the court of appeals should decide on its own jurisdiction. There may be a problem with frivolous immunity appeals, an area in which at least some courts of appeals allow the district court to proceed.)

[19] Although these words may seem redundant, they are designed to do at least two things. First, they establish that this rule does not interfere with district-court action when independent rules allow it to act without appellate permission. Second, they leave open the way for district-court action when the claim of appeal jurisdiction is patently wrong.

(b) The movant must notify the clerk of the appellate court when the motion is filed and when the district court rules on the motion.

(c) If the district court indicates that it [might][would] grant the motion, the movant may ask the appellate court ~~[in its discretion]~~ to remand the action to the district court.

Committee Note

[The Committee Note would parallel the Note for the simpler Rule 60 model. In addition it should make clear that subdivision (a) does not address a judgment that the district court can change or supersede without appellate permission.]

"Indicative Rulings"

On March 14, 2000, Solicitor General Seth P. Waxman proposed to Judge Garwood, as chair of the Appellate Rules Advisory Committee, an amendment to the Appellate Rules. The amendment would address a common procedure that at times is characterized as an "indicative ruling." The problem arises when a notice of appeal has transferred jurisdiction of a case to the court of appeals. A party may seek to raise a question that is properly addressed to the district court — a common example is a motion to vacate the judgment under Civil Rule 60(b). As a rough statement, the most workable present approach is that the district court has jurisdiction to deny the motion but lacks jurisdiction to grant the motion. If persuaded that relief is appropriate, the district court can indicate that it is inclined to grant relief if the court of appeals should remand the action for that purpose. The court of appeals can then decide whether to return the case to the district court. This procedure, however, is not securely entrenched; different approaches are taken. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2873. Additional detail is provided in Solicitor General Waxman's letter.

The proposal to adopt a court rule was made for several reasons. First, differences remain among the circuits. A uniform national procedure seems desirable. Second, experience shows "that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals." Third, the Supreme Court's ruling that a court of appeals need not vacate a district court judgment when an appeal is mooted by settlement creates a new need for advice from the district court. The parties to an appeal may be able to settle only if they can persuade the district court to vacate the judgment; providing a procedure for an indication by the district court will lead to settlement of more "cases on the docket of the appellate courts."

The proposal was limited to civil actions because "post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters."

The Appellate Rules Committee considered this proposal in April 2000 and April 2001. Judge Garwood reported that although committee members "seemed to have a variety of views on the merits of the proposal and on the drafting of the proposed rule," "the committee concluded unanimously" that any rule should be included in the Civil Rules, not the Appellate Rules. Reliance on the Civil Rules makes sense because the court of appeals plays only a minor role in the process. The first line of action is in the district court. The court of appeals becomes involved only if the district court indicates a desire to grant relief, and then "a routine motion to remand is made in the appellate court."

If a civil rule is to be adopted, it should be tailored to the transfer of jurisdiction effected by an appeal. There is no apparent reason to limit existing district-court freedoms to act pending appeal. An interlocutory injunction appeal, for example, does not oust district-court jurisdiction to carry on many proceedings, including entry of judgment on the merits. Section 1292(b) and Civil Rule 23(f) expressly address stays of district-court proceedings. Collateral-order appeals present special questions: immunity appeals, for example, are designed to protect against the burdens of trial and even pretrial proceedings, while a security appeal may have quite different consequences. It does not seem desirable, however, to limit any new rule to appeals from "final" judgments.

The following draft is simply a sketch to illustrate the form a rule might take. It is described as Rule 62.1, bringing it within Civil Rules Part VII (Judgments). An alternative might be to resurrect the appeals numbers beginning with Rule 74.

RULE 62.1 INDICATIVE RULINGS

(a) A district court may entertain an otherwise timely motion to alter, amend, or vacate a judgment that is pending on appeal [and that cannot be altered, amended, or vacated without permission of the appellate court] and

(1) deny the motion, or

(2) indicate that it would grant the motion if the appellate court should remand for that purpose.

(b) A party who makes a motion under Rule 62.1(a) must notify the clerk of the appellate court when the motion is filed and when the district court rules on the motion.

(c) If the district court indicates that it would grant a motion under Rule 62.1(a)(2), a party may move the appellate court to remand the action to the district court. The appellate court has discretion whether to remand.

(d) This Rule 62.1 does not apply to relief sought under Federal Rule of Appellate Procedure 8, nor to proceedings under Title 28, U.S.C., §§ 2241, 2254, and 2255.

Committee Note

[The Committee Note should make clear that subdivision (a) does not address a judgment that the district court can change or supersede without appellate permission.

[Subdivision (c) calls for remand of the action. It might be better to retain jurisdiction of the appeal, with a limited remand for the purpose of ruling on the motion in the district court. Much would depend on the nature of the relief indicated by the district court. If there is to be a new trial, outright remand makes sense. If the judgment is to be amended and re-entered, retained jurisdiction may make better sense.]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Chambers of
WILL GARWOOD
Circuit Judge

903 San Jacinto Boulevard
Austin, Texas 78701
512/916-5113

May 14, 2001

The Honorable David F. Levi
United States District Court for
the Eastern District of California
501 I Street — 14th Floor
Sacramento, CA 95814

Dear Judge Levi:

Last year, the Department of Justice asked the Advisory Committee on Appellate Rules to amend the Federal Rules of Appellate Procedure ("FRAP") to explicitly authorize the use of a procedure known as an "indicative ruling." A copy of Solicitor General Waxman's March 14, 2000 letter to me is enclosed. The letter describes the indicative ruling procedure at some length.

The Appellate Rules Committee discussed this proposal at both its April 2000 and April 2001 meetings. The members of the Committee seemed to have a variety of views on the merits of the proposal and on the drafting of the proposed rule and Committee Note submitted by the Department of Justice. However, the Committee concluded unanimously that if the rules of practice and procedure are to be amended to include provisions authorizing and regulating indicative rulings, those provisions should be located in the Federal Rules of Civil Procedure ("FRCP"), and not in FRAP.

The proposed rule would authorize parties to file post-judgment motions found in the FRCP (not in FRAP) in the district court (not in the appellate court) and would authorize the district court (not the appellate court) to issue a particular type of ruling. The appellate court has almost no involvement in the indicative ruling procedure unless and until the district court indicates that it would grant the post-judgment motion, in which case a routine motion to remand is made in the appellate court. At bottom, the proposed rule on indicative rulings is a rule that would govern a district court's consideration of post-judgment motions listed in the FRCP; as such, the proposed rule belongs in the FRCP. This point is reinforced by the fact that Rule 33 of the Federal Rules of Criminal Procedure, the closest existing analog to the proposed rule on indicative rulings, is found in the criminal rules, not in the appellate rules.

For these reasons, our Committee has decided to leave this proposal in the good hands of your Committee. Please don't hesitate to contact me if you have any questions. I look forward to seeing you in Philadelphia in June.

Sincerely,

Will Garwood

Enclosure

cc: Dean Patrick J. Schiltz (w/o enc.)
Prof. Edward H. Cooper (w/ enc.)
Mr. Douglas Letter (w/o enc.)
Mr. John K. Rabiej (w/o enc.)

00-04

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 14, 2000

The Honorable William L. Garwood
United States Court of Appeals
for the Fifth Circuit
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Proposed Amendment to FRAP to Establish a New Rule Governing "Indicative Rulings" by District Courts

Dear Judge Garwood:

The Department of Justice proposes creation of a new provision in the Federal Rules of Appellate Procedure (FRAP) to cover the use of a procedure commonly referred to in civil cases by the courts of appeals as seeking an "indicative ruling." An indicative ruling procedure allows a district court that has lost jurisdiction over a matter due to the filing of a notice of appeal to notify the court of appeals how it would rule on a motion if it still had jurisdiction. If the district court would grant the motion, the court of appeals can then remand the matter for entry of a new order. The indicative ruling is commonly used in the context of a motion that would be filed under Federal Rule of Civil Procedure 60(b), but it can also be used in an interlocutory appeal when the district court's ruling is needed on the specific issue appealed.

We are suggesting a new provision in the FRAP to cover this indicative ruling procedure for civil cases because it is widely employed by the Circuits on the basis of case law, but is nowhere mentioned in the federal civil or appellate rules. There is no relevant rule in the FRAP. FRCP 60(a) provides that a district court may grant relief from a "clerical mistake" while an appeal is pending "with leave of the appellate court." But the civil rules mention no other situations and do not explain the procedure to be used.

A federal rule is warranted because our experience in dealing with many counsel in appellate civil cases over the years has revealed that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals. In addition, the Circuits use somewhat differing procedures, although there appears to be no good reason for local variation.

The indicative ruling procedure is discussed in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), and is currently used by nearly every Circuit.[1] Under this procedure, "when an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial." The Circuits that follow this procedure appear to accept that a district court has some form of jurisdiction to allow it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. The Ninth Circuit, however, maintains that the district court has no jurisdiction to entertain a Rule 60(b) motion, and therefore requires a remand from the court of appeals before a district court can even deny such a motion.

By contrast, the Second Circuit has on some occasions used a different procedure. For example, in Haitian Centers Council, Inc. v. Sale, Acting Commissioner, INS, No. 93-6216 (Oct. 26, 1993), the court declined to use the indicative ruling procedure and instead dismissed the appeal without prejudice for 60 days. The Second Circuit then reinstated the case in the court of appeals after the district court had ruled on the relevant motion. We have found this procedure to be commonly used in the Second Circuit.

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[1] See Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F. 2d 39 (1st Cir. 1979); Toliver v. Sullivan, 957 F. 2d 47 (2nd Cir. 1992); United States v. Accounts Nos. 3034504504 & 144-07143, 971 F.2d 974 (3d Cir. 1992); Fobian v. Storage Tech. Corp., 164 F.3d 887 (4th Cir. 1999); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, (5th Cir. 1994); Detson v. Schweiker, 788 F. 2d 372 (6th Cir. 1986); Brown v. United States, 976 F. 2d 1104 (7th Cir. 1992); Pioneer Insurance v. Gelt, 558 F.2d 1303 (8th Cir. 1977); Aldrich Enterprises, Inc. v. United States, 938 F. 2d 1134 (10th Cir. 1991).

Originally, the Circuits used the indicative ruling procedure solely or principally for parties who wished to move for a new trial based on newly-discovered evidence. In other circumstances, however, this procedure has been deemed applicable -- for example, when new methodologies or procedures change the impact of evidence used below; when the law has changed subsequent to judgment; when settlement negotiations are contingent on the district court's judgment being vacated; or when there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issues on appeal.

Indicative rulings are procedurally superior to other possible methods of handling these situations. The district court, being familiar with the case, is often in the best position to evaluate a motion's merits quickly. If a motion should clearly not be granted, the district court will usually recognize that fact faster than the appellate court. If the motion has possible merit, there is no need for the appellate court to have discovered that first. Most importantly, an early indication of the district court's view can avoid a pointless remand in those cases where the trial court would deny the motion.

In addition, indicative rulings have become critical in modern settlement negotiations, following the Supreme Court's ruling in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), for cases that are on appeal. In that opinion, the Supreme Court ruled that, in most circumstances, a court of appeals need not vacate the decision of a district court if an appeal becomes moot through a settlement. The Court made clear, however, that the district court remains free to vacate its own judgment pursuant to Fed. R. Civ. P. 60(b). See 513 U.S. at 29. Vacatur of a district court ruling is often a key element in a negotiated settlement. The indicative ruling procedure can be used effectively to determine if a district court would be willing to vacate its judgment as part of an overall settlement of a case. If the district court indicates a willingness to issue such an order, more cases on the docket of the appellate courts can be settled and dismissed without taking up scarce appellate judicial resources.

A formal amendment to the FRAP is warranted for several reasons. While the indicative ruling procedure is commonly used, its inclusion in the federal rules would ensure that all practitioners are aware of it. In addition, while nearly every Circuit currently employs this procedure, courts have used other mechanisms to achieve the same end. By making our recommended change to the FRAP, the courts would have

one standardized procedure to rely on under these circumstances, which would promote efficiency, consistency, and predictability in judicial proceedings.

Therefore, we propose a new rule, and suggest that it be located after current FRAP 4. At this point, it appears appropriate to provide for this procedure only in civil cases; our understanding is that post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters. In addition, Federal Rule of Criminal Procedure 33 already states that, if an appeal is pending, a district court may grant a new trial in a criminal case "based on the ground of newly discovered evidence," "only on remand of the case." Because our proposal does not apply to criminal cases, we also make clear that it does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, FRAP 4 does not apply to appeals from the Tax Court (see FRAP 14), but we make clear in the explanatory note that the courts of appeals are free to use this same procedure in Tax Court cases.

We suggest a new FRAP 4.1, to read as follows:

> "**Rule 4.1. Indicative Rulings.** When a party to an appeal in a civil case seeks post-judgment relief in district court that is precluded by the pendency of an appeal, the party may seek an indicative ruling from the district court that heard the case. A party may seek an indicative ruling by filing a motion in district court setting forth the basis for the relief requested, and stating that an indicative ruling appears to be necessary because an appeal is pending and the district court lacks jurisdiction to grant the relief absent a remand. The movant must notify the clerk of the court of appeals that a motion requesting an indicative ruling has been filed in the district court, and must notify the clerk of any disposition of that motion. If the district court indicates in an order that it would grant the relief requested in the event of a remand, the movant may seek a remand to the district court for that purpose. Nothing in this rule governs relief sought under FRAP 8, and it does not apply to matters under 28 U.S.C. §§ 2241, 2254, and 2255."

We also propose the following as an Advisory Committee Note:

> "This rule is designed to make known, and to make uniform, a procedure commonly used by the courts of appeals in civil cases for obtaining 'indicative

rulings' by the district courts when an appeal is pending. (The problem arises because a district court loses jurisdiction over a judgment when an appeal is filed.) The D.C. Circuit described this procedure in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), as follows:

> When an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial."

Nearly all of the Circuits have adopted this procedure in their case law; they appear to accept that a district court has some form of jurisdiction that allows it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. Accordingly, a uniform procedure is needed so that a district court may notify the parties and the court of appeals that it would grant or seriously entertain a post-judgment motion, and that a remand from the appellate court is thus warranted for that purpose. This procedure is currently used by the courts of appeals in a variety of situations other than simply seeking a new trial based on recently discovered evidence: new methodologies or other procedures change the impact of evidence used below; there has been a post-judgment change in the law; settlement negotiations are contingent on a decision that the district court's judgment be vacated, see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994); or there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issue on appeal. Thus, the indicative ruling procedure should be used in appropriate circumstances for filing post-judgment motions in civil cases, such as under FRCP 60(b), and may also be used when an interlocutory appeal is pending. The procedure provided by this Rule 4.1 will not be necessary or appropriate, of course, where the movant seeks relief pending appeal under Rule 8 FRAP (i.e., a stay or injunction pending appeal) or seeks other relief in aid of the appeal, since such relief is available in the district court without a remand even after the notice of appeal is filed. Moreover, nothing in this rule would foreclose a district court from exercising any authority it retains during the pendency of an interlocutory appeal. There does not appear to be a need for this procedure in

criminal cases, and FRCrP 33 already provides that a district court may grant a new trial in a criminal case 'based on the ground of newly discovered evidence,' 'only on remand of the case.' Because this new rule does not apply to criminal cases, it also does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, although Rule 4 does not apply to appeals from the Tax Court, the courts of appeals are free to use this same procedure in Tax Court cases."

Thus, I am submitting this matter to you for consideration by the full FRAP Advisory Committee.

Sincerely,

Seth P. Waxman

cc: Professor Patrick J. Schiltz
University of Notre Dame
325 Law School
Notre Dame, Indiana 46556

Minutes of Spring 2001 Meeting of
Advisory Committee on Appellate Rules
April 11, 2001
New Orleans, Louisiana

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 11, 2001, at 8:35 a.m. at the Hotel Inter-Continental in New Orleans, Louisiana. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Samuel A. Alito, Jr., Chief Justice Richard C. Howe, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Acting Solicitor General. Also present were Judge Anthony J. Scirica, Chair of the Standing Committee; Judge J. Garvan Murtha, the liaison from the Standing Committee; Prof. Edward H. Cooper, Reporter to the Advisory Committee on Civil Rules; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office; Ms. Marie C. Leary from the Federal Judicial Center; and former Advisory Committee members Chief Justice Pascal F. Calogero, Jr., and Mr. John Charles Thomas.

Judge Garwood introduced Chief Justice Howe and Mr. Roberts, who replaced Chief Justice Calogero and Mr. Thomas, respectively, as members of this Committee. Judge Garwood thanked Chief Justice Calogero and Mr. Thomas for their devoted service to this Committee and presented both with certificates of appreciation. Judge Garwood also introduced Judge Murtha, who replaced Judge Phyllis A. Kravitch as the liaison from the Standing Committee. Finally, Judge Garwood welcomed Judge Scirica from the Standing Committee and Prof. Cooper from the Civil Rules Committee.

II. Approval of Minutes of April 2000 Meeting

The minutes of the April 2000 meeting were approved.

III. Report on June 2000 and January 2001 Meetings of Standing Committee

Judge Garwood asked the Reporter to describe the Standing Committee's most recent meetings.

The Reporter said that, at its June 2000 meeting, the Standing Committee approved for publication all of the rules forwarded by this Committee — including the proposed amendments to Rules 4(a)(7), 5(c), 21(d), and 26.1, as well as the electronic service package — with one

D. Item No. 00-04 (FRAP 4.1 — indicative rulings)

The Department of Justice has proposed that FRAP be amended to authorize a procedure — commonly referred to as an "indicative ruling" — that is permitted under the common law of most of the courts of appeals. The need for an indicative ruling most often arises in the following situation: A district court enters judgment. A party files a notice of appeal. Sometime later, that party — or another party — files a motion under FRCP 60(b) for relief from the judgment. At that point, the district court cannot grant the FRCP 60(b) motion, as it no longer has jurisdiction over the case. The party can ask the court of appeals to remand the case to the district court, but that would be a waste of everyone's time if the district court will not grant the FRCP 60(b) motion.

Under the indicative ruling procedure, the party files its FRCP 60(b) motion in the district court. The district court then issues an "indicative ruling" — that is, a memorandum in which the district court indicates how it would rule on the FRCP 60(b) motion if it had jurisdiction. If the district court indicates that it would grant the motion, the court of appeals remands the case.

The Justice Department's proposal was discussed at some length at this Committee's April 2000 meeting. At that time, members raised several concerns. Some members objected to the exclusion of proceedings under 28 U.S.C. §§ 2241, 2254, and 2255 from the rule. Other members expressed confusion over how the rule would operate in the case of interlocutory appeals. Still other members questioned the need for rulemaking on this subject or expressed concern about particular language in the Committee Note. The Justice Department agreed to give the matter further study.

Mr. Letter reported that the Justice Department continued to believe that habeas proceedings should be excluded from the rule, but did not feel strongly about it. Likewise, the Department was willing to drop any reference to interlocutory proceedings from the rule or Committee Note.

After further Committee discussion, the Reporter suggested that any rule on indicative rulings should be placed in the FRCP, not in FRAP. Placement in the FRCP would be more logical; after all, the rule authorizes parties to file the post-judgment motions authorized by *the FRCP* in the *district* court and authorizes the *district* court to issue a particular type of ruling. The appellate court has no real involvement in the indicative ruling procedure unless and until the district court indicates that it would grant the post-judgment motion, in which case a routine motion to remand is made in the appellate court. The rule on indicative rulings is a rule governing a district court's consideration of post-judgment motions listed in the FRCP; as such, it belongs in the FRCP. This point is reinforced by the fact that FRCrP 33, the closest existing analog to the proposed rule on indicative rulings, is found in the criminal rules, not in the appellate rules.

Several members agreed with the Reporter. A member moved that the proposal of the Justice Department on indicative rulings be referred to the Civil Rules Committee and removed from the study agenda of this Committee. The motion was seconded. The motion carried (unanimously).

E. Item No. 00-05 (FRAP 3 — notice of appeal of corporation unsigned by attorney)

At the request of Judge Motz, this Committee placed on its study agenda the question whether Rule 3 should be amended to specifically address the situation in which a notice of appeal is filed on behalf of a corporation, but, rather than being signed by an attorney, the notice is signed by one of the corporation's officers. To date, there is only one decision on this issue. *See Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999). However, the issue is pending before the Fourth Circuit, so the possibility of a future conflict exists.

Judge Motz asked that further discussion of this matter be postponed. She stated that the Fourth Circuit had not yet issued its decision on this issue. The Reporter said that it is likely that the panel is holding the case in anticipation of the Supreme Court's decision in *Becker v. Montgomery*, which is scheduled for argument on April 16. In *Becker*, the Sixth Circuit held that it was required to dismiss an appeal because the pro se appellant failed to sign the notice of appeal.

By consensus, the Committee agreed to postpone further discussion of this matter until its fall 2001 meeting.

F. Items Awaiting Initial Discussion

1. Item No. 00-06 (FRAP 4(b)(4) — failure of clerk to file notice of appeal)

Judge Easterbrook forwarded to this Committee a copy of his opinion for the Seventh Circuit in *United States v. Hirsch*, 207 F.3d 928 (7th Cir. 2000), and asked this Committee to consider amending Rule 4(b)(4) to address the failure of a district clerk to file a notice of appeal in a criminal case when requested by a defendant under FRCrP 32(c)(5).

The Reporter suggested that this matter be removed from this Committee's study agenda. Judge Easterbrook himself said in *Hirsch* that the situation that he wishes Rule 4(b)(4) to address "is rare and may be unique," given that he was "unable to find any other case in which judges have had to ponder how to proceed when the clerk does not carry out that mechanical step." Moreover, *Hirsch* itself was not such a case. The transcript made clear that the defendant in *Hirsch* had not, in fact, asked the clerk to file a notice of appeal on his behalf. Until this situation actually arises, this would not be a fruitful subject of rulemaking.

III. Broader Projects

A. Time

The time counting project has two aspects. One is the inter-Committee Project, done in cooperation with the Criminal, Bankruptcy, and Appellate Rules Committees, to make the time-calculation rules consistent across the different sets of rules. The second part of the time-counting project is for each of the Rules Committees to examine the periods and deadlines specified within their Rules to be sure they are reasonable and appropriate.

A "time-computation rule" is not a deadline, but rather a rule that directs how a deadline is to be computed. Judge Mark Kravitz uses an example to draw the distinction between a time-computation rule and a rule that sets out a period. Appellate Rule 27(a)(3)(A) — which provides that a response to a motion must be filed within 8 days after service of that motion — is not a time-computation rule. But Appellate Rule 26(a)(2) — which provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded — is a time-computation rule.

The inter-Committee project is well-launched. Judge Levi appointed a Subcommittee made up of representatives from the Advisory Committees and designated Judge Kravitz as chair and Professor Schiltz as reporter. Chilton Varner is this Committee's representative on the Time-Counting Subcommittee. The Subcommittee has generated a proposed template and circulated it to its members for comment. The template will then go to the advisory committees in time for their spring meetings, and, following those meetings, this Subcommittee will review any concerns raised

by the Standing Committee or any of the advisory committees, and the advisory committees will begin work on reviewing their deadlines. The tentative plan for the time-computation project is as follows:

Fall 2005	Time-Computation Subcommittee drafts template
January 2006	Template reviewed by Standing Committee
Spring 2006	Template reviewed by advisory committees
Summer 2006	Time-Computation Subcommittee reviews comments from Standing Committee and advisory committees and approves template
Fall 2006	Advisory committees consider amendments to time-computation rules to reflect template and begin work on revising deadlines
Spring 2007	Advisory committees approve amendments to time-computation rules and deadlines for publication
June 2007	Standing Committee approves amendments to time-computation rules and deadlines for publication
August 2007	Amendments to time-computation rules and deadlines published for comment

The Subcommittee will serve as a clearinghouse for proposed changes to times specified in the Civil Rules that might affect the Bankruptcy and Appellate Rules. The Committee can most efficiently and effectively perform this work by following the model used in the Style Project. The Committee would divide itself into two Subcommittees, with each assigned primary responsibility for half the Rules. Each Subcommittee would work through the times specified in its portion of the Rules and make recommendations to the full Committee.

To lay the background for this work, Professor Cooper has broken down the types of periods prescribed in the Rules and identified some of the problems that should be addressed. The list identifies rules that specify a number of days and those provisions that are more general. Although the list is lengthy, the groupings overlap and the same rule provision may appear in more than one group. The list is designed to focus thinking on whether to focus only on deadlines expressed in terms of numbers of days or to make the project broader, examining all the time triggers set out in the rules.

1. Modification of Prescribed Periods: Rule 6(b)

Rule 6(b) reads as follows:

> (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

This succinct subdivision bristles with potential issues, a few of which are sketched below, but at the moment the only evident cause of distress is the part that prohibits extending the time for post-judgment motions under Rules 50, 52, 59, and 60.

The general power to extend time limits makes it possible to expedite most litigation by setting periods that work in most circumstances but that are too brief to accommodate cases that present more complex problems. It will provide an essential background for calculating each of the individual periods set throughout the rules. There is no reason to think about abandoning it.

The prohibition on extending the times set by Rules 50, 52, 59, and 60 reflects the dramatic reduction of flexibility and forgivingness that accompanies entry of a final judgment. The implicit determination is that once the parties have reached judgment, supported by the generous and discretionary pretrial procedure and flexible trial procedure, it is fair to shift the balance toward expedition and efficiency. They should be immersed in the case by that point, and prepared to move forward immediately. Entry of final judgment, the act that sets these periods, is supposed to be an unambiguous event, thanks to Rule 58. Tight and unforgiving periods are desirable to protect prevailing parties and the courts, carrying the litigation forward quickly or ending it.

As attractive as this reasoning may be, it sacrifices at least two sets of competing interests. One set of problems arises from the tendency of some parties and even some courts to overlook the Rule 6(b) limit. Lawyers and judges are accustomed to the pre-judgment practices that reflect great flexibility and discretion. At times a court mistakenly believes that it has authority to extend the 10-day time limits set by Rules 50, 52, or 59, and does so. The consequence is not only that the tardy motion cannot be granted, but also that appeal time runs out because only a timely motion suspends it. This may be a situation in which the rule is so important that it should not be modified to protect the ignorant, but it will continue to inflict some damage.

The other competing interest is that complex cases deserve more than 10 days to frame a suitable post-judgment motion. This need can be met by delaying entry of judgment, a practice that gains some tangential support from the Rule 58(c)(1) admonition that entry of judgment may not be delayed in order to tax costs or award fees except as Rule 58(c)(2) permits. This informal practice

may be the best approach — it enables a court to meet the needs of a particular case but discourages frequent use by its seeming irregularity. But it is worth considering whether it would be better to draft a carefully controlled power to extend these time periods.

The question whether there should be authority to extend the time to move under Rule 60(b) to vacate a judgment is somewhat different. The general limit is a "reasonable time," subject to a maximum one-year limit for motions made under Rule 60(b)(1), (2), and (3). Mistake, and more particularly newly discovered evidence and fraud, are events that may well remain hidden for more than a year. But the limitations-like policy of finality and repose is strong. A one-year outer limit, protected against any discretionary extension, may well remain the best answer.

2. Simultaneous Acts

Rule 7.1(b)(1): A corporate party must file its disclosure statement "with its first appearance, pleading, * * *" etc.

3. Days After

Rule 4(d)(2)(E): The request to waive service "shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States." This one is unusual. It may imply that the plaintiff is responsible for allowing more than 30 days if 30 days is not reasonable; it may imply instead that the plaintiff has discretion to allow more than 30 days, but is safe with 30 days.

Rule 4(d)(3): A defendant who waives service "is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States."

Rule 4(m): Sets 120 days to serve summons after filing the complaint. The court has authority to extend the time. Rule 4(c)(1) incorporates Rule 4(m) in directing the time to serve. Rule 4(m) also is incorporated (quite unsatisfactorily) in Rule 15(c)(3).

Rule 11(c)(1)(A): This one presents a tricky question of characterization. A motion for Rule 11 sanctions may not be filed or presented to the court "unless within 21 days after service * * * the challenged paper * * * is not withdrawn or appropriately corrected." It seems fair to characterize this as a safe harbor allowing 21 days to act after service of the motion.

Rule 12(a)(1)(A): 20 days to serve an answer after service.

Rule 12(a)(1)(B): If a party waives service, 60 days to serve an answer after the day when the request to waive service was sent — or 90 days if the defendant was addressed outside any judicial district of the United States.

Rule 12(a)(2): 20 days after service to serve an answer to a crossclaim; 20 days after service to reply to a counterclaim; 20 days after service of a court order to reply to an answer.

Rule 12(a)(3)(A): The United States, etc., has 60 days to serve an answer after the United States attorney is served with complaint, crossclaim, or counterclaim.

Rule 12(a)(3)(B): Serve an answer by the later of 60 days after service on the United States Attorney or on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States.

Rule 12(a)(4)(A): Service of a Rule 12 motion alters all of the Rule 12(a) time periods for serving a responsive pleading to **10** days after notice of the court's action to deny the motion or to postpone disposition of the motion to trial on the merits, unless the court fixes a different time by order. ["postpones its disposition until the trial on the merits" seems workable only when there is an explicit postponing order: does this need attention?]

Rule 12(e): If an order to provide a more definite statement "is not obeyed within **10** days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

Rule 12(f): A motion to strike a pleading to which no responsive pleading is permitted may be made within 20 days after service of the pleading.

Rule 12(h)(1): This one is indirect. Defenses going to personal jurisdiction, venue, and service of process are waived if omitted from a Rule 12 motion, or if not made by motion or included in a responsive pleading "or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." Rule 15(a) allows 20 days after service to amend a pleading to which a responsive pleading is not permitted.

Rule 14(c): This one is uncertain. A defendant against an admiralty or maritime claim may bring in a third-party who may be liable to the plaintiff and demand judgment against the third party in favor of the plaintiff. The third party shall make defenses to the plaintiff's claim "in the manner provided in Rule 12." Most likely this incorporates the Rule 12 periods by treating service of the third-party complaint as service of the complaint.

Rule 15(a): If no responsive pleading is permitted, a party may amend a pleading as a matter of course "at any time within 20 days after it is served." After that it must obtain leave or the adverse party's consent. A party shall plead in response to an amended pleading within the longer of the time remaining to respond to the original pleading or within **10** days after service of the amended pleading.

Rule 15(c)(3): An amendment changing the party or the naming of the party against whom a claim is asserted relates back to the time of the original pleading if the party to be brought in received notice of the described quality "within the period provided by Rule 4(m) for service of the

summons and complaint." Apparently this means within 120 days after the original pleading was filed, or within a longer period actually ordered by the court under Rule 4(m). If read literally, it is strange — the time provided by Rule 4(m) may run out long before the limitations period expires if the original pleading was filed more than 120 days before the period expires. So if an eager plaintiff files on day 180 of a 730-day limitations period and the proper defendant learns of the action on day 365, Rule 15(c)(3) does not permit relation back, while relation back would be permitted if the action had been filed on day 730 and the proper defendant learned of it on day 850.

Rule 23(f): Application for permission to appeal an order granting or denying class certification must be made "within **10** days after entry of the order."

Rule 25(a)(1): An action shall be dismissed as to a deceased party "unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death * * *."

Rule 26(a): Initial disclosures must be made "at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference" — then the court sets the time if disclosures are to be made. A party first served or otherwise joined after the conference must make the disclosures "within 30 days after being served or joined," again unless a different time is set by stipulation or order. (Time changes are a subject of the 26(f) conference.)

Rule 26(a)(3): After pretrial disclosures are made, objections to the use of a deposition or the admissibility of materials must be made within 14 days.

Rule 26(f): A written report of the Rule 26(f) conference is due "within 14 days after the conference." A court may change this time by local rule.

Rule 30(e): A party or deponent who has made a request to review a deposition transcript before completion of the deposition "shall have 30 days after being notified * * * in which to review * * *."

Rule 31(a)(4): Sets the times for later-round questions for a deposition on written questions: cross-questions "14 days after the notice and written questions are served"; redirect questions **7** days after cross-questions are served; recross questions **7** days after redirect questions are served.

Rule 32(d)(3)(C): This one is, by incorporation, a defined set of days. Objections to the form of questions for a deposition on oral questions "are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within **5** days after service of the last questions authorized."

Rule 33(b): Answers or objections to interrogatories must be served "within 30 days after the service of the interrogatories." A different period may be set by stipulation or order. Rule 33(c) separately provides that the court may order that a contention or opinion interrogatory need not be answered until after completion of designated discovery, until a pretrial conference, or until a later time.

Rule 34(b): A party served with a Rule 34 request "shall serve a written response within 30 days after the service of the request." A different period may be set by stipulation or order.

Rule 36(b): Each matter of which admission is requested is admitted "unless, within 30 days after service of the request," the party to whom the request is directed serves a written answer or objection. A shorter or longer time may be set by order or party agreement.

Rule 38(b): A party may demand jury trial by "serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than **10** days after the service of the last pleading directed to such issue."

Rule 38(c): If party has demanded jury trial of only some issues, "any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues."

Rule 45(c)(2)(B): A person commanded by subpoena to produce and permit inspection and copying "may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve * * * written objection * * *."

Rule 50(b): A motion for judgment as a matter of law may be renewed "by filing a motion no later than **10** days after entry of judgment."

Rule 50(c)(2): A motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is entered "shall be filed no later than **10** days after entry of the judgment."

Rule 52(b): "On a party's motion filed no later than **10** days after entry of judgment, the court may amend its findings * * *." "The motion may accompany a motion for a new trial under Rule 59."

Rule 53(g)(2): A party may file objections to a master's report, etc., or a motion to adopt or modify it, "no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time."

Rule 54(d)(1): The clerk may tax costs on **one** day's notice. "On motion served within **5** days thereafter, the action of the clerk may be reviewed by the court." (As noted in Part XIV, these periods seem suspiciously brief.)

Rule 54(d)(2): A motion for attorney fees "must be filed no later than 14 days after entry of judgment."

Rule 56(a): A party seeking to recover on a claim "may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move" for summary judgment.

Rule 58(b)(2)(B): When a separate document is required for entry of judgment, judgment is entered when judgment is entered in the civil docket "and when the earlier of these events occurs: (A) when it is set forth on a separate document, or (B) when 150 days have run from entry in the civil docket * * *."

Rule 59(b): A new-trial motion "shall be filed no later than **10** days after entry of the judgment."

Rule 59(c): A party opposing a new-trial motion supported by affidavits "has **10** days after service to file opposing affidavits, but that period may be extended for up to 20 days" by order or stipulation.

Rule 59(e): A motion to alter or amend the judgment "shall be filed no later than **10** days after entry of the judgment."

Rule 60(b): Both specific and open-ended. A Rule 60(b) motion to vacate must be filed within a reasonable time; for a motion made under paragraphs (1) — mistake, (2) — newly discovered evidence, or (3) — fraud, there is a one-year cut-off even if a later motion otherwise would be in a reasonable time.

Rule 62(a): No execution or enforcement on a judgment "until the expiration of **10** days after its entry."

Rule 71A(d)(2): The notice to a defendant in a condemnation action shall state that the defendant may serve an answer within 20 days after service of the notice.

Rule 71A(e): A defendant in a condemnation action "shall serve an answer within 20 days after the service of notice upon the defendant."

Rule 71A(f): The defendant in a condemnation action may serve an answer to an amended complaint "within the time allowed by subdivision (e)" — 20 days after service of notice of filing.

Rule 71A(h): "[A]ny party [to a condemnation action] may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix." [The time to answer is set by Rule 71A(e), above.]

Rule 72(a): "Within **10** days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order."

Rule 72(b): A party objecting to a magistrate judge's recommended disposition "shall promptly arrange for the transcription of the record * * * Within **10** days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections * * * A party may respond to another party's objections within **10** days after being served with a copy thereof."

Rule 81(c): "In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within **5** days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within **10** days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within **10** days after service on the party of the notice of filing the petition."

Supplemental Rule B(3)(a): "The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee."

Supplemental Rule B(3)(b): "The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee."

Supplemental Rule C(6)(a)[as designated after Rule G becomes effective]: A person claiming an interest in the property that is the subject of an in rem action "must file a verified statement of right or interest (A) within **10** days after the execution of process or (B) within the time that the court allows."

Supplemental Rule F(1): "Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint * * * for limitation of liability * * *."

Supplemental Rule F(4): The court directs publication **once a week** for four successive weeks of notice of a limitation of liability proceeding. "The plaintiff **not later than the day of second publication** shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose." [NB: is this a period of less than 11 days? The day of second publication is, by our counting rules, 7 days after the day of first publication. But could it have been intended to exclude intervening Saturdays, etc.? Whether this presents the same need to reconsider as 10-day periods is unclear.]

Supplemental Rule F(6): "Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow," the plaintiff in a limitation of liability proceeding must mail a list of information about all claims to the attorney for each claimant.

Supplemental Rule G(4)(b)(ii): Anticipates the times for filing claim and answer in a civil forfeiture proceeding by requiring that they be stated in the notice that must be sent to any person who reasonably appears to be a potential claimant. As to the claim, the notice states a deadline for filing "at least 35 days after the notice is sent."

Supplemental Rule G(5)(a)(ii): A claim to civil forfeiture property must be filed by the time stated in a direct notice sent under Rule G(4)(b) — the notice states a deadline "at least 35 days after the notice is sent." Succeeding provisions, of increasing complexity, apply to situations in which individual notice was not sent, setting claim periods of 30 days or 60 days after specified events.

Supplemental Rule G(5)(b): "A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 20 days after filing the claim."

Supplemental Rule G(6)(a): The government may serve special interrogatories limited to a claimant's identity and relationship to civil forfeiture property "at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 20 days after the motion is served."

Supplemental Rule G(6)(b): Answers or objections to G(6)(a) special interrogatories "must be served within 20 days after the interrogatories are served."

Supplemental Rule G(6)(c): The government need not respond to a motion to dismiss a civil forfeiture action "until 20 days after the claimant has answered" the special G(6)(a) interrogatories.

5. Open-Ended Period After

Rule 5(d): Papers required to be served "must be filed with the court within a reasonable time after service."

Rule 7.1(b)(2): A corporate party must file a supplemental disclosure statement "promptly * * * upon any change in the information."

Rule 13(e): A claim that matured or was acquired after a pleading was served may be presented as a counterclaim "with the permission of the court." (There is no comparable provision for a crossclaim; presumably Rule 15 covers by allowing amendment of the pleading in which the crossclaim would have been asserted.)

Rule 14(a): "At any time after commencement of the action" a party may serve a third-party claim, but must obtain leave if it makes service "later than **10** days after serving the original answer."

Rule 14(c): This one is uncertain. A defendant against an admiralty or maritime claim may bring in a third-party who may be liable to the plaintiff and demand judgment against the third party in favor of the plaintiff. The third party shall make defenses to the plaintiff's claim "in the manner provided in Rule 12." Most likely this incorporates the Rule 12 periods by treating service of the third-party complaint as service of the complaint.

Rule 17(a): An action shall not be dismissed because not prosecuted by the real party in interest "until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest."

Rule 23(c)(2)(B): A class-certification order must state "when and how members may elect to be excluded." (Presumably this may be either a period after a designated time or a period before a designated time.)

Rule 26(b)(4)(A): If a Rule 26(a)(2)(B) report is required of an expert witness, the witness may not be deposed "until after the report is provided."

Rule 26(e)(1), (2): Disclosures must be supplemented "at appropriate intervals"; a party must "seasonably * * * amend" discovery responses. (Remember that Style Rule 26(e)(1) combines these into a single phrase: "in a timely manner.")

Rule 26(g)(2): A party is not obliged to take any action with respect to an unsigned discovery request, response, or objection "until it is signed."

[Style] Rule 30(f)(4): "A party who files the deposition must promptly notify all other parties of the filing." [This reflects the change in Rule 5(d) that defers filing.] The same provision applies to a deposition on written questions, [Style] Rule 31(c).

Rule 31(b): The officer designated to take a deposition on written questions "shall proceed promptly" to take the testimony after the questions are delivered to the officer.

Rule 32(d)(1): Errors and irregularities in a deposition notice are waived "unless written objection is promptly served upon the party giving the notice."

Rule 32(d)(2): An objection to disqualification of the officer taking a deposition is waived "unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence."

Rule 32(d)(4): Errors in transcribing a deposition, or the manner in which it is prepared, signed, sealed, etc., "are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained."

Rule 51(c)(2): A party that has not been informed of actions on jury instruction requests or intended instructions must object "promptly after learning that the instruction or request will be, or has been, given or refused."

Rule 53(e): A master who makes an order must file it and promptly serve a copy on each party.

Rule 53(f): A master must file the report and promptly serve a copy on each party.

Rule 60(b): Both specific and open-ended. A Rule 60(b) motion to vacate must be filed within a reasonable time; for a motion made under paragraphs (1) — mistake, (2) — newly discovered evidence, or (3) — fraud, there is a one-year cut-off even if a later motion otherwise would be in a reasonable time.

Supplemental Rule C(4): If attached property "is not released within **10** days after execution, the plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest * * *." [This is another one of the 10-day periods that might remain untouched: do they really mean to exclude intermediate Saturdays, etc.?]

Supplemental Rule G(3)(c)(ii): A person authorized to execute an arrest warrant in a civil forfeiture proceeding must execute it "as soon as practicable," with stated exceptions.

Supplemental Rule G(4)(a)(i): Notice of a civil forfeiture action must be published "within a reasonable time after filing the complaint or at a time the court orders," with exceptions.

6. Days Before

Rule 6(d): A written motion "shall be served not later than **5** days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court." Except as provided by Rule 59(c), "opposing affidavits may be served not later than **1** day before the hearing, unless the court permits them to be served at some other time."

Rule 26(a)(2)(C): Expert-witness disclosures are made at the times and in the sequence directed by the court; absent order or stipulation, they must be made "at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party."

Rule 26(a)(3): Pretrial disclosures, unless otherwise directed by the court, "must be made at least 30 days before trial." (Objections must be filed within 14 days thereafter.)

Rule 26(f): The parties must confer "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due."

Rule 27(a)(2): "At least 20 days before the hearing date," a person petitioning for an order to perpetuate testimony must serve each expected adverse party with a copy of the petition and a notice stating the time and place of hearing. (The court may order service by publication or otherwise if service cannot be made with due diligence.)

Rule 27(b): Invokes "the same notice and service thereof" as Rule 27(a)(2) for a motion to perpetuate testimony pending appeal.

Rule 32(a)(3): This one is complex. A deposition cannot be used against a party "who, having received **less than 11 days** notice * * * has promptly upon receiving such notice filed a motion for a protective order * * * and such motion is pending at the time the deposition is held."

Rule 55(b)(2): A party who has appeared "shall be served with written notice of the application for [default] judgment at least **3** days prior to the hearing on such application."

Rule 56(c): A summary-judgment motion "shall be served at least **10** days before the time fixed for the hearing." [This provision seems far too brief. Local rules commonly require far longer periods; they are not invalid only because they are so much more sensible.]

Rule 65(b): "On **2** days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification * * *."

Rule 68: "At any time **more than 10 days** before the trial begins" a defending party may serve an offer of judgment. "If within **10** days after the service of the offer the adverse party serves written notice that the offer is accepted," the clerk shall enter judgment. (How does this work out? The "more than 10 days" period seems not to exclude intervening Saturdays, etc. The "within 10 days" to accept thus seems longer — to run on after trial has begun. This may need independent study. There are good reasons to allow an offer to be made — assuming there are good reasons to

have Rule 68 — at a time close to trial. More than most of the 10-day periods, this one needs to be reconsidered to the extent that is possible without thinking more broadly about Rule 68.)

Rule 68 again: When liability but not damages have been determined, an offer of judgment may be "served within a reasonable time **not less than 10 days** prior to the commencement of hearings to determine the amount or extent of liability."

7. Open-Ended Period Before

Rule 12(b): If a Rule 12(b)(6) motion is converted to summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Rule 12(c): A motion for judgment on the pleadings may be made "[a]fter the pleadings are closed but within such time as not to delay the trial * * *." If the motion is converted to summary judgment, a reasonable opportunity to present pertinent material just as in Rule 12(b).

Rule 12(f): A motion to strike a pleading may be made before responding to the pleading if a responsive pleading is permitted.

Rule 12(h)(2): A defense of failure to state a claim or to join a Rule 19 party, and an objection of failure to state a defense "may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits."

Rule 12(h)(3): "Whenever it appears" that there is no subject-matter jurisdiction, the court shall dismiss the action. (This is categorized as a "before" provision because of the general tradition that once judgment is entered and affirmed or not appealed the subject-matter jurisdiction objection is lost.)

Rule 15(a): A party may amend a pleading to which a responsive pleading is permitted "at any time before a responsive pleading is served."

Rule 26(d): "[A] party may not seek discovery from any source before the parties have conferred as required by Rule 26(d)." (See 29, 30(a)(2)(C), 31(a)(2)(C) for qualifications.)

Rule 30(a)(2)(C): Absent stipulation, a party must obtain leave of court to take an oral deposition before the time specified in Rule 26(d) unless the notice certifies that the person to be examined is expected to leave the United States and be unavailable for examination in the United States unless deposed before that time. (Rule 31(a)(2)(C) applies the same provision to a deposition on written questions.)

Rule 30(b)(1): "Reasonable notice in writing" of an oral deposition must be given to every other party.

Rule 31(a)(2)(C): See Rule 30(a)(2)(C) above.

Rule 32(a)(3): A deposition may not be used against a party who received **less than 11 days notice** if the party moved promptly for a protective order and the motion remains pending at the time the deposition is held.

Rule 32(d)(2): An objection to disqualification of the officer taking a deposition is waived "unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence."

Rule 33(a): Interrogatories may not be served before the time specified in Rule 26(d). (Style Rule 33(a) omits this provision.)

Rule 34(b): Rule 34 requests may not be served before the time specified in Rule 26(d). (Style Rule 34 omits this provision.)

Rule 36(a): A request for admissions may not be served before the time specified in Rule 26(d). (Style Rule 36 omits this provision.)

Rule 41(a)(1): A plaintiff may dismiss without court order "by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs."

Rule 41(c): A voluntary dismissal by the claimant alone of a counterclaim, crossclaim, or third-party claim under 41(a)(1) "shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing." (During the Style Project various deficiencies in this rule were noted, but they did not have to do with the time aspect.)

Rule 45(c)(2)(B): A person commanded by subpoena to produce and permit inspection and copying "may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve * * * written objection * * *." (Under present Rule 6(b), if the subpoena sets 10 days for compliance the time to object may be more than 14 days. Curious.)

Rule 51(c)(2): A party that has been properly informed of the court's action on jury instruction requests and intended instructions must object before the instructions and before final jury arguments. If it has not been properly informed, the party must object "promptly after learning that the instruction or request will be, or has been, given or refused."

Rule 68: This one is both precise and open-ended: When liability but not damages have been determined, an offer of judgment may be "served within a reasonable time **not less than 10 days** prior to the commencement of hearings to determine the amount or extent of liability."

Supplemental Rule G(6)(a): This is both after and before, but the before is the operating element: The government may serve special interrogatories on a claimant in a civil forfeiture action "at any time after the claim is filed and before discovery is closed."

Supplemental Rule G(8)(c): "At any time before trial, the government may move to strike a claim or answer" in a civil forfeiture action.

8. "Prior to"; "Before"; "Until"

Rule 5(d): Disclosure and discovery materials "must not be filed until they are used in the proceeding or the court orders filing."

Rule 30(b)(3): "With prior notice to the deponent and other parties," any party may designate another method to record deposition testimony.

Rule 30(e): A deponent or party may request review of a deposition transcript "before completion of the deposition."

Rule 49(a): A party waives the right to jury trial of an issue not included in special verdict questions "unless before the jury retires the party demands its submission to the jury."

Rule 50(a)(2): A motion for judgment as a matter of law "may be made at any time before submission of the case to the jury."

Rule 56(c): A party opposing a motion for summary judgment "prior to the day of hearing may serve opposing affidavits." [This is one of the most bizarre time provisions. A party may "serve" by mailing one day before the day of hearing. We must do something about this one.]

Rule 71A(c)(2): The complaint in a condemnation action need join as defendants only persons then known, "but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest * * * whose names can be ascertained by a reasonably diligent search of the records * * *."

Rule 71A(f): "Without leave of court, the plaintiff [in a condemnation action] may amend the complaint at any time before the trial of the issue of compensation * * *."

Rule 71(a)(i)(1): "If no hearing has begun to determine the compensation * * * the plaintiff may dismiss the action as to that property * * * by filing a notice of dismissal * * *."

Rule 71A(i)(2): "Before the entry of any judgment vesting the plaintiff with title or a lesser interest * * * the action may be dismissed in whole or in part, without an order of the court * * * by filing a stipulation of dismissal * * *." [The difficulties encountered in unraveling this paragraph for the Style Project seem not relevant now.]

9. "By," "At," "Upon," "When," "During," "With"

Rule 23(c)(2)(B): A class-certification order must state "when and how members may elect to be excluded." (Presumably this may be either a period after a designated time or a period before a designated time.)

Rule 23(h)(1): A claim for attorney fees in a class action must be made "at a time set by the court."

Rule 24(a), (b): "Upon timely application" anyone (a) shall or (b) may be permitted to intervene.

Proposed Amended [Style-Substance] Rule 31(c): The party who noticed a deposition on written questions "must notify all other parties when it is completed."

Rule 32(d)(3)(A): Objections to the competence of a witness or the competency or relevance of testimony "are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time."

Rule 32(d)(3)(B): Errors and irregularities, etc., during a deposition "which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."

Rule 35(b)(1): If requested by the party against whom a Rule 35 examination order is made the party causing the examination to be made shall deliver a copy of the examiner's report. "After

delivery the party causing the examination shall be entitled upon request to receive" like reports from the party against whom the order was made.

Rule 45(c)(2)(B): If a person commanded to produce and permit inspection and copying objects to the subpoena, the party serving the subpoena "may, upon notice to the person commanded to produce, move at any time for an order to compel."

Rule 45(c)(3)(A): "On timely motion" the court shall quash or modify a subpoena that is subject to various challenges.

Rule 46: Formal exceptions are not necessary; it suffices "that a party, at the time the ruling or order of the court is made or sought, makes known" the party's desires or objections.

Rule 51(a)(1): A party may file jury instruction requests "at the close of the evidence or at an earlier reasonable time that the court directs."

Rule 56(b): A party against whom a claim is made "may, at any time, move" for summary judgment.

Rule 60(a): Clerical mistakes and errors arising from oversight or omission "may be corrected by the court at any time of its own initiative or on the motion of any party."

Rule 71A(d)(1): "Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants * * *. Additional notices directed to defendants subsequently added shall be so delivered."

Supplemental Rule C(6)(b)[as redesignated when Rule G takes effect]: "Interrogatories may be served with the complaint in an in rem action without leave of court."

Supplemental Rule F(5): Claims in a limitation of liability proceeding shall be filed on or before the date specified in the published notice.

10. Court-Directed Times

Rule 4(i)(3): "The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve" all of the people required to be served in an action against the United States, its agency, corporation, officer, or employee.

Rule 4(m): If the plaintiff does not effect service within 120 days after filing the complaint, the court shall dismiss the action or direct that service be made within a "specified time"; but if the plaintiff shows good cause for the failure "the court shall extend the time for service for an appropriate period."

Rule 23(c)(2)(B): An order certifying a 23(b)(3) class must state when and how members may elect to be excluded from the class.

Rule 23(h)(1): A claim for attorney fees in a class action must be made "at a time set by the court."

Rule 29: A stipulation extending the time provided in Rules 33, 34, and 36 for discovery responses "may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court."

Rule 53(b)(2): The order appointing a master must state the time limits for reviewing the master's orders, findings, and recommendations.

Rule 65(b): A temporary restraining order issued without notice "shall expire by its terms within such time after entry, **not to exceed 10 days**, as the court fixes," unless extended.

Rule 81(c): If the state law of the court from which an action is removed does not require an express demand for jury trial, a demand need not be made after removal "unless the court directs that [the parties] do so within a specified time if they desire to claim trial by jury." The court shall make this direction "as a matter of course at the request of any party."

Supplemental Rule F(4): In a limitation of liability proceeding "the court shall issue a notice to all persons asserting claims * * * admonishing them to file their respective claims * * * on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice." The court can enlarge the time.

Supplemental Rule F(5): Claims in a limitation of liability proceeding "shall be filed and served on or before the date specified in the notice provided for in subdivision (4) * * *."

11. No-Limit Rules

Rule 15(b): Pleadings may be amended to conform to the evidence and to raise issues tried by express or implied consent "at any time, even after judgment." (And failure to amend makes no difference.)

Rule 25(d): An order substituting a successor in office "may be entered at any time"; omission of the order "shall not affect the substitution."

12. Intrinsically Troubling Periods

Rule 54(d)(1): "[C]osts may be taxed by the clerk on one day's notice." Why require notice at all if the time is to be so brief? Review is allowed on motion served "within 5 days thereafter." Even with the extension of this period as one less than 11 days, should there be a more specific starting time — such as notice sent after the order? Or is one day's notice before the taxing order enough to put the parties on guard?

Rule 56(c): A party opposing a summary-judgment motion "prior to the day of hearing may serve opposing affidavits." That means the affidavits may be mailed the day before the hearing. This one must be fixed. The provision that the summary-judgment motion "shall be served at least 10 days before the time fixed for the hearing" is not as bad, but it is still unreasonable. Local rules commonly set far longer periods; they are valid only because they are so much more sensible than Rule 56(c).

13. General Questions

(1) Need we think about the events that trigger time periods? Many rules are triggered by service. At least for the most part, they seem sensible.

(2) Need we think about what it is that must be done within the prescribed period? It may be service, it may be filing. Rules 50, 52, and 59 were recently amended to establish a uniform filing requirement. Filing was preferred because it is an unambiguous event.

(3) Rules that direct the court to act within a designated time do not seem to present issues for this project, which focuses on the problems encountered by party administration of timing directions. Some but not all of these rules are noted here as illustrations.

Rule 12(d): Motions under 12(b) and (c) "shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial."

Rule 12(f): A court may strike a pleading on its own initiative at any time.

Rule 16(b): Sets the time to enter a scheduling order.

Rule 16(d): A final pretrial conference "shall be held as close to the time of trial as reasonable under the circumstances."

Rule 23(c)(1)(A), (C): The court must determine whether to certify a class action "at an early practicable time"; the order may be altered or amended "before final judgment."

Rule 26(b)(2): The court may act on its own initiative to limit discovery "after reasonable notice."

Rule 53(b)(4): An order appointing a master may be amended at any time after notice to the parties.

Rule 58(c)(1): Entry of judgment may not be delayed in order to tax costs or award fees, except as allowed in 58(c)(2) to enable action on a motion for attorney fees before appeal. This rule may provide some support for the practice of delaying entry of judgment for the purpose of deferring commencement of the 10-day periods allowed for filing post-judgment motions.

Rule 59(d): "No later than **10** days after entry of judgment the court, on its own, may order a new trial." This one may present an issue: should it be revised to allow the court to give notice within 10 days that it is considering a new trial order?

Rule 77(d): "Immediately upon the entry of an order or judgment the court shall serve a notice of the entry * * *."

(4) Similarly, general time references do not seem to be an issue for this project. Examples of such references are:

Rule 26(a)(2)(B): The expert-witness disclosure report must include a list of all publications authored by the witness within the preceding ten years, and all cases in which the witness has testified as an expert within the preceding four years.

Rule 71A(d)(3): Notice of a condemnation action must be published "once a week for not less than three consecutive weeks."

Rule 74(b): "If within the period specified by local rule, the parties agree to a magistrate judge's exercise of" authority to exercise civil trial jurisdiction, they shall execute and file a joint form of consent.

Rule 77(a): "The district courts shall be deemed always open for the purpose of filing," etc.

Supplemental Rule E(4)(f): "Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing * * *.

Supplemental Rule F(4): Notice of the need to file claims in a limitation of liability proceeding "shall be published * * * once a week for four successive weeks prior to the date fixed for the filing of claims."

Supplemental Rule G(4)(a)(iii): Published notice of a civil forfeiture proceeding must be published once a week for three consecutive weeks, or only once if notice of nonjudicial forfeiture of the same property was published.

MEMORANDUM

DATE: September 8, 2005

TO: Time-Computation Subcommittee **CC:** John K. Rabiej

FROM: Judge Mark R. Kravitz

RE: Time-Computation Project

Thank you for agreeing to serve on the Time-Computation Subcommittee, which has been appointed by Judge David Levi and charged with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. I have been asked to chair the Subcommittee, and Prof. Patrick Schiltz, the Reporter to the Advisory Committee on Appellate Rules, has been asked to serve as the Subcommittee's reporter. The Subcommittee's main task, as I understand it, is to attempt to simplify the time-computation rules and to eliminate inconsistencies among those rules.

A "time-computation rule" is not a deadline, but rather a rule that directs how a deadline is to be computed. Thus, Appellate Rule 27(a)(3)(A) — which provides that a response to a motion must be filed within 8 days after service of that motion — is not a time-computation rule. But Appellate Rule 26(a)(2) — which provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded — is a time-computation rule.

The Subcommittee will focus on time-computation rules, not on deadlines. If changes to the time-computation rules are recommended, it will be up to the individual advisory committees to decide whether their respective deadlines should be adjusted or whether changes should be made to other rules, such as the rules that give courts the authority to alter deadlines.[1] The Subcommittee will likely act as a "clearinghouse" for information about such changes and help to coordinate the work of the advisory committees, but the Subcommittee will not itself address such topics as whether a defendant should have more than 7 days to move for a judgment of acquittal under Criminal Rule 29(c)(1) or whether the "safe harbor" of Civil Rule 11(c)(1)(A) should be longer than 21 days. Obviously, the expertise needed to address such questions resides in the advisory committees, not in the Subcommittee.

The ultimate goal of the Subcommittee is to recommend to the advisory committees a time-computation template containing uniform and simplified time-computation rules. Attached

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[1] *See, e.g.*, FED. R. APP. P. 26(b); FED. R. BANKR. P. 9006(b); FED. R. CIV. P. 6(b); FED. R. CRIM. P. 45(b).

please find a list of the time-computation rules that are presently found in the Appellate, Bankruptcy, Civil, and Criminal Rules, and that are obvious candidates for inclusion in the template. (The Evidence Rules have a few deadlines,[2] but no provisions about how to compute those deadlines.) Prof. Schiltz, who put together this list, has also identified three issues that are not now addressed by the rules of practice and procedure, but that might merit the attention of the Subcommittee.

John Rabiej from the Administrative Office will soon be contacting you to set up a teleconference for late September or early October. At that teleconference, I hope to get tentative agreement on how the issues identified by Prof. Schiltz should be resolved. Prof. Schiltz will then draft a template that reflects our agreement, and we will hopefully be able to review and approve that draft template before the Standing Committee meets in January. The template will then go to the advisory committees in time for their spring meetings, and, following those meetings, this Subcommittee will review any concerns raised by the Standing Committee or any of the advisory committees, and the advisory committees will begin work on reviewing their deadlines. The tentative plan for the time-computation project is thus as follows:

Fall 2005	Time-Computation Subcommittee drafts template
January 2006	Template reviewed by Standing Committee
Spring 2006	Template reviewed by advisory committees
Summer 2006	Time-Computation Subcommittee reviews comments from Standing Committee and advisory committees and approves template
Fall 2006	Advisory committees consider amendments to time-computation rules to reflect template and begin work on revising deadlines
Spring 2007	Advisory committees approve amendments to time-computation rules and deadlines for publication
June 2007	Standing Committee approves amendments to time-computation rules and deadlines for publication
August 2007	Amendments to time-computation rules and deadlines published for comment

[2]*See, e.g.*, FED. R. EVID. 412(c)(1)(A), 413(b), 414(b), 415(b).

As you review the attachment, please let me know if you believe that we have missed any topics that might be addressed by the Subcommittee. Also, please feel free to share by e-mail any comments that you have on the issues identified by Prof. Schiltz. We certainly do not have to wait until the teleconference to begin our discussion.

Thank you for your assistance with this project.

I. SCOPE OF TIME-COMPUTATION RULES

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . .

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . .

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order . . . .

E. Comment

Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) make clear that their time-computation provisions apply to any "applicable statute," as well as to federal rules, local rules, and court orders. For some reason, Criminal Rule 45(a) does not mention "applicable statutes." I do not know why the newly restyled Criminal Rule is inconsistent with the other rules, but the Subcommittee may want to address this inconsistency.

II. EXCLUDING DAY OF EVENT

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.

E. Comment

Appellate Rule 26(a)(1), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(1) are consistent in substance and, as far as I know, have created no problems for the bench or bar. It appears that only "restyling" to make the language consistent may be needed.

III. 11-DAY RULE: EXCLUDING INTERMEDIATE SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is

less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(2) ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

E. Comment

Appellate Rule 26(a)(2), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(2) are consistent in substance, with two exceptions. First, the dividing line under the Bankruptcy Rule is 8 days, whereas the dividing line under the Appellate, Civil, and Criminal Rules is 11 days. Second, the Appellate Rule alone recognizes the concept of "calendar days." (More about calendar days below.)

The "11-day rule" (which I will call it, for the sake of simplicity) is the most criticized of the time-computation rules. The 11-day rule makes computing deadlines unnecessarily complicated and leads to counterintuitive results — such as parties sometimes having less time to file papers that are due in 14 days than they have to file papers that are due in 10 days.[3] The Subcommittee should consider eliminating the 11-day rule and providing instead that "days are days" — i.e., that intermediate Saturdays, Sundays, and legal holidays are always counted, no matter how long the deadline. A "days are days" rule would also moot the

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[3] If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days.

Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005). Ed Cooper points out that a 10-day deadline can actually extend to 17 days, if it begins running on a Friday, December 22.

inconsistency between the 8-day dividing line in the Bankruptcy Rule and the 11-day dividing line in the Appellate, Civil, and Criminal Rules.

IV. CALENDAR DAYS

A. Appellate Rule

As noted above, the Appellate Rules alone recognize the concept of "calendar days." Appellate Rule 26(a)(2) provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded *unless the deadline is stated in calendar days*. If the deadline is stated in calendar days, then "days are days," and intermediate Saturdays, Sundays, and legal holidays are counted.

Only one deadline in the Appellate Rules is stated in calendar days: Appellate Rule 41(b) requires that "[t]he court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later."

In addition, Appellate Rule 26(c) — the "3-day rule" (discussed below) — is stated in calendar days: "When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." (The equivalent provision in the Bankruptcy, Civil, and Criminal Rules is simply stated in "days.")

Finally, Appellate Rule 25(a)(2)(B)(ii) provides that a brief or appendix is timely filed if, on or before the last day for filing, it is "dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days." And Appellate Rule 25(c)(1)(C) lists as an authorized method of service transmittal "by third-party commercial carrier for delivery within 3 calendar days."

B. Bankruptcy Rule

The Bankruptcy Rules do not refer to calendar days.

C. Civil Rule

The Civil Rules do not refer to calendar days.

D. Criminal Rule

The Criminal Rules do not refer to calendar days.

E. Comment

The use of calendar days by the Appellate Rules — but not by the Bankruptcy, Civil, or Criminal Rules — is a major inconsistency in the time-computation rules. The inconsistency would not exist but for the 11-day rule. If that rule were eliminated — if "days were days" — then the Appellate Rules would no longer need to use the concept of calendar days, as all days would be counted as calendar days. This is another reason for the Subcommittee to consider eliminating the 11-day rule.

V. LAST DAY OF PERIOD ON SATURDAY, SUNDAY, OR LEGAL HOLIDAY

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . . When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, [or] legal holiday . . . .

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, and, as far as I know, neither the bench nor the bar have had difficulty understanding that when a deadline ends on a Saturday, Sunday, or legal holiday, the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. It appears that only "restyling" to make the language consistent may be needed.

VI. LAST DAY OF PERIOD ON DAY CLERK'S OFFICE INACCESSIBLE

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless . . . if the act to be done is filing a paper in court — [it is] a day on which the weather or other conditions makes the clerk's office inaccessible.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a . . . day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, except that newly restyled Criminal Rule 45(a)(3) eliminates the "act to be done is filing" qualifier. The reason for this omission is not clear to me, but the Subcommittee may wish to address it.

The Subcommittee may also wish to consider whether to address the myriad problems that will arise as electronic filing becomes pervasive. For example, suppose that the clerk's office is physically open, but electronic filing is not possible because of problems with the clerk's computer system? Or because of problems with the filing attorney's or party's computer system? Or suppose the opposite: The clerk's office is physically closed, but electronic filing is possible 24 hours per day, 365 days per year. Should the rules provide that a paper that is filed electronically at 11:59 p.m. on the last day of a deadline is timely, even though it was filed after clerk's office had closed?

My summer research assistant looked at a sample of local and state rules, but was unable to find any provision directed specifically at electronic accessibility. It may be that attempting to address these issues now would be premature, and that we should instead give courts and local rulemakers a few years to identify the issues that electronic filing will present and experiment with various means of addressing those issues.

VII. DEFINITION OF "LEGAL HOLIDAY"

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the court is held.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:

(A) the day set aside by statute for observing:

(i) New Year's Day;

(ii) Martin Luther King, Jr.'s Birthday;

(iii) Washington's Birthday;

(iv) Memorial Day;

(v) Independence Day;

(vi) Labor Day;

(vii) Columbus Day;

(viii) Veterans' Day;

(ix) Thanksgiving Day;

(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

E. Comment

Appellate Rule 26(a)(4), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(4) are essentially consistent in substance, with the one difference reflecting the fact that most of the circuit courts to which the Appellate Rules apply encompass more than one state, whereas most of the bankruptcy and district courts to which the Bankruptcy, Civil, and Criminal Rules apply encompass only one state. As far as I know, this provision has not created any difficulties and needs only to be "restyled" to make the language consistent.

VIII. 3-DAY RULE: ADDING 3 DAYS UNLESS PERSONALLY SERVED

A. Appellate Rule

Rule 26. Computing and Extending Time

* * * * *

(c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

B. Bankruptcy Rule

Rule 9006. Time

* * * * *

(f) **Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P.** When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

C. Civil Rule

Rule 6. Time

* * * * *

(e) ADDITIONAL TIME AFTER SERVICE UNDER RULE 5(b)(2)(B), (C), OR (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

D. Criminal Rule

Rule 45. Computing and Extending Time

* * * * *

(c) **Additional Time After Service.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).

E. Comment

Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c) are essentially consistent. The only differences reflect the fact that the service authorized under Appellate Rule 25(c) differs from the service authorized under Civil Rule 5(b) (which is incorporated by reference into the Bankruptcy Rules[4] and the Criminal Rules[5]). For example, Appellate Rule 25(c)(1)(C) authorizes service by third-party commercial carriers such as Federal Express, while Civil Rule 5(b)(2)(D) authorizes such service only if the party being served has consented.

The Subcommittee should consider whether the 3-day rule might be eliminated as part of a general effort to ensure that, to the extent possible, "days are days." The 3-day rule complicates time computation by forcing parties to figure out whether or not they get 3 extra days. In the past, parties have had particular difficulty grasping the fact that the 3-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order.

The 3-day rule harkens back to the time when almost all service was either in person or by mail. The concern was that a party facing, say, a 10-day deadline to respond to a paper would have 10 real days if the paper was served personally, but only about 7 real days if the paper was served by mail. The 3-day rule was designed to put all served parties in roughly the same position and thus to eliminate strategic behavior by serving parties.

Today, the 3-day rule has been expanded to cover every type of service except personal service, and thus it seems likely that 3 days are being added to the vast majority of service-triggered deadlines. Rather than continue to complicate time computation with the 3-day rule, the Subcommittee may want to consider abolishing the rule, leaving the advisory committees free to add 3 days to those service-triggered deadlines that need the extra time.

Abolishing the 3-day rule would simplify time computation. It might, however, introduce the type of strategic behavior that the 3-day rule was designed to curtail. For example, a party might opt for mail rather than electronic or personal service in order to give his or her opponent 2 or 3 fewer days to work on a response. Note, though, that similar incentives already exist under the present rule. For example, a party might opt for mail rather than electronic service because,

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[4]*See* FED. R. BANKR. P. 7005.

[5]*See* FED. R. CRIM. P. 49(b).

although both gain the benefit of the 3-day rule, mail service is likely to take 2 or 3 days, whereas electronic service is likely to be instantaneous.

IX. OTHER ISSUES

There are several issues that the rules of practice and procedure do not currently address but perhaps should. Those issues include the following:

A. Deadlines stated in hours

Congress is increasingly imposing (or considering imposing) deadlines stated in hours, without giving any instructions about how those deadlines should be computed. For example, the Justice for All Act of 2004 provides that, if a victim of a crime files a mandamus petition complaining that the district court has denied the victim the rights that he or she enjoys under the Act, "[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3).

Suppose such a petition is filed at 2:00 p.m. on Thursday. By when must the court of appeals "take up and decide" the petition? By 2:00 p.m. Sunday? By 9:01 a.m. Monday? By 2:00 p.m. Monday? By 2:00 p.m. Tuesday? By 5:00 p.m. Tuesday?

The Subcommittee may want to recommend new provisions describing how deadlines stated in hours should be computed. This would be a difficult drafting exercise — made more difficult by the fact that, as far as I can tell, no local rules or state rules address the computation of deadlines stated in hours.

B. "Backward-looking" deadlines

The rules are silent about how backward-looking deadlines are computed. For example, Civil Rule 56(c) provides that a summary judgment motion "shall be served at least 10 days before the time fixed for the hearing." If the 10th day falls on a Saturday, must the motion be served by the previous Friday or by the following Monday? The Subcommittee may want to consider proposing template language that would address this issue.

C. Deadlines stated in 7-day increments

Ed Cooper has suggested the possibility that all deadlines could be stated in 7-day increments — i.e., 7 days, 14 days, 21 days, etc. This would reduce the problem of deadlines ending on a Saturday or Sunday, although it would not eliminate the problem altogether (parties can be served on — and thus deadlines can run from — a Saturday or Sunday), nor reduce the problem of deadlines ending on legal holidays.

III. B. Summary Judgment

One of the most frustrating parts of the Style Project was the hours we spent on Rule 56. The work revealed problems in the text of the Rule, well beyond the limits of the Style Project. At the same time, the Committee recognized that well-developed case law has laid a heavy gloss over Rule 56 that is daily applied in practice. The Committee has made prior forays into Rule 56. Those studies in turn shed light on some of the problems of proposing to change the rule.

1. The 1992 Proposals

The Advisory Committee took up revision of Rule 56 in the wake of the 1986 Supreme Court decisions. In September 1992 the Judicial Conference rejected the proposed revision. A few years later the Reporter prepared a first-draft revision of Rule 56(c) based on the earlier proposal. This draft responded to one set of purposes underlying the proposal. Rule 56(c) does not provide much detail about the procedure of moving for summary judgment. Many districts have adopted local rules that spell out detailed requirements. Rule 56 can be improved by adopting the best features of these rules, and some measure of national uniformity may be gained in the bargain. The Rule 56(c) draft remains for initial consideration. The present question is whether to undertake broader revision of Rule 56. If Rule 56 is to be revamped, the Rule 56(c) draft would be revised to fit within the new overall structure. For present purposes, Rule 56(c) questions are relegated to the separate memorandum.

The earlier effort pursued a multitude of objectives. This initial description is rough, but should present most of the questions that should be considered in deciding whether to renew the study of Rule 56.

a. The Purpose of Revision

The first paragraph of the final Committee Note seems to reflect a desire to increase the use of Rule 56:

> This revision is intended to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that, considering the evidence to be presented and received at trial, can have but one outcome — while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters.

The first question to confront is what motives might prompt Rule 56 revision. Is there a sense that Rule 56 should be used more vigorously to weed out cases — or parts of cases — that do not deserve elaborate pretrial preparation or trial? That use of Rule 56 has gone too far, so that parties are "deprived of a fair opportunity to show that a trial is needed"? Or that practice varies, not simply in the way courts express themselves but in the actual willingness to dispatch cases by Rule 56? Any of these reasons would prompt a thorough-going reframing of the entire rule.

Less ambitious goals might be pursued. The core of current Rule 56 practice could be taken as given, turning attention to matters affecting the procedure of moving for summary judgment. These goals could be reasonably ambitious, or instead could seek more modest gains. Omissions and unfortunate drafting could be cured. Unrealistically short times for response could be adjusted.

The 1992 draft undertakes many changes within this general range, to be explored here in no particular order.

b. Standard

The present standard allows summary judgment only if presentation of the same record at a jury trial would require judgment as a matter of law. The directed verdict standard applies even if jury trial has been waived, or even if there is no right to jury trial. There is no discretion to grant summary judgment in a case that does not meet this standard. But the equation is not exact. Many cases recognize discretion to deny summary judgment even though the directed-verdict standard is satisfied — Style Rule 56(c) recognizes this discretion by saying that summary judgment "should" be granted when there is no genuine issue as to any material fact.

It would be possible to reconsider each of these points. It might be argued that if the case is to be tried to the court without a jury, the judge should be able to grant summary judgment on the basis of some standard more open-ended than the directed-verdict standard. Indeed, it might be urged that the efficiency gained by summary judgment justifies departure from the directed-verdict standard even in a jury case.

The 1992 proposal did not attempt to make these changes, apart from recognizing discretion to deny summary judgment even when the required showing has been made. The initial effort, indeed, was to integrate Rule 56 more directly with judgment as a matter of law, emphasizing the identity of standards. Application of the jury standard in judge-tried cases was recognized and carried forward. The Rule 50 standard for judgment as a matter of law was expressly incorporated

in subdivision (b), while subdivision (a) carried forward the concept of "facts not genuinely in dispute."

The proposal did undertake a task that has been accomplished by the Style Project. The several different phrases that present Rule 56(d) and (e) deploys to describe the "genuine issue" concept are replaced by uniform terminology. The thought was to use the same words to express the same standard, not to suggest that the different expressions had led to different standards.

There is no apparent reason to reconsider the basic standard. The tie to directed verdict standards in jury cases is apparent, and probably wise. Strong resistance to any change is certain. Nor is there any clear reason to reconsider the standard for judge-tried cases. Any party who wishes to present live witnesses should have the opportunity to do so, limited only by predictive application of the directed-verdict standard. If no party wishes to present live witnesses, the case can be tried on a paper record. Trial on a paper record is different from summary judgment. It entails Rule 52 findings and review for clear error.

The 1992 draft did write into Rule 56 discretion to deny summary judgment even when a verdict would be directed if the opposing party does not improve its showing at trial. It did this in a way that anticipated but goes beyond the Style Project outcome. Proposed Rule 56(a) said that the court "may" enter summary judgment or "may" summarily determine an issue. The Committee Note explained that discretion to deny has been recognized in the cases, and that the "purpose of the revision is not to discourage summary judgment, but to bring the language of the rule into conformity with this practice." This change may be resisted, however, on the ground that it might increase the

rate of denials. In addition, the 1992 Committee Note suggests complications: discretion to deny may be limited, or may disappear, when summary judgment is sought on specially protected grounds such as official immunity or First Amendment rights. Although slight, the distinction from "should" in Style Rule 56(c) is real; the Committee Note to Style Rule 56 says that "courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact."

c. Moving and Opposing Burdens

The Rule 56 moving burden depends on allocation of the trial burden. A party who would have the burden at trial must support a summary-judgment motion by showing evidence that would entitle it to a directed verdict at trial. A party who would not have the burden at trial may carry the Rule 56 burden in either of two ways. It may undertake a positive showing that negates an essential element of the opposing party's case. But it need not do that. Instead, it suffices to "show" that the opposing party does not have evidence sufficient to carry its trial burden.

The language of Rule 56 has not been changed since the Supreme Court first clearly articulated the Rule 56 burden for a party who does not have the trial burden. The 1992 proposal undertook to express the distinctions derived from the allocation of trial burdens. The words chosen do not accomplish a clear articulation:

> **(b)** ***Facts Not Genuinely in Dispute.*** A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be

entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

This drafting distinguishes between the moving burdens first by looking to "the evidence shown to be available for use at trial" and complementing this showing with "the demonstrated lack thereof." Either party may rely on evidence to establish a right to judgment as a matter of law "under Rule 50," presumably meaning according to the standard for judgment as a matter of law expressed in Rule 50. A party who would not have the trial burden may invoke "the demonstrated lack" of evidence standard, a result ensured by "and the burden of production or persuasion." The reference to "standards applicable thereto" seems calculated to invoke the rule that the trial standard of proof affects the directed verdict standard and with it the Rule 56 standard: if the trial burden requires clear and convincing evidence, stronger evidence is needed to justify a reasonable jury finding.

Although this drafting is a reasonably neat job, it is fair to wonder whether it would mean anything to a reader who does not already understand the Rule 56 burden.

Smaller questions also might be raised. One comment on the drafting, for example, expressed concern that "[a] fact * * * admitted by the parties" might be read to give conclusive effect to a party's out-of-court statement admissible under the "admission" exception to the hearsay rule. Nothing of the sort was intended, but the comment reflects the anxiety that will accompany any effort to state the moving burden.

In this dimension, then, the questions are whether it would be useful to describe the moving burdens in Rule 56; whether the 1992 draft does the job adequately; and whether a better job can be

done. These questions may become entangled with residual disagreements about the Supreme Court's rulings.

The 1992 proposal also addressed the burden on a party opposing a summary-adjudication motion. The details are described in the Rule 56(c) memorandum. The immediately relevant provision was the final sentence of proposed 56(c)(2). A party that fails to respond in the required detail "may be treated as having admitted" a fact asserted in the motion. This provision seems to establish discretionary authority to grant summary judgment without independently determining whether the moving party has carried its burden to show lack of a genuine dispute. Presumably the purpose is to give teeth to the requirement of detailed response. But this approach is likely to be resisted on the ground that an opposing party should be entitled to rely simply on the argument that the moving party has not carried its burden. Much will turn on a determination whether — either to help the court consider the motion or to encourage summary disposition — a moving party can impose a burden of detailed response simply by making the motion.

Finally, proposed Rule 56(e)(2) addressed a distinct aspect of the parties' burdens, whether moving or opposing: "The court is required to consider only those evidentiary materials called to its attention pursuant to subdivision (c)(1) or (c)(2)." Without invading subdivision (c) territory, the value of this proposition is apparent. At trial a court is not required to embark on a quest for evidence the parties have not submitted. It should not be required to comb through whatever materials have been filed by the time of summary judgment to determine whether the parties have failed to refer to decisive material. The only question is whether this proposition need be stated in

the rule. One advantage of explicit statement may be that it goes part way toward imposing an obligation to respond — the opposing party knows that absent a response the court will consider only the adverse portions of the record pointed out by the moving party.

d. "Evidence" Considered

The 1992 proposal described the basis for decision as "evidence shown to be available for use at trial." Proposed Rule 56(b). The Committee Note explains that this language "clarifies that the obligation to consider only matters potentially admissible at trial applies not just to affidavits, but also to other evidentiary materials submitted in support or opposition to summary adjudication."

More elaborate provisions were set out in proposed Rule 56(e):

> **(e)** ***Matters to be Considered.***
>
> **(1)** Subject to paragraph (2), the court, in deciding whether an asserted fact is genuinely in dispute, shall consider stipulations, admissions, and, to the extent filed, the following: (A) depositions, interrogatory answers, and affidavits to the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (B) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings, even if verified, only to the extent of allegations therein that are admitted by other parties.
>
> **(2)** The court is required to consider only those evidentiary materials called to its attention pursuant to subdivision (c)(1) or (c)(2).

The Committee Note begins by stating that subdivision (e) implements the principle stated in (b).

The Note says that facts may be "admitted" for Rule 56 purposes in pleadings, motions, briefs, statements in court (as a Rule 16 conference), or through Rule 36. It states that submission of a document under Rule 56 is sufficient authentication and that there is no need for independent assurances that a copy is accurate. Other evidence required to establish admissibility should be supplied by deposition, interrogatory answers, or affidavit.

Proposed Rule 56(g)(4) rounded out these provisions by stating that the court may conduct a hearing to rule on the admissibility of evidence.

There is no further discussion of the need to state the admissibility requirement in the rule, nor of the reasons for dispensing with authentication of documents or assurance that a document copy is accurate. Presumably admissibility is required because the purpose of Rule 56 is to determine whether there is a need for trial. The availability of inadmissible evidence does not show the need to try an issue that cannot be supported by admissible evidence.

Apart from wondering whether the admissibility requirement should be addressed in rule text, these provisions tie directly to the timing provisions. The parties must be afforded an opportunity for investigation and discovery that will enable them to find admissible evidence, including the opportunity to find admissible substitutes for inadmissible information. The timing provisions are described below. The proposed amendments to Rule 56(f) also expressly recognized the authority

to deny a Rule 56 motion because an opposing party shows good cause why it cannot present materials needed to support its opposition.

A novel feature of redrafted Rule 56(f) would allow a party who cannot present materials needed to oppose a motion to make an "offer of proof." This provision seems to contemplate a statement of the admissible evidence a party hopes to secure, perhaps supported by pointing to information in an inadmissible form that may lead to admissible evidence. A showing that a bystander heard a witness say that the light was red might not be admissible, but could lead to discovering the identity of the witness and development of the same information in admissible form. Surely that approach is recognized in present practice. The questions are whether it need to stated in the rule, and whether reference to an "offer of proof" is the most useful description of the practice. Together, these opportunities to delay decision seem to address the major potential difficulties of the admissibility requirement.

The provision barring reliance on verified pleadings, unless admitted, is curious. At least at times, a sworn pleading has been given the same effect as an affidavit — each is a unilateral, self-serving instrument, not independently admissible, but each is sworn to. It is required that the verified pleading satisfy the formal requirements of a Rule 56 affidavit, showing that the person signing is competent to testify. This practice is not often invoked, in part because verification is not often required and perhaps in part because verified pleadings do not often meet the formal requirements for a Rule 56 affidavit. This provision may reflect a view that as compared to

affidavits, pleadings are verified with less scrupulous concern for truth. It might reflect experience that verified pleadings have been used to support or oppose summary judgment, to undesirable effect. Perhaps the view is that little work is required to copy the verified pleading into an affidavit, so this additional assurance is properly required.

e. Timing

The time provisions in present Rule 56 clearly require revision. Rule 56(a) allows a party making a claim to move at any time more than 20 days after commencement of the action, or at any time after an adverse party has served a motion for summary judgment. That means that a party making a counterclaim, for instance, can file a Rule 56 motion at the same time that it serves the counterclaim.[20] A party defending against a claim can move at any time. The motion must be served at least 10 days before the time set for hearing. Opposing affidavits can be "served" — including service by depositing in the mail — "prior to the day of hearing." All of these time periods are too short for many cases — often much too short.

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[20] An intriguing observation. Rule 56(a) says that a party seeking to recover on a counterclaim may move for summary judgment at any time after 20 days from commencement of the action. That seems to say that the counterclaim cannot be included in an answer filed 10 days after the action is filed. But Rule 56(b) says that a party against whom a claim is asserted may move at any time. The apparent reconciliation is that the defendant can move for summary judgment against the plaintiff's claim on the 10th day, but cannot move for summary judgment on its counterclaim until the 21st day. Does that make sense?

The proposed rule sought to establish a functional test to control the motion. Proposed Rule 56(c) provided:

> A party may move for summary adjudication at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control.

Response time was set at 30 days after the motion is served. (There is no explicit provision for hearing, so no time period was geared to the hearing. Present Rule 56(d) refers to "the hearing on the motion." The 1992 version deleted this reference; the Committee Note explained that the reference was confusing because the court may decide on the basis of written submissions alone. Some of the comments expressed concern at the lack of a hearing requirement. Compare the Style Project understanding that a provision for "hearing" can be satisfied without an in-person appearance before the court.)

These provisions were supplemented by express recognition in proposed 56(g)(1) and (2) of the court's authority to specify the period for filing motions and to "enlarge or shorten the time for responding * * *, after considering the opportunity for discovery and the time reasonably needed to obtain or submit pertinent materials."

Setting motion time in relation to the opportunity to discover relevant evidence is attractive in the abstract. It is likely to work well — indeed to be largely irrelevant — in actively managed

cases. It is not clear that it would work well in cases left to management by the parties. There can easily be disputes whether there has been a reasonable opportunity to discover evidence. But the same disputes can arise under present Rule 56(f), in the form of seeking a continuance to permit affidavits to be obtained, or discovery to be had. And substituting the close of the discovery period is not a good idea — there may not be a defined discovery period, and in any event one stated purpose of the revisions is to cut short the discovery process when dispositive issues can be resolved without further discovery on other issues.

Another possible shortcoming of the reliance on reasonable opportunity for discovery may not be real. One "simplified" procedure that might be encouraged is to permit a motion for summary adjudication with the complaint. Actions that are essentially collection actions are the most likely candidates for such treatment. Perhaps this practice could be fit under the proposed rule by arguing that in such actions there is no need to discover evidence not already known to the defendant. An explicit subdivision describing this possible practice might be useful, however, if the practice seems desirable.

f. Explanation of Court's Action

The final sentence of 1992's Rule 56(a) reads: "In its order, or by separate opinion, the court shall recite the law and facts on which the summary adjudication is based." The Committee Note says that "[a] lengthy recital is not required, but a brief explanation is needed to inform the parties

(and potentially an appellate court) what are the critical facts not in genuine dispute * * *." It also says something not in the Rule — an "opinion" also should be prepared if a denial of summary judgment is immediately appealable. Since 1992 many appellate opinions wrestling with official-immunity appeals have bewailed the absence of any district-court explanation of the reasons for denying summary judgment. This may prove to be an issue that pits the interests of appellate courts against the needs of trial courts; it would be easier to strike a balance if we could know how often denial of an official-immunity motion for summary judgment is not followed by an appeal, and whether there is a practicable way to impose a duty to explain only when there is an appeal.

Reasoned explanation of a decision granting summary judgment is obviously valuable. It is also burdensome. The choice made in 1992 seems right, but must be thought through again.

Explanation of a decision denying summary judgment was urged by some of the comments on the 1992 proposal. This question ties to the question of "partial summary judgment." If a court decides to leave for trial all of the issues presented by the motion, it may be better to leave to Rule 16 conferences or other devices the opportunity to guide further party preparation for trial. Again, the choice made in 1992 may be the best outcome. But there is at least one competing concern. A summary-judgment denial may be appealable. By far the most common example is denial of a motion based on official immunity. There are lots of those appeals. Appellate courts regularly bewail the absence of any statement of the reasons that led to the denial. If it could be done, it might be useful to draft a rule that requires explanation when a denial may be appealed. The most obvious

difficulty is to cabin any such rule to circumstances with a realistic basis for appeal in final-judgment doctrine. A rule might be drafted for immunity appeals only — perhaps including not only official immunity, but also Eleventh Amendment, foreign sovereign, and qualifying state-law immunities. It also might include any denial certified for § 1292(b) appeal. Venturing further, account might be taken of circumstances in which denial of summary judgment might arguably be appealable as a denial of interlocutory injunction relief for purposes of a § 1292(a) appeal. Even this much speculation illustrates the difficulty.

g. Partial Summary Judgment: Nomenclature and Limits

The 1992 proposal elected to retain "summary judgment" as the Rule 56 caption, but was drafted to distinguish three concepts. The general concept, "summary adjudication," embraces both "summary judgment" and "summary determination." Summary judgment refers to disposition of at least a claim; summary determination to disposition of a defense or issue. It is not clear whether the distinction is employed in a way that enhances clarity, but it may prove useful.

Two limits are created for summary determination. The first no doubt reflects much present practice. Present Rule 56(d) does not use the term "partial summary judgment," but commonly is described that way. It says that if a Rule 56 motion does not dispose of the entire case, the court "shall if practicable ascertain what material facts exist without substantial controversy." The 1992 proposal explicitly changes "shall" to "may," recognizing that the court should have discretion to

refuse any summary determination. The Style Project has done the same thing, although in a rather different way. Rather than "may," it says the court "should," to the extent practicable, determine what material facts are not genuinely at issue. This revision, reflecting actual practice, seems safe.

The other limitation on summary determination appears in proposed Rule 56(a). Summary determination is authorized only as to "an issue substantially affecting but not wholly dispositive of a claim or defense." The Committee Note explains this limit: "the point being that motions affecting only part of a claim or defense should not be filed unless summary adjudication would have some significant impact on discovery, trial, or settlement." The underlying concern seems reasonable. It would be good to restrict the opportunity to use Rule 56 for purposes of delay or harassment. A motion for determination of incidental issues may impede, not advance, ultimate disposition. But the practical value of this limit deserves some thought. The effort to sort out issues that do not substantially affect a claim or defense may itself impede progress, particularly if the parties take to responding to Rule 56 motions by arguing the "significant impact" point. And some parties might avoid the attempt to determine whether an issue substantially affects a claim by moving for summary judgment on the claim. Under proposed Rule 56(c) the motion must specify the facts that are established beyond genuine issue, providing an obvious map for summary determination of some issues.

Partial summary disposition was extended by proposed Rule 56(d) to include an order "specifying the controlling law." It went on to provide that "[u]nless the order is modified by the

court for good cause, the trial shall be conducted in accordance with the law so specified * * *." The theory is that it can be useful to establish the law as a guide for further trial preparation and trial. The most obvious question is whether this sort of procedure should be added to the traditionally fact-sorting function of Rule 56, or instead should be relegated to Rule 16. There also may be questions of the relationship between this provision and Rule 51 as revised in 2003.

The 1992 version of Rule 56(d) concluded by stating that "An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent permitted by Rule 54(b)." Current Style conventions suggest that such gratuitous cross-references be deleted. This one may particularly deserve deletion because it gives no hint of the Rule 54(b) doctrine that requires final disposition of all parts of a "claim," or of all claims between a pair of parties. This provision was complemented by a Committee Note statement that denial of a Rule 56 motion does not establish the law of the case; the motion may be reconsidered, or a new motion may be filed. The implicit determination that there is no need to refer to this proposition in the rule may suggest that the Committee Note also can remain silent.

g. Parties Affected

The 1992 Committee Note says something not clearly anchored in the proposed rule text: When summary judgment is warranted as a matter of law because there are no genuine factual disputes,

> the judgment or determination may be entered as to all affected parties, not just those who may have filed the motion or responses. When the court has concluded as the result of one motion that certain facts are not genuinely in dispute, there is no reason to require additional motions by or with respect to other parties who have had the opportunity to support or oppose that motion and whose rights depend on those same facts.

It is easy enough to understand the sense of frustration that may underlie this statement. If the facts are so clear as to warrant summary judgment in favor of the moving party against the party targeted by the motion, why should the court have to revisit the issue on a later motion or actually have to carry the same facts through to trial as among other parties? But of course another party may do a more effective job in resisting a motion explicitly addressed to that party. Although it is more than frustrating to have to conclude that there is a genuine issue after all — and to have to deal with the contrary earlier ruling — this thought requires careful attention.

h. Court-Initiated Summary Judgment

Current practice recognizes the court's authority to initiate summary judgment by giving notice to the parties that it is considering summary judgment and providing an opportunity to respond at least equal to the times provided to respond to a motion. Proposed Rule 56(g)(3) expressed this practice by providing notice to the parties "to show cause within a reasonable period why summary adjudication based on specified facts should not be entered." This language may restrict present practice by the requirement that the notice specify the facts the court thinks to be

established beyond genuine issue. That may be difficult for the court, and might carry an undesirable aura of predisposition. Apart from those questions, it may be asked whether a rule that explicitly recognizes authority to act without motion may create a negative-implication limit on authority to act without motion under other rules that do not expressly recognize action on the court's initiative.

i. Oral Testimony

Present Rule 43(e) provides that when a motion is based on facts not appearing in the record the court may direct that the matter be heard wholly or partly on oral testimony. This authority can be used on a summary-judgment motion, but not to consider the credibility of the witnesses. The 1992 proposal adapted this practice into Rule 56(g)(4), authorizing a hearing to "receive oral testimony to clarify whether an asserted fact is genuinely in dispute." The Committee Note explains that the hearing, "as under Rule 43(e)," may be useful "to clarify ambiguities in the submitted materials — for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the evidentiary hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is."

The Committee Note explanation puts this provision half-way in the middle of a familiar problem. Many cases rule that a self-serving affidavit cannot be used to contradict deposition testimony. If summary judgment is warranted on the deposition testimony, the witness cannot defeat

summary judgment simply by changing the testimony. This practice recognizes that the self-contradicting affidavit may defeat summary judgment after all if a persuasive explanation is offered. The proposed rule extends this qualification by suggesting that hearing the witness "to determine just what the person's testimony is" will help. The idea is attractive. Whether it really can be separated from clandestine credibility determinations is not apparent.

j. Rule 11 Overlap

Present Rule 56(g) provides that the court "shall" order payment of reasonable expenses, including reasonable attorney fees, caused by filing Rule 56 affidavits "in bad faith or solely for the purpose of delay." It further provides that an offending party or attorney may be adjudged guilty of contempt.

The 1992 proposal eliminated Rule 56(g). The Committee Note observes that Rule 11 applies to Rule 56 motions, responses, briefs, and other supporting materials. In that respect Rule 11 goes far beyond the affidavits targeted by Rule 56(g). But there are at least two respects in which Rule 11 falls short of Rule 56(g). The Committee Note was written at a time when the Advisory Committee had determined to carry forward mandatory sanctions in what became the 1993 Rule 11. Now that Rule 11 sanctions are discretionary, Rule 56(g) — which appears to require sanctions — goes beyond Rule 11 with respect to Rule 56 affidavits. Rule 11, moreover, does not authorize

contempt sanctions; a Rule 11(c)(2) direction to pay a penalty into court approaches contempt, but is not contempt.

The question here is whether Rule 56(g) should be abrogated in favor of Rule 11. Severe penalties are available independently for false swearing in an affidavit, or for falsity in a § 1746 unsworn declaration under penalty of perjury. Those penalties, however, may not reach every affidavit presented in "bad faith," and more particularly may not reach an affidavit presented solely for the purpose of delay. 10B FP&P § 2742 describes cases in which sanctions were imposed without any indication that the affidavits were false. It also cites a 1968 district court ruling that sanctions are discretionary, notwithstanding "shall," and agrees: "Although this conclusion appears to be contrary to the language of Rule 56(g), it seems sound." There is so much discretion in determining bad faith or a sole purpose to delay that insisting on mandatory sanctions seems pointless. It also points out that Rule 56(g) applies to an affidavit offered under Rule 56(f) to support a request for additional time; applying a falsity test in that situation might be difficult.

Perhaps the most important observation is that there has not been much apparent use of Rule 56(g). Rule 11 may well suffice.

2. Rule 56(c)

The first two sentences of Rule 56(c) establish the following procedure for summary judgment motions: "The motion shall be served at least 10 days before the time fixed for the hearing.

The adverse party prior to the day of hearing may serve opposing affidavits." Rule 5(b) provides that service by mail is complete upon mailing. Read together, the two rules seem to permit a party opposing a motion for summary judgment to wait until the day before the hearing to mail affidavits to the moving party, confidently expecting that the moving party will not receive the affidavits before the hearing.

One response to this bizarre possibility has been local rules governing the time for making summary judgment motions and responding to them. Local rules in the Central District of California, for example, have required that the motion be filed 21 days before the hearing, or 24 days if service is by mail. The opposition must be filed 14 days before the hearing, and a reply must be filed 7 days before the hearing. This schedule makes it possible for the court and all counsel to be prepared for the hearing, and also may make it possible to determine that a hearing is not required. But the schedule seems inconsistent with the Rule 56(c) provisions that the motion be served at least 10 days before the hearing, and that opposing affidavits may be served up to the day before the hearing.

In *Marshall v. Gates,* C.D.Cal.1993, 812 F.Supp. 1050, reversed 9th Cir. November 8, 1994, No. 93-55022, reversed on different grounds 9th Cir.1995, 44 F.3d 722, the district court refused to consider opposing papers filed after the local deadline, noting that service had been by mail and that moving counsel had not seen the opposing papers at the time of the hearing. The papers included both affidavits and many other forms of submission. The court of appeals reversed The initial

opinion, later withdrawn, held that as applied to affidavits the local rule was invalid because of the conflict with Rules 5(b) and 56(c). Rule 56(c) allows a response to be served the day before the hearing, a time met in this case. The opinion that replaced the initial opinion was quite different. The court noted that "a colleague on this court" had pointed out that every district in the 9th Circuit had a local rule that had been invalidated by the initial opinion. Then it observed that "[w]e are * * * under an obligation to construe local rules so that they do not conflict with the federal rules, and we have exercised our ingenuity in doing so." Having justified ingenious interpretation of local rules, the court proceeded to interpret Rule 56(c) itself. "[A]n interpretation consistent with the reality of practice in the district court is that F.R.C.P. 56(c) does not unconditionally require a district court to accept affidavits up to the date set for hearing on the motion for summary judgment. Rather, the rule allows district courts to adopt procedures pursuant to which the non-moving party may oppose a motion prior to a hearing date. Local Rule 7.6 in no way eliminates this opportunity; instead it places a condition on that right." That said, the court reversed because summary judgment cannot be granted merely as a sanction for failure to oppose the motion. Summary judgment can be granted only if the moving party has carried the summary judgment burden of demonstrating the absence of genuine issues for trial.

There was been an immediate response to the initial Court of Appeals decision in *Marshall v. Gates*. Among others, Judges Keeton, Levi, Schwarzer, and Stotler suggested that the Committee should consider correcting amendments to Rule 56. The court's felt need to exercise so much

creativity in construing Rule 56(c) suggests that it is time for repair. The simplest repair would be to authorize local rules that set realistic time periods. But more is possible.

One model falls ready to hand. The package that amended Rule 50 originally included a complete revision of Rule 56 that integrated it with Rule 50. Although the Judicial Conference rejected the Rule 56 revision, attention apparently focused on the perception that the revision simply restated present practice — depending on the eyes of the beholders, this character made it either unnecessary or an unnecessary confirmation of undesirable practice. There is no reason to suppose that anything particular was found amiss in the provisions of proposed Rule 56(c), which would not only create a realistic set of time limits but also impose other requirements of specificity that should help ensure good practice.

The Rule 56(c) proposal, as drafted, looked like this:

> **(c) Motion and Proceedings Thereon.** A party may move for summary adjudication at any time after the other parties to be affected thereby have made an appearance in the case and have been afforded a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within 30 days after the motion is served, any other party may serve and file a response thereto.
>
> > **(1)** Without argument, the motion shall (A) describe the claims, defenses, or issues as to which summary adjudication is warranted, specifying the judgment or determination sought; and (B) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute and on the basis of which the judgment or determination should be granted, citing the particular pages or paragraphs of stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting those assertions.

(2) Without argument, a response shall (A) state the extent, if any, to which the party agrees that summary adjudication is warranted, specifying with respect thereto the judgment or determination that should be entered; (B) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in genuine dispute, citing the particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting that contention; and (C) recite in separately numbered paragraphs any additional facts that preclude summary adjudication, citing the materials evidencing such facts. To the extent a party does not timely comply with clause (B) in challenging an asserted fact, it may be deemed to have admitted such fact.

(3) If a motion for summary adjudication or response thereto is based to any extent on depositions, interrogatory answers, documents, affidavits, or other materials that have not been previously filed, the party shall append to its motion or response the pertinent portions of such materials. Only with leave of court may a party moving for summary adjudication supplement its supporting materials.

(4) Arguments supporting a party's contentions as to the controlling law or the evidence respecting asserted facts shall be submitted by a separate memorandum at the time the party files its motion for summary adjudication or response thereto or at such other times as the court may permit or direct.

Apart from the reference to "summary adjudication," taken from the other portions of the rule, these provisions could be cast in current style conventions and provide a strong framework for regulating summary judgment practice. Some questions, however, may deserve further consideration. This proposal does not include any explicit relation between the time for response and hearing; perhaps it can be assumed that the moving party will set a hearing date beyond the 30-day period permitted for responding. The initial timing provision, allowing a motion to be made only after a reasonable opportunity for discovery, may invite unnecessary squabbling; Rule 56(f) may be sufficient protection. A simplified version of Rule 56(c) might look something like this:

Rule 56. Summary Judgment

* * * * *

(c) Motion and Proceedings. A party may move at any time for summary adjudication against a party that has appeared. A party opposing the motion may file a response within 30 days after the motion is served.

(1) Without argument, the motion must:

(A) describe the claims, defenses, or issues as to which summary adjudication is warranted;

(B) specify the adjudication sought;

(C) recite in separately numbered paragraphs the specific facts that are not genuinely in dispute, citing the particular pages or paragraphs of [stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other] materials supporting the facts.

(2) Without argument, a response must:

(A) specify any summary adjudication that the party agrees is warranted;

(B) respond to the facts asserted under rule 56(c)(1)(C) and recite in separately numbered paragraphs any additional facts precluding summary adjudication, citing the particular pages or paragraphs of [stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other] materials supporting the response;

(3) The court may accept the truth of a fact asserted as required by Rule 56(c)(1)(C) if a response is not made as required by Rule 56(c)(2)(B).

(4) A party must append to a motion or response [the pertinent parts of] any cited materials that have not been filed.

(5) The court may permit a party to supplement the materials supporting a motion or response.

> **(6)** A party must submit its contentions as to the controlling law or the evidence respecting the facts in a separate memorandum filed with the motion or response or at a time the court directs.

This form does not set a time for hearing, nor a time that relates the time of the response to the time for hearing. Since 30 days are allowed for response, there is an indirect constraint — the moving party must allow at least 30 days for the hearing, and should allow more if it wishes an opportunity to consider the response before the hearing. It is possible that so many lawyers will find ways to behave foolishly that additional constraints should be provided. A local rule requiring that the motion be made at least x days before the hearing date would not be inconsistent with this rule. Local rules may make more sense than an attempt at greater detail in the national rule.

The (c)(3) provision that if a response is not made the court may accept the truth of a fact asserted as required by (1)(C) draws from the "deemed to have admitted" in the earlier draft. This is an important point that should not go by without discussion. The alternative would be to require that the court examine the sources described by the motion to determine whether the moving party has carried the summary-judgment burden of showing there is no genuine issue of material fact. Several current decisions impose that duty under present Rule 56. *U.S. v. One Piece of Real Property at 5800 SW 74th Ave.,* 11th Cir.2004, 363 F.3d 1099, ruled: "[T]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather,

must consider the merits of the motion." If S.D.Fla.L.R. 7.5(D) permits summary judgment without a review of the record, "that rule is inconsistent with Federal Rule of Civil Procedure 56, and, therefore, void." *Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 2d Cir.2004, 373 F.3d 241, is similar, without challenging the local rule: Rule 56 "does not embrace default judgment principles. Even when a motion for summary judgment is unopposed, the district court is not relieved of its duty to decide whether the movant is entitled to judgment as a matter of law." "[T]he district court may not rely solely on the statement of undisputed facts contained in the moving party's [E.D.N.Y. Local] Rule 56.1 statement. It must be satisfied that the citation to evidence in the record supports the assertion." And *de la Vega v. San Juan Star, Inc.*, 1st Cir.2004, 377 F.3d 111, characterizes summary judgment based on the opposing party's failure to file a timely response as an improper "sanction." A local rule cannot be enforced in a way that conflicts with Rule 56, and Rule 56 means that summary judgment cannot be granted merely for lack of any response by the opposing party. *See also Cusano v. Klein*, 9th Cir.2001, 264 F.3d 936, 950 — a local rule that would permit summary judgment for failure to file opposing papers, "without regard to whether genuine issues of material fact exist, would be inconsistent with Rule 56 * * *."

The cases that require an independent determination whether the summary-judgment moving burden has been carried live in some tension with other cases that approve enforcement of local rules that require specific refutation of the facts the motion identifies as established. The Seventh Circuit is particularly clear. One illustration is *Smith v. Lamz*, 7th Cir.2003, 321 F.3d 681, 683. N.D.Ill.

Local Rule 56.1(b) "provides that when a responding party's statement fails to controvert the facts as set forth in the moving party's statement * * *, those facts shall be deemed admitted for purposes of the motion. * * * We have consistently held that a failure to respond by the nonmovant as mandated by the local rules results in an admission." The First Circuit, quoted above, said, somewhat earlier in the same year, that it was proper to deem admitted "uncontested" facts stated in the motion because the opposing party cited to the record only twice and then referred only to a 30-page deposition without providing page numbers. *Cosme-Rosado v. Serrano-Rodriguez*, 1st Cir.2004, 360 F.3d 42, 45-46. Other decisions say more generally that a motion may not be supported or opposed by general references to entire depositions or other materials — the judge is not required to "wade through" or "paw over" the record in search of the relevant parts. *Crossley v. Georgia-Pac. Corp.*, C.A.8th, 2004, 355 F.3d 1112, 1114; *Orr v. Bank of America*, 9th Cir.2002, 282 F.3d 1099, 1109.

The question seems fairly put. Allowing summary judgment without further investigation of the supporting materials when the opposing party fails to respond would help the court. An opposing demonstration that the supported materials do not support, or that the record includes contradicting materials, can spare the court and avoid unwarranted summary judgments. A rule provision that requires response helps both when it elicits a response that otherwise would not be

made and when, for want of a response, the court can grant the motion as unopposed. The question remains whether summary judgment should be favored to this extent.

III. C. Notice Pleading Reconsidered

Pleading and discovery are inseparably joined in the Civil Rules system of "notice pleading." The complaint and answer are designed primarily to set the framework for pretrial litigation, relying on disclosure, discovery, and increasingly on "managerial judging" to inform the parties as to fact, contention, and legal theory. The discovery part of this package, recently joined by disclosure, has provoked such continuing anguish that it has been the subject of constant Advisory Committee study for the last 40 years. At least some segments of the bar continue to be dissatisfied with the disruptions and costs imposed by discovery. Although discovery issues will remain on the agenda, it may be appropriate to explore once again the question whether the notice pleading part of the package should be revised.

The most likely goal of revising the pleading rules would be to strengthen the use of pleadings to dismiss at the outset actions by plaintiffs who cannot even identify in a complaint facts that, if proved, would establish a claim for relief. The argument would be that Rule 11 does not provide adequate protection against actions brought without a solid foundation in both fact and law, in the hope that discovery either will show that there actually is a sustainable claim or, less attractively, in the hope that the prospect of discovery will elicit a settlement offer.

Whether there is any force to the arguments that pleading rules need strengthening depends on experience, not theory. Experience, not theory, also will shape the revisions that might be considered. There may be no general problems, or no sufficient number of problems to believe that

any "solution" is possible. Or there may be discrete problems that are better addressed by focused rules than by a general revision of notice pleading. Or there may be some number of significant problems, but no way to improve on wise administration of the current pleading rules, perhaps assisted by occasionally turning a blind eye to some of the more open-ended opinions that seem to deny any role for variable application of particular pleading requirements according to the nature of the litigation.

The immediate question is whether it would be desirable to undertake further study of notice pleading. As with recent discovery and class-action projects, organized bar groups are a likely source of help. Any useful appraisal of current pleading practice will require information drawn from many substantive areas and from courts in all parts of the country. Comparisons to state-court pleading practices also will be helpful. In addition to the familiar national groups that have helped with other projects, it may be particularly useful to seek out state bar groups in states that have distinctive pleading practices. It also may prove possible to enlist the Federal Judicial Center, either for an ambitious study or for something simpler akin to the recent survey of federal judges on Rule 11.

One testing hypothesis can be simply stated, with only brief elaboration. It begins with the belief that pleadings appropriately play different roles in different types of litigation. Form 9 is famous, and for good reason. The simplest pleading suffices for an automobile collision case based on negligence. There is likely to have been a collision, and with that reasonable ground for bringing

suit. The law is familiar, the means of investigation and discovery ready to hand, and the need to test the sufficiency of the legal theory almost nonexistent. Many courts, on the other hand, might be less comfortable with a similarly brief allegation that from July 1, 2001 continuing to the present the defendant has contracted, combined, or conspired with others unknown to fix the price of widgets purchased by the plaintiff in violation of § 1 of the Sherman Act. The conclusion of this hypothesis is that courts in fact act on these distinctions, insisting on greater pleading detail in cases that seem to call for it. If the automobile collision occurred in a no-fault state, allegations will be required to bring the suit into the tort system. Different levels of detail will be required in alleging title depending on whether the action is one to compel specific performance with an allegation of marketable title, one to quiet title, one to remove a cloud from title, or one to eject a trespasser. More generally, courts will consider experience with frequent misuse of specific types of claims, projected complexity in discovery and trial, and — more controversially — whether a particular type of claim should be favored. The burden is on would-be reformers to show that courts could do a better job if given more explicit authority to impose higher pleading standards.

1. Recent Cases

Two Supreme Court decisions provide the texts that cast doubt on the proposition that lower courts can tailor the specificity required by notice pleading to the perceived needs of different types of litigation. The lead decision is *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 1993, 507 U.S. 163, 113 S.Ct. 1160. A 1993 memorandum on the *Leatherman* decision is set

out below. The lesson that pleading with particularity can be required only when directed by a specific Civil Rule provision was repeated in *Swierkiewicz v. Sorema N.A.*, 2002, 534 U.S. 506, 122 S.Ct. 992. The *Swierkiewicz* decision ruled that a complaint claiming employment discrimination need not "plead facts establishing a prima facie case" within the familiar burden-shifting framework. The decision relied in part on the observation that a plaintiff who has direct evidence of discrimination may prevail without proving all the elements of a "prima facie case." Beyond that, the court observed:

> imposing the * * * heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2) * * *. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See * * * Leatherman * * *.Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example * * *. This Court * * * has declined to extend such exceptions to other contexts. * * * Just as Rule 9(b) makes no mention of municipal liability * * *, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).[4]
>
> Other provisions of the Federal Rules * * * are inextricably linked to Rule 8(a)'s simplified notice pleading standard. * * * Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 72, 104 S.C.t 2229 * * * (1984). * * * the liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.

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[4] These requirements are exemplified by the * * * Forms * * *. For example, Form 9 sets forth a complaint for negligence * * *.

Alongside these decisions lie other Supreme Court decisions that seem to look in a different direction. The first is *Crawford-El v. Britton*, 1998, 523 U.S. 574, 597-598, 118 S.Ct. 1584, 1596-1597. The claim was that the defendant prison official had punished the plaintiff prisoner for exercising his First Amendment rights by arranging for transfer of the plaintiff's legal materials to the plaintiff's new prison by inappropriately slow means. The claim required showing improper motive. The Court quoted an earlier observation that

> "firm application of the Federal Rules of Civil Procedure is fully warranted" and may lead to the prompt disposition of insubstantial claims. * * * Though we have rejected the Court of Appeals' solution, we are aware of the potential problem that troubled the court. It is therefore appropriate to add a few words on some of the existing procedures available to federal trial judges in handling claims that involve examination of an official's state of mind.
>
> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise is discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. * * * This option exists even if the official chooses not to plead the affirmative defense of qualified immunity."

Christopher v. Harbury, 2002, 536 U.S. 403, 416-418, 122 S.Ct. 2179, 2187-2188, is more difficult to describe. The Court recognized the legal theory underlying a claim that the plaintiff's

access to court had been denied by State Department refusal to provide access to information that would have enabled the plaintiff to maintain an action arising from the killing of her husband by Guatemala officials who were trained, paid, and used as informants by the CIA. In order to make out the present claim, the plaintiff must show that if she had been given access to the information she could have successfully maintained an action for relief that cannot any longer be sought:

> Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant. See generally Swierkiewicz * * *. Although we have no reason here to try to describe pleading standards for the entire spectrum of access claims, this is the place to address a particular risk inherent in backward-looking claims. Characteristically, the action underlying this sort of access claim will not be tried independently, a fact that enhances the natural temptation on the part of plaintiffs to claim too much, by alleging more than might be shown in a full trial focused solely on the details of the predicate action.
>
> Hence the need for care in requiring that the predicate claim be described well enough to apply the "nonfrivolous" test and to show that the "arguable" nature of the underlying claim is more than hope. * * *
>
> The particular facts of this case underscore the need for care on the part of the plaintiff in identifying, and by the court in determining, the claim for relief underlying the access-to-courts plea. The action alleged on the part of all the Government defendants * * * was apparently taken in the conduct of foreign relations by the National Government. Thus, if there is to be judicial enquiry, it will raise concerns for the separation of powers in trenching on matters committed to the other branches. * * * Since the need to resolve such constitutional issues ought to be avoided where possible, * * * the trial court should be in a position as soon as possible in the litigation to know whether a potential constitutional ruling may be obviated because the allegations of denied access fail to state a claim on which relief could be granted.
>
> * * * [T]he complaint should state the underlying claim in accordance with * * * Rule * * * 8(a), just as if it were being independently pursued, and a like plain

> statement should describe any remedy available under the access claim and presently unique to it.

If it were not for the citation of the Swierkiewicz decision, even a careful reader might be pardoned for thinking these words recognize the role of heightened pleading.

The most recent of the Supreme Court decisions is *Dura Pharmaceuticals, Inc. v. Broudo*, 2005, 125 S.Ct. 1627, 1634. The ruling on the securities law question was that a fraud plaintiff cannot recover simply by showing that the price on the day of purchase was higher than it would have been but for the fraud; the purchaser must prove "economic loss." The Court concluded that the complaint "failed adequately to allege" proximate cause and economic loss:

> [W]e assume, at least for argument's sake, that neither the [Civil] Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss. But, even so, the "short and plain statement" must provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99 * * * (1957). * * *
>
> [The complaint alleged only that the plaintiffs paid artificially inflated prices, and suffered damages. It did not claim that the share price fell significantly after the truth was known. But an artificially inflated purchase price] is not itself a relevant economic loss. And the complaint nowhere else provides the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentations * * *.
>
> We concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. Swierkiewicz * * *. But it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. At the same time, allowing a plaintiff to forgo any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid. * * * Such a rule would tend to transform a private securities action into a partial downside insurance policy.

The Court quoted and cited to the legislative history of the Private Securities Litigation Reform Act. Again, the concept of "notice" seems to have taken on an increased level of detail in response to the perceived needs of a particular class of litigation.

Given the directness of the *Leatherman* and *Swierkiewicz* pronouncements and the indirectness of the Court's potentially inconsistent opinions, it should not be surprising that the courts of appeals have generally abandoned the once-familiar theory that heightened pleading could be required in civil rights actions against government officials who are likely to plead official immunity. Judge Posner provided a succinct statement in *Thomson v. Washington*, 7th Cir.2004, 362 F.3d 969, 970-971:

> [T]he judge wanted the plaintiff to plead enough facts to show that it would be worthwhile to put the defendants to the bother of answering the complaint. That is an understandable approach in light of the burden that prisoners' civil rights litigation places on the district courts, the frivolousness of most of that litigation, and the endeavor of Congress in the Prison Litigation Reform Act to curb the abuse of legal process by prisoners with time on their hands. But it is an approach that the Federal Rules of Civil Procedure and the decisions of the Supreme Court and the federal courts of appeals forbid. The federal rules replaced fact pleading with notice pleading. All that the rules require, with a few exceptions inapplicable to this case, such as pleading fraud, * * * is that a complaint state the plaintiff's legal claim, such as, in this case, denial of access to the courts in violation of the due process clause, infliction of cruel and unusual punishment by denying essential medical treatment (Eighth Amendment), and retaliation for seeking to use the legal process to petition for redress of grievances (First Amendment), together with some indication (here amply supplied) of time and place. * * * Federal judges are forbidden to supplement the federal rules by requiring "heightened" pleading of claims not listed in Rule 9.

Apart from this specific area, it is difficult without intensive and probably impressionistic study to guess at the ways in which notice pleading may, in practice, entail requirements that vary with the specific subject of action. The greater the variability, the less pressing the case will be for undertaking a lengthy study of possible reforms.

A few general observations remain possible. One is that careful lawyers commonly plead far more than needed to withstand a motion to dismiss. One reason is that the pleadings are the first part of the case to come to the judge's attention — it is important to tell a compelling story, or least a persuasive story. Another may be to frame the issues — a detailed complaint may elicit an answer that advances the litigation. Yet another reason may arise from the 2000 amendment that ties the scope of party-controlled discovery to the claims and defenses stated in the pleadings. A plaintiff who wants to ensure broad discovery without venturing into "subject matter" territory may simultaneously plead some claims in broad general terms and other claims in careful detail.

Apart from direct pleading requirements, courts may seek detailed statement by other means. Reconciling these means with general notice pleading practice may prove difficult. Some courts, for example, have adopted standing orders that require a "case statement" in actions under the Racketeer Influenced and Corrupt Organizations Act. These orders stand on shaky ground to the extent that they go beyond the requirements of Rule 9(b); *see Wagh v. Metris Direct, Inc.*, 9th Cir.2003, 363 F.3d 821. Even case-specific directions may prove vulnerable. In *Wynder v. McMahon*, 2d Cir.2004, 360 F.3d 73, 77-79, the court reversed dismissal of the action based on

failure to comply with an order that the plaintiff articulate in a logical way his theory of the case and his employment discrimination claim. "Rule 8 would become a dead letter if district courts were permitted to supplement the Rule's requirements through court orders demanding greater specificity or elaboration of legal theories, and then to dismiss the complaint for failure to comply with those orders." If this were allowed, "district courts could impose disparate levels of pleading requirements on different sorts of plaintiffs."

More extreme situations, however, may provoke different responses. *Acuna v. Brown & Root Inc.*, 5th Cir.2000, 200 F.3d 335, affirmed dismissal for failure to comply with a scheduling order that required statement of the individual claims of some 1,600 plaintiffs — a so-called "Lone Pine" order. The injuries "occurr[ed] over a span of up to forty years. Neither the defendants nor the court was on notice from plaintiffs' pleadings as to how many instances of which diseases were being claimed as injuries or which [uranium] facilities were alleged to have caused those injuries. It was within the court's discretion to take steps to manage the complex and potentially very troublesome discovery that the cases would require." Before filing, "[e]ach plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries."

This preliminary sketch is nothing more than a bloodless introduction to a topic that stirs deep passions. The combination of notice pleading and searching discovery created in 1938 by the

Civil Rules has transformed the meaning of the law in many areas. It is not only that real value has been given to substantive principles that would have been more difficult to enforce under earlier procedure. It also is that the substantive law itself has developed in response to the information unearthed by discovery launched from notice-pleaded claims. It will be essential to determine whether the problem of notice pleading is that it is inadequate procedure, not that it has become an essential part of the law-enforcing and lawmaking role of the courts. If courts are managing to muddle along reasonably well, it may be better to defer this project to a day of greater need.

2. Possible Rules Approaches

Several approaches might be taken to depart from the relaxed "notice" pleading now in place. They cannot be ranked in clear order from least to greatest departure. Among the possibilities are these:

(1) Add a verification requirement. This approach would entail substantial revision of Rule 11, particularly the provision in Rule 11(b)(3), added in 1993, that permits allegations "if specifically so identified," that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery * * *."

(2) Republish present Rule 8(a)(2), with a Committee Note stating that it is time to give meaning to the dead-letter requirement that the short and plain statement show that the pleader is entitled to relief.

(3) Revise Rule 8(a)(2). Three obvious variations would be:

[a] A pleading * * * must contain * * * (2) a short and plain statement of the claim in sufficient detail to show~~ing~~ that the pleader is entitled to relief * * *; or

[b] A pleading * * * must contain * * * (2) a short and plain statement of the facts constituting a claim * * *; or

[c] A pleading * * * must contain * * * (2) a short and plain statement of the claim, stating with particularity facts showing that the pleader is entitled to relief * * *.

(4) Revise [Style] Rule 8(d)(1) by adding a new sentence at the end:

Each allegation must be simple, concise, and direct. No technical form is required. The pleading as a whole must be sufficient to support informed decision of a motion under Rule 12(b), (c), (d), or (f).

(5) Revise Rule 9 by adding a catalogue of claims that must be pleaded with particularity. Many entries in the catalogue could be found by regularizing the tendency of many courts to require heightened pleading of many claims now.

(6) Revive the motion for a bill of particulars by scrapping Style Rule 12(e) and substituting the following:

(1) On motion or on its own, the court may order a more definite statement of a pleading:

(A) If the pleading is one that requires a responsive pleading and is so vague or ambiguous that a party cannot reasonably prepare a response; or

(B) If a more particular pleading will support informed decision of a motion under subdivisions (b), (c), (d), or (f).

(2) A motion for a more definite statement must be made before filing a responsive pleading and must point out the deficiencies in the pleading and the details desired.

(3) If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other order that it considers appropriate.

(7) Revise Rule 7 to encourage use of a reply. The most extensive requirement, short of requiring a reply to all new matter in the answer, would be to allow a defendant to impose a reply obligation simply by including in the answer a request for a reply. Short of that, Rule 7 might identify specific circumstances calling for a reply. The narrowest version would focus on specific types of litigation; cases in which the defendant pleads some form of official immunity are a familiar example.

3. The Leatherman Issue: Particularized Pleadings

The *Leatherman* decision involved two actions asserting that a municipal employer was liable because its law enforcement officers had violated the Fourth Amendment rights of the plaintiff and it had failed to train them to avoid Fourth Amendment violations. The district court dismissed, invoking the "heightened pleading standard" required by the Fifth Circuit in § 1983 actions. The heightened pleading requirement began with decisions requiring pleading "with factual detail and particularity" in actions against officers who likely would plead official immunity, so that the complaint would show arguments defeating immunity. It was later extended to actions asserting municipal liability. The Court of Appeals for the Fifth Circuit affirmed the dismissal. The Supreme Court reversed.

The core of Chief Justice Rehnquist's opinion for a unanimous Court is "that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." A plaintiff is not required to set out in detail the facts underlying the claim. Rule 9(b), which requires particularity in pleading fraud or mistake, does not include "any reference to complaints alleging municipal liability under § 1983. Expressio unius est exclusio alterius."

The rationale of the opinion may be slightly clouded by a reservation expressed at the outset. The Court noted that municipalities do not enjoy immunity from suit; the limits on municipal liability are more direct. "We thus have no occasion to consider whether our qualified immunity

jurisprudence would require a heightened pleading in cases involving individual government officials." On the face of things, this reservation is puzzling. The "expressio unius" theory seems to apply to individual official immunity in the same way that it applies to municipal liability. The answer may be that "expressio unius" interpretation carries only so far; it can be overcome by pressing interests. Municipal corporation defendants do not have pressing interests that justify overriding ordinary pleading doctrine. Individual official defendants may have pressing interests that deserve to be protected by strict pleading requirements that were not contemplated when the Federal Rules were written. Protecting the immunity interests of individual defendants has generated a complicated body of doctrine that justifies appeal before final judgment, see 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10. Similar impulses may still justify special pleading doctrine after the *Leatherman* decision.

At the close of the opinion, the Court observed that Rules 8 and 9 were written before it had recognized grounds for holding municipal corporations liable because of constitutional wrongs by their employees.

> "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."

This passage may be a veiled invitation to consider amending the pleading rules. An explicit suggestion for amendment has been made by Chief Judge Harry Lee Hudspeth of the Western

District of Texas, who wrote to the Committee that an order for a more definite statement has been a valuable tool in determining whether pro se complaints are supported by any ground for litigation.

Beyond the setting of the *Leatherman* case, it seems clear that the required level of pleading specificity varies widely among different types of litigation. An exhaustive demonstration of this proposition was provided by Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 1986, 86 Colum. L. Rev. 433. A survey of more recent decisions by Judge Keeton led to the same conclusion: "[S]pecificity requirements are not limited to cases decided under Rule 9(b) or under Admiralty Rules C(2) and E(2)(a). Rather, the 'degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context.'" *Boston & Maine Corp. v. Town of Hampton*, 1st Cir., 1993, 987 F.2d 855, 866.

There is room to debate the desirability of this contextual specificity phenomenon. It may seem a wilful defiance of notice pleading philosophy. It also may seem a desirable reinstatement of the easily ignored requirement of Rule 8(a)(2) that the short and plain statement of the claim "show[] that the pleader is entitled to relief." A requirement that a complaint do more than identify the transaction that gives rise to litigation could support early disposition of actions that proceed on inadequate legal theories or without hope of establishing indispensable facts.

These general questions invite consideration of a range of responses. One response is to do nothing. Doing nothing could be appropriate on either of two opposed points of view, or on a more relaxed conclusion that it is too early to do anything.

One set of arguments for doing nothing would begin with the premise that all heightened pleading requirements are wrong. Pleading should do no more than identify the transaction underlying suit, paving the way for discovery and formal pretrial procedures that establish more reliable means for disposition without trial. There is no need for amendment on this view if the Leatherman decision will, in relatively short order, cause most courts to abandon all explicit and implicit heightened pleading requirements.

The opposing point of view would be that heightened pleading requirements are a good thing, and that courts will continue to impose them without any particular deference to the apparent force of the *Leatherman* decision. This point of view would be bolstered by the argument that it would be virtually impossible for the rulemaking process to regularize the process by which heightened pleading requirements are enforced. The rulemaking process cannot keep abreast of the intricacies of desirable pleading practice for the ever-changing array of claims that can be brought to federal courts. Detailed rules for specific categories of cases must always be incomplete and must lag far behind the lessons of emerging experience. It is better to rely on the present requirement that a complaint show that the pleader is entitled to relief, allowing courts to tailor this requirement to the circumstances that may make early disposition more appropriate. Some categories of cases, for

example, may frequently involve ill-founded claims; such tendencies may vary between different parts of the country, and over time. Discretion to insist on more particular pleading, allowing opportunity to amend to meet perceived deficiencies, may work far better than detailed rulemaking. Many categories of cases, as another example, may threaten to impose exhausting pretrial burdens before it is possible to consider disposition apart from the pleadings. Courts should be empowered to protect themselves and the adversaries by requiring a preliminary assurance that the burdens are justifiable. Yet other categories of cases may involve areas in which special desires to protect against the burdens of litigation contend with the need to enforce rights — the official immunity question put aside in the *Leatherman* opinion is a good illustration.

If the detailed rule approach is rejected, an alternative approach would be to regularize the process for demanding more helpful pleading. In one form or another, the rules could adopt a modernized form of the antique motion for a bill of particulars. The most obvious means of following this approach would be amendment of the procedure for demanding a more definite statement. This approach seems the most promising if any rules amendment is to be attempted. The rule could be framed directly in terms of the need to facilitate disposition by pretrial motions. It would not have the appearance of singling out particular categories of apparently disfavored claims for hostile treatment.

Expansion of the more definite statement procedure would provide a clear focus for arguments about the need to expand the role of pleading motions. One range of arguments surely will be that a seemingly neutral procedure will in fact be used to dispose of disfavored claims by artificially elevated pleading requirements. Another will be that augmented pleading demands are inherently undesirable. Rule 12(e) originally provided for bills of particulars. It was amended in 1948 to provide only for a more definite statement, and to limit the occasion for more definite statement to situations in which a responsive pleading is required and cannot reasonably be framed. The purpose of the amendment was to reinforce the basic structure of the rules: the exchange of fact information and identification of the issues should be accomplished through discovery and pretrial conference. Apparent failure to state a claim should be raised by motion under Rule 12(b)(6); if the pleading as framed is sufficient, Rule 12(e) should not be used to require more detailed statements that may make it insufficient. Pretrial disposition should be by summary judgment after opportunity to explore the facts, not on the pleadings. Pleading should not be used to force allegations that can be made only after discovery. More particular statements are seldom appropriate even if a pleading suggests that a particular defense may be available — the absence of allegations of time or writing may suggest a limitations of statute of frauds defense, but that does not of itself make more a more definite statement appropriate. All of these matters, and more, are explored in 5A Federal Practice & Procedure: Civil 2d, §§ 1374-1379.

The wide variety of heightened pleading requirements that have emerged in practice provides the foundation for a response to this history. It may show that the collective wisdom of many judges, growing over time, is better than the abstract passion for minimized pleading. Whatever may have been desirable in 1938 or 1948 is no longer desirable. The burdens imposed by going to pretrial stages beyond pleading continue to grow. As the law keeps growing to regulate more and more human activities in increasingly complex ways, so grows the opportunity to bring lawsuits founded on theories that cannot withstand the light of full statement. Pleading must be restored as a protection against the procedures that help to prepare for trial or summary disposition.

Some support for these arguments may be found in recent experiences of the Committee. A few years ago it was proposed that the Rule 12(b)(6) motion to dismiss for failure to state a claim be abolished; the Committee did not accept the proposal. More recently, the amendments now pending in Congress encourage more particular pleading in at least two ways. Rule 11 would allow for specific identification of factual allegations as "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Rule 26(a)(1)(A) and (B) provide for disclosure of information "relevant to disputed facts alleged with particularity in the pleadings." The Rule 26 provisions were informed by extensive testimony at the hearings on disclosure, especially from product liability defense attorneys, asserting that notice pleading often provides little guidance for an adversary attempting to understand the purpose and character of an action.

A final approach might be to amend Rule 8(a)(2) to emphasize the perhaps overlooked requirement that a pleading show that the pleader is entitled to relief. This approach might work best if the purpose of the amendment were left to statement in a Note suggesting that the *Leatherman* decision may cause some courts to forswear desirable opportunities to dispose of actions on the pleadings.

The Rule 8, 9, and 12 approaches can be illustrated by the following rough drafts.

Rule 8(a)(2)

A pleading * * * shall contain * * * (2) a short and plain statement of the claim in sufficient detail to showing that the pleader is entitled to relief * * *.

NOTE

Rule 8(a)(2) is amended to reinvigorate the requirement that the pleading show that the pleader is entitled to relief. The amount of detail sufficient to show a right to relief will depend on the nature of the action. Heightened pleading requirements often have been exacted in a wide variety of actions, particularly those that promise to involve protracted and expensive pretrial and trial proceedings. Illustrative opinions are gathered in *Boston & Maine Corp. v. Town of Hampton*, 1st Cir., 1993, 987 F.2d 855. The wisdom of this practice has been proved by its gradual evolution. The lack of clear support for the practice in the text of the rules led to the ruling that heightened pleading requirements could not be required in actions asserting municipal liability under 42 U.S.C. § 1983, *see Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit,* 1993, 113 S.Ct. 1160. The Court observed in the Leatherman decision that if heightened pleading requirements are desirable, "that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." It is not feasible or desirable to draft specific pleading requirements for all of the different actions that may come before a federal court. This amendment restores the gradual process of judicial evolution that developed up to the time of the *Leatherman* decision.

Rule 8(e)(1)

Each averment of a pleading ~~shall~~ must be simple, concise, and direct. No technical forms of pleading or motions are required. The pleading as a whole must be sufficient to support informed decision of a motion under Rule 12(b), (c), (d), or (f).

Note

(The Note would draw from the Note set out for Rule 12(e) below.)

Rule 9

Rule 9(b): "In all averments of fraud, ~~or~~ mistake, or civil rights violation by a public official or public entity, the circumstances constituting fraud, ~~or~~ mistake, or civil rights violation by a public official or public entity ~~shall~~ must be stated with particularity." -or-

[*A pleading of fraud, mistake, or civil rights violation by a public official or entity must be stated with particularity.*] -or-

Rule 9(x, renumbering later subdivisions): An averment of a civil rights violation by a public official must be stated with particularity.

NOTE

Many courts have found it useful to require specific statement of civil rights claims against public officials or against public bodies responsible for official wrongs. In *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit*, 1993, 113 S.Ct. 1160, the Court held that the relationship between Rules 8 and 9 shows that particular statement can be required only by specific rule provision. This amendment restores the heightened pleading requirements that had evolved in many courts before the *Leatherman* decision. It does not attempt to define the nature of a claim that may properly be classified as a "civil rights violation by a public official." The classification should be made according to the needs that have informed the evolving practice up to the time of the Leatherman decision.

(e) Motion for More Definite Statement. ~~If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.~~

(1) On motion or on its own, the court may order a more definite statement of a pleading:

(A) If the pleading is one that requires a responsive pleading and is so vague or ambiguous that a responsive pleading cannot reasonably be required; or

(B) If a more particular pleading will support informed decision of a motion under subdivisions (b), (c), (d), or (f).

(2) A motion for a more definite statement must point out the deficiencies in the pleading and the details desired.

(3) A more definite statement must be made within the time fixed by the order or, if no time is fixed, within 10 days after notice of the order. If a more definite statement is not made the court may strike the pleading or impose other sanctions.

NOTE

Rule 12(e) is amended to reinvigorate the function of pleading as a method of disposing of actions — or portions of actions — that rest on inadequate legal premises. The structure of these rules places primary reliance on discovery, pretrial conferences, and summary judgment not only to shape a case for trial but also to winnow out matters that ought not go to trial. Pleading is intended primarily to establish the framework for these later proceedings. It is important that cases not be decided on the pleadings before all parties are afforded adequate opportunity to discover the fact information that may be needed to support a clear statement of legal theory. Post-pleading procedures, however, have come to pose increasingly heavy burdens on litigants and courts in more and more cases. Recognizing the nature of these burdens, a host of decisions have developed increasingly detailed pleading requirements for a wide variety of

cases. The framework of the present rules requires that such requirements be imposed by a process of moving to challenge the pleading, consideration of often limited allegations, and — if the pleading is inadequate — working through the process of amendment. A more direct procedure is provided by a motion for more definite statement.

The need to expand the role of the motion for more definite statement arises in part from the decision in *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit*, 1993, 113 S.Ct. 1160. The Court ruled that heightened pleading requirements cannot be imposed outside the categories specifically enumerated in Rule 9. At the same time, it suggested that the appropriate means of establishing such requirements is "by the process of amending the Federal Rules." It is not feasible to establish detailed catalogues of pleading requirements for every legal category that may warrant such requirements, nor to express adequately the nuanced shades of specificity that may be appropriate for different categories. The more definite statement procedure can be used to restore the process of gradual judicial development that, up to the time of the *Leatherman* decision, was responsible for establishing pleading requirements adapted to the needs of different actions.

STYLE PROCESS
Standing Rules Committee
SEPTEMBER 21, 2005

1. Coordinating with the Style Consultant –

   The advisory-committee reporters are strongly encouraged to share rule drafts early in the process with Professor Joseph Kimble, the consultant to the Standing Committee's Style Subcommittee. The reporters should consider electronically copying the style consultant with preliminary drafts as they are being drafted.

2. Submitting a Draft to the Rules Office –

   The reporter submits the proposed rule amendment to the Rules Committee Support Office (ordinarily, three to four weeks before the scheduled meeting date).

3. Transmitting the Draft to the Advisory Committee and the Style Consultant –

   The Rules Office will format the proposed rule amendment for the advisory committee, copy and include it in agenda materials, and send a copy to the style consultant. Ideally, the consultant should receive the copy at least two weeks before the meeting.

4. Style Consultant's Suggestions –

   The style consultant may provide the reporter (copying the Style Subcommittee chair) with comments and suggested edits on the proposed rule amendment no later than one week before the scheduled advisory-committee meeting, unless the consultant had less than one week to review the proposal, in which case the period is split in half.

5. Reporter's Discretion –

   The reporter may accept, defer action on, or decline to accept the style consultant's suggested edits, with the understanding that style changes later proposed by the Style Subcommittee must be adopted by the advisory committee (see # 7).

6. Style Subcommittee Recommends Edits After Publication –

   The Style Subcommittee, in consultation with its consultants, will review rule amendments published for comment and submit its suggested edits to the advisory-

committee chair and reporter no later than 30 days before the public-comment period ends.

7. Style Changes –

Style Subcommittee edits that involve pure style issues ordinarily control. The advisory committee may recommend that the Standing Committee adopt different language on a matter of pure style (see # 10).

8. Substantive Changes –

The advisory committee may reject any edit that it believes will affect substantive meaning. Determining whether a specific edit represents a substantive change is solely within the advisory committee's judgment, subject to reconsideration by the Standing Committee.

9. Style Subcommittee's Review After the Advisory Committee's Final Action –

The agenda materials sent to Standing Committee members before their meeting will contain the rule amendment as approved by the advisory committee after public comment, with a recommendation that it be transmitted to the Judicial Conference for approval. The Style Subcommittee will review any changes made after publication by the advisory committee in light of public comment and submit suggested edits to the advisory-committee chair and reporter no later than one week before the Standing Committee meeting. The chair may accept style edits on behalf of the advisory committee.

10. Standing Committee's Final Review –

The Standing Committee will review any Style Subcommittee edits to the published version of the rule amendment. The Style Subcommittee chair may also request the Standing Committee to reconsider the advisory committee's determination to reject an edit because it represents a substantive change. The advisory-committee chair may ask the Standing Committee to reconsider edits recommended by the Style Subcommittee.