COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 17-18, 2004
Volume II

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 17-18, 2004

1. Opening Remarks of the Chair

   A. Report on the March 2004 Judicial Conference session
   B. Transmission of Supreme Court-approved rules amendments to Congress

2. **ACTION** — Approving Minutes of January 2004 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Evidence Rules

   A. **ACTION** — Approving publishing for public comment proposed amendments to Rules 404, 408, 606, and 609
   B. Minutes and other informational items

6. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rules 28.1 and 32.1
   B. Minutes and other informational items

7. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 and Official Forms 6G, 16D, and 17
   B. **ACTION** — Approving publishing for public comment proposed amendments to Rules 1009, 2002, 4002, 7004, 9001, and Schedule I of Official Form 6
   C. Minutes and other informational items

8. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 6, 27, and 45 and Supplemental Rules B and C
   B. **ACTION** — Approving publishing for public comment at a later date proposed amendments to Rules 16, 26, 33, 34, 37, 45, 50, Supplemental Rules A, C, and E, and a new Supplemental Rule G, and revisions to Form 35
   C. **ACTION** — Approving publishing for public comment at a later date proposed amendments to restyled Rules 38-63, except Rule 45, which was acted on earlier
   D. **ACTION** — Approving publishing for public comment at a later date proposed noncontroversial style-substance amendments to Rules 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, and 40
   E. Consideration of proposed amendments to rules resolving noncontroversial "global" issues arising from style project
   F. Minutes and other informational items

9. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59
   B. **ACTION** — Approving publishing for public comment proposed amendments to Rules 5, 32.1, 40, 41, and 58
   C. Minutes and other informational items

10. Report of Technology Subcommittee

11. Long-Range Planning Report

12. Next Meeting: January 10-11, 2005, or January 13-14, 2005

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **May 17, 2004**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met at a conference on electronic discovery at Fordham Law School on February 20-21, 2004, and met again at the Administrative Office of the United States Courts on April 15-16, 2004. Style Subcommittees A and B met at Fordham Law School, one on February 19 and the other on February 21. The Discovery Subcommittee met on March 20 at the Administrative Office of the United States Courts. The several Subcommittees also met by conference calls during the time since the January meeting of the Standing Committee. Draft Minutes of the April Advisory Committee meeting are attached.

Part I of this report presents action items. Part I A recommends transmission for approval of amendments to Civil Rules 6(e), 27, and 45, as well as Supplemental Rules B and C. These proposals were published for comment in August 2003. A new Rule 5.1 and conforming amendments to Rule 24(c) also were published last August, but the Advisory Committee has tabled discussion of these proposals for further work.

Part I B recommends several proposals for publication for comment in August 2004. One proposal is to amend Rule 50. A package of proposals aimed at discovery of electronically stored information includes amendments to Rules 16, 26, 33, 34, 37, and 45, along with a related amendment of Form 35. Another package includes a new Supplemental Rule G for civil asset forfeiture actions, along with conforming amendments of Supplemental Rules A, C, and E.

Part I C recommends approval for publication early in 2005 of Style Rules 38 through 63, minus Style Rule 45 which was approved for later publication at the January 2004 Standing Committee meeting. This part also seeks approval to publish a small number of amendments for comment in parallel with the Style Package. These amendments were considered in the Style Project, but seemed arguably substantive. At the same time, they seem to be both noncontroversial and clear improvements. For ease of internal reference, they have been referred to as the "Style-Substance Track."

Part II of this report presents information items. Ongoing deliberations on the proposal to adopt a new Rule 5.1 are briefly noted. The Federal Judicial Center Report on filed and sealed settlement agreements is described, with a note on the Center's survey of class actions. Initial work on a rule to implement the E-Government Act is reported.

I Action Items

A. Rules for Adoption: 6(e), 27, 45; Supplemental Rules B, C

Rule 6(e)

The Advisory Committee recommends approval for adoption of amended Rule 6(e) as follows on the next page:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 6. Time

* * * * *

(e) Additional Time After Certain Kinds of 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~~ must or may act 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~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the prescribed period would otherwise expire under [subdivision] (a).

Committee Note

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

---

* New material is underlined; matter to be omitted is lined through.

The effect of invoking the day when the prescribed period would otherwise expire under Rule 6(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 6(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 6(a) the period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the third and final day to act. If the period prescribed expires on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 6(e) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 6(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 6(e) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

Rule 6(e) as Published

This recommendation modifies the version of Rule 6(e) that was published for comment as follows:

(e) Additional Time After Certain Kinds of 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~~ must or may act 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~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the ~~prescribed~~ period.

The changes from the published version eliminate ambiguities that were detected in the published version. Since the primary purpose of the amendment is to eliminate ambiguities, recognizing that the actual number of days allowed is a secondary concern, the changes do not require republication.

Discussion

Publication of any day-counting amendment inevitably attracts suggestions that all the time periods in the rules should be reconsidered. Improvements are urged both in expression and in

function. The most satisfactory approach to this large task is likely to involve all the sets of procedural rules, establishing uniform methods that can be relied upon in all federal-court settings. The Standing Committee has recognized these pleas; the long-range agenda includes a joint project to reconsider the time rules. Until that project matures, room remains for smaller-scale improvements in individual sets of rules. The Appellate Rules Committee is considering changes to Appellate Rule 26(c) to parallel the proposed Rule 6(e) changes — indeed, it was the Appellate Rules Committee that referred these questions to the Civil Rules Committee for consideration. The proposal made here reflects helpful advice and comments made by the Appellate Rules Committee and its Reporter, Professor Schiltz. Both Professor Schiltz and the Reporter to the Bankruptcy Rules Committee, Professor Morris, are in agreement with the approach the Civil Rules Committee is taking.

Cases and commentary have recognized four possible means of calculating the three days added by present Rule 6(e). Practicing attorneys report that much time is devoted to nervous counting and recounting the days. Achieving a clear answer is the first concern. In the abstract, there is much to be said for counting the three added days before the prescribed period is counted — the underlying theory is that a paper served by mail or the other means incorporated in Rule 6(e) may take up to three days to arrive. But an informal survey of practicing attorneys revealed that almost all add the three days at the end. Transition to a clear new rule will work best if the new rule conforms closely to what most attorneys have been doing anyway.

The premise that three days should be added at the end of the prescribed period could be implemented in different ways. The shortest extension would be provided by adding three days after counting the days in the original period without regard to any Saturday, Sunday, or legal holiday. If the last prescribed day is a Saturday, for example, day 1 would be Sunday, day 2 would be Monday even if Monday is a legal holiday, and day 3 would be Tuesday. The act would be due on Tuesday; in this illustration, the 3 added days would not extend the time to act. An intermediate extension could be provided by looking to the last day to act under Rule 6(a) before counting the three added days. In the example just given the original period would expire on Tuesday, the first day that is not a Saturday, Sunday, or legal holiday. Wednesday, Thursday, and Friday would be the three added days.

In determining how to express in the rule the method of calculating the addition of three days, the Civil Rules Committee has attempted to be clear, resolving the ambiguities that the public comment had pointed out; consistent with proposed Appellate Rule 26(c) and with the corresponding Bankruptcy Rules; and to provide the maximum time to act that meets these goals. The method of calculation that achieves all these objectives is to count to the end of the prescribed period under Rule 6(a), using all the time-counting rules except the three-day extension, and then add three days. The rule language set out above is clear and consistent with the Appellate Rules. After the end of the prescribed period is identified, three days are added. The Notes provide explicit direction on how to treat intermediate Saturdays, Sundays, and legal holidays. The last day to act is the third day,

unless the third day is a Saturday, Sunday, or legal holiday. The last day to act in that case is the next day that is not a Saturday, Sunday, or legal holiday.[1]

This formulation is consistent with the Appellate Rule calculation and as generous as that consistency allows. Application is illustrated in the Committee Note. One way to explain the result is that no Saturday, Sunday, or legal holiday is to be counted against more than one exclusion. Adoption of this recommendation reflects the view that such an extension will not often interfere with the real-world pace of litigation.

Rule 6(a) states that the last of the counted days is included in calculating time limits unless, among other things, the required act is filing a paper in court and the day is one on which weather or other conditions have made the clerk's office inaccessible. There is no apparent reason to address this circumstance in Rule 6(e). If the clerk's office is inaccessible on the last day counted under Rule 6(e), the time to act is extended by Rule 6(a). Inaccessibility during the period before the last day counted under Rule 6(e) does not warrant any additional extension.

Changes Made After Publication and Comment

Changes were made to clarify further the method of counting the three days added after service under Rule 5(b)(2)(B), (C), or (D).

Summary of Comments

03-CV-001, Thomas J. Yerbich (Court Rules Attorney, D.Alaska): (1) Suggests that Rule 6(a) should be amended to ensure that the three days added by Rule 6(e) do not convert all 10-day periods to 13-day periods: "**(a)** * * * When the period of time prescribed or allowed is less than 11 days determined without regard to subdivision (e), intermediate Saturdays * * *"

(2) Urges that a further change should be made to ensure that time is not extended too much, and computations are not complicated too much, for situations in which the period ends on a Saturday, Sunday, or legal holiday. If the period ends on a Saturday, for example, the three Rule 6(e) days should begin on Sunday, not Monday or the next day that is not a legal holiday. Possible confusion

---

[1] In April 2004, the Civil Rules Committee agreed on language that would have excluded intermediate Saturdays, Sundays, and legal holidays in the calculation of the three days following the expiration of the prescribed period. The full Committee has agreed unanimously to revise that language. The revision resulted from the recognition that the Committee mistakenly believed its approach was consistent with the approach of proposed Appellate Rule 26. The Appellate Rule approach is simply to count the prescribed period, making use of all of the timecounting rules save the three-day extension. After the end of the prescribed period is identified, three "real" (i.e., calendar) days are added. The effect of the language the Civil Rules Committee first adopted in April 2004 excluded intermediate Saturdays, Sundays, or holidays in calculating the three days, which was inconsistent with the Appellate Rules approach.

arises from referring to a "period" to act — the period ends not on Saturday but on Monday, implying that the three days are added after Monday. To fix this problem, substitute "number of days" for "period":

> Whenever a party must or may act within a prescribed ~~period~~ number of days after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the ~~period~~ number of days [expires?].

(This comment includes several examples of ways to calculate in "business days" and "calendar days.")

(3) Offers a proposal for the "counting backward" question — what happens if you must act "10 days before" a defined day and the tenth day before is a Saturday, Sunday, or legal holiday. May you file on Monday, or the next day that is not a legal holiday, even though it is less than 10 days before the defined day? The proposal relies on "not later than" to say that you must file before the 10th day:

> **(f)** Whenever a party has the right or is required to do some act or take some proceedings within a period of time before a specified date or event prescribed or allowed by these rules, by the local rules of any district court, or by order of court, or by any applicable statute, the right must be exercised, the required act performed or the proceedings taken, not later than the prescribed time preceding the specified date or event.

03-CV-003, Professor Patrick J. Schiltz: Professor Schiltz describes a draft Committee Note for the parallel amendment of Appellate Rule 26(c), recommending the opposite answer to the question addressed by Comment 03-CV-001:

> Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2). After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.
>
> To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 1, 2005.

(If the Appellate Rules version is adopted, it should be in the form approved by the Appellate Rules Committee.)

03-CV-007, S. Christopher Slatten, Esq.: Amended Rule 6(e) remains ambiguous. Do we add 3 "calendar days" or 3 "business days"? It would be good to emulate appellate Rule 26(c) by providing that "3 calendar days are added after the period." If the period ends on Friday, for example, Saturday, Sunday, and Monday are the 3 days.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the clarification.

03-CV-009, State Bar of Michigan Committee on United States Courts: (1) Federal time-counting rules are too complicated. A uniform set of rules, based on calendar weeks, should be substituted for Civil, Criminal, and Appellate Rules. (2) The Committee Note rejects the argument that the 3 added days are an independent period of less than 11 days, so that Saturdays, Sundays, and legal holidays are excluded. But the Rule remains ambiguous. It should say: "3 consecutive calendar days are added after the period." (3) The rule remains ambiguous as to the time when the "prescribed period" ends. If the last day is a Saturday, Sunday, or legal holiday, does it end only on the next day that is none of those? Clarity can be achieved by saying: "The 3 days must be added before determining whether the last day of the period falls on a day that requires extension under Rule 6(a)."

03-CV-011, Peter D. Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice: Suggests one addition: "3 calendar days are added after the period." "[T]his addition will make absolutely clear the Committee's intention that parties include weekends and holidays when counting the three extra days."

03-CV-012, Alex Manners, CompuLaw: Ambiguities remain. First, the 3 additional days should be described as "calendar days," to ensure that Saturdays, Sundays, and legal holidays are counted. Second, it may be uncertain when a period ends if the last day is a Saturday, Sunday, or legal holiday. Are the 3 days added after the last day to act if there were no extension? This can be made clear by adding this at the end: "If the original period is less than 11 days, the original period is subject to Rule 6(a), whereby holidays and weekends are excluded from the computation, and then three calendar days are added."

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports the proposal. But time calculations under Rule 6 are still "rather complex," and indeed "border on being labyrinthian and require 'finger counting,' a very fallible method." The Standing Committee and Advisory Committee should "revisit Rule 6 in its entirety with an eye toward promulgating a rule based in 'running time' tied to a calendar week or multiples thereof."

Rule 27(a)(2)

The Advisory Committee recommends approval for adoption of amended Rule 27(a)(2) as follows:

Rule 27. Deposition Before Action or Pending Appeal

(a) Before Action.

* * * * *

~~**(2) Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of the hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-~~

~~examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.~~

(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided by Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

* * * * *

Committee Note

The outdated cross-reference to former Rule 4(d) is corrected to incorporate all Rule 4 methods of service. Former Rule 4(d) has been allocated to many different subdivisions of Rule 4. Former Rule 4(d) did not cover all categories of defendants or modes of service, and present Rule 4 reaches further than all of former Rule 4. But there is no reason to distinguish between the different categories of defendants and modes of service encompassed by Rule 4. Rule 4

service provides effective notice. Notice by such means should be provided to any expected adverse party that comes within Rule 4.

Other changes are made to conform Rule 27(a)(2) to current style conventions. (new)

Rule 27(a)(2) as Published

Only style changes are made to the version of Rule 27(a)(2) that was published for comment in August 2003. The changes are indicated on the published version by overstriking words deleted and double-underlining words added:

Rule 27. Deposition Before Action or Pending Appeal

(a) Before Action.

* * * * *

~~**(2) Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of the hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.~~

(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing ~~on the petition~~. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent ~~on behalf of persons not served and~~ if an unserved person is not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

Discussion

Only style changes are recommended in the published draft. The few public comments all support the proposal as published.

Changes Made After Publication and Comment

Only style changes are recommended in the published draft.

Summary of Comments

03-CV-002 Jack E. Horsley, Esq.: The Rule 27 amendment is prudent.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the published amendment.

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports the changes. The style changes bring "much greater clarity."

Rule 45(a)(2)

The Advisory Committee recommends approval for adoption of amended Rule 45(a)(2) as follows:

Rule 45. Subpoena

(a) Form; Issuance.

* * * * *

~~(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from~~

~~the court for the district in which the production or inspection is to be made.~~

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production and inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

* * * * *

Committee Note

This amendment closes a small gap in regard to notifying witnesses of the manner for recording a deposition. A deposition subpoena must state the method for recording the testimony.

Rule 30(b)(2) directs that the party noticing a deposition state in the notice the manner for recording the testimony, but the notice need not be served on the deponent. The deponent learns of the recording method only if the deponent is a party or is informed by a party. Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. The deponent thus has notice of the recording method when an additional method is designated. This amendment completes the notice provisions to ensure that a nonparty deponent has notice of the

recording method when the recording method is described only in the deposition notice.

A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner. Should such a witness not learn of the manner of recording until the deposition begins, undesirable delay or complication might result. Advance notice of the recording method affords an opportunity to raise such protective issues.

Other changes are made to conform Rule 45(a)(2) to current style conventions.

Rule 45(a)(2) as Published

A single style change has been made in each of subparagraphs (A), (B), and (C) to reflect Style Subcommittee decisions made after publication in August 2003. The change is shown in the proposal as published by overstriking words deleted and double-underlining words added:

Rule 45. Subpoena

(a) Form; Issuance.

* * * * *

~~(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.~~

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, ~~in the name of~~ from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, ~~in the name of~~ from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production and inspection, if separate from a subpoena commanding a person's attendance, ~~in the name of~~ from the court for the district where the production or inspection is to be made.

Discussion

There were few comments on this proposal. A recommendation for adoption seems warranted for the reasons described in the Committee Note.

Changes Made After Publication and Comment

Only a small style change has been made in the proposal as published.

Summary of Comments: Rule 45

03-CV-006, Eugene F. Hestres, Esq.: The notice of taking the deposition states the method of recording and normally is served on a nonparty deponent. "Requiring that the Notice of the deposition be also served upon the non-party deponent would eliminate the need to amend Rule 45." Requiring that the subpoena state the method may create problems when a last-minute change is made in the method of recording. The deponent can always object.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the published proposal.

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports the proposal.

Supplemental Rule B

The Advisory Committee recommends approval for adoption of amended Supplemental Rule B(1)(a) as follows:

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.

* * * * *

Committee Note

Rule B(1) is amended to incorporate the decisions in *Heidmar, Inc. v. Anomina Revennate de Armamento Sp.A. of Ravenna*, 132 F.3d 264, 267-268 (5th Cir.1998), and *Navieros InterAmericanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 314-315 (1st Cir. 1997). The time for determining whether a defendant is "found" in the district is set at the time of filing the verified complaint that prays for attachment and the affidavit required by Rule B(1)(b). As provided by Rule B(1)(b), the affidavit must be filed with the complaint. A defendant cannot defeat the security purpose of attachment by appointing an agent for service of process after the complaint and affidavit are filed. The complaint praying for attachment need not be the initial complaint. So long as the defendant is not found in the district, the prayer for attachment may be made in an amended complaint; the affidavit that the defendant cannot be found must be filed with the amended complaint.

Rule B(1)(a) as Published

No change has been made in Rule B(1)(a) as published:

Discussion

The only comment supported adoption of the proposed amendment.

Changes Made After Publication and Comment

No changes have been made since publication.

Summary of Comments: Supplemental Rule B(1)(a)

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports both the Rule B and Rule C proposals.

Supplemental Rule C

The Advisory Committee recommends approval for adoption of amended Supplemental Rule C(6)(b) as follows:

C. In Rem Actions: Special Provisions

* * * * *

(6) Responsive Pleading; Interrogatories.

* * * * *

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a):

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

(A) within 10 days after ~~the earlier of (1)~~ the execution of process, ~~or (2) completed publication of notice under Rule C(4),~~ or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 20 days after filing the statement of interest or right.

* * * * *

Committee Note

Rule C(6)(b)(i)(A) is amended to delete the reference to a time 10 days after completed publication under Rule C(4). This change corrects an oversight in the amendments made in 2000. Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

Rule C(6)(b) as Published

No change has been made in Rule C(6)(b) as published.

Discussion

The only comment supported adoption of the proposed amendment.

Changes Made After Publication and Comment

No changes have been made since publication.

Summary of Comments: Supplemental Rule C(6)(b)

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports both the Rule B and Rule C proposals.

B. Rules for Publication (1): 16, 26, 33, 34, 37, 45, & Form 35

The Civil Rules Committee recommends that the Standing Committee publish for comment a package of proposed rule amendments relating to the discovery of electronically stored information. The Committee has long heard concerns that the discovery rules are inadequate to accommodate the unique features of information generated by, stored in, retrieved from, and exchanged through, computers. These concerns first emerged in 1997, during the study of discovery that led to the adoption of the 2000 discovery rule amendments. In the next several years, as electronic discovery moved from an unusual activity reserved to large cases to a frequently-seen activity, used in an increasing proportion of the litigation filed in the federal courts, the Committee continued to hear concerns over the fit between the discovery rules and the dramatic changes in practice resulting from the growing importance of this form of discovery.

In 2000, the Committee began to examine this topic in detail. To gather information from diverse segments of the bar, and to hear from judges, the Committee held two mini-conferences — one in San Francisco and the other in Brooklyn — and a major conference in February 2004 at the Fordham Law School. The Committee has also, through its discovery subcommittee, solicited and received helpful comment from a number of lawyers, judges, and bar organizations, as well as considerable and ongoing assistance from the Federal Judicial Center. The Committee has also drawn on the accumulation of experience in this area, reflected in case law, the expanded treatment in the Manual for Complex Litigation, and in "best practices" protocols drafted by the ABA Litigation Section and others.

Through this work, the Committee has concluded that it is time to present proposed rule changes for public comment. Electronic discovery is now a routine part of civil litigation. Electronic discovery has unique features, distinct from conventional discovery into, and by, paper, which rules changes can helpfully address. There is a growing demand for rules in this area, which is still new for many judges and lawyers. At least four United States district courts — E. & W. Dist. Ark, D.N.J., and D. Wyo. — have adopted local rules in this area, and many more are under consideration. At least two states — Texas and Mississippi — have adopted court rules specifically addressing these issues. More are in the pipeline. There is much to be said for experimentation at the local level and we have learned much from these efforts. But if the national rules committees delay, the timetable of the rulemaking process will inevitably result in a proliferation of local rules. Adoption of differing local rules by many courts may freeze disuniform practices in place and frustrate the ability to achieve national consistency in an area that should be covered by the uniformity the Civil Rules were meant to achieve.

The publication process is more critical in this area than for many other proposed rule amendments. Litigants and lawyers live with the problems raised by electronic discovery in ways that judges do not. The comments from litigants and lawyers on specific proposals for rules that attempt to accommodate electronic discovery, as it is practiced today and as it will develop in the future, are essential.

The information and insights we have already received from the bar have greatly increased our appreciation of the problems electronic discovery presents. The sheer volume of electronically stored information and the dynamic nature of such information are different from information kept on, and discovered through, paper. The distinctive features of electronic discovery threaten to increase the expense and burden of discovery, and uncertainty as to the applicable standards exacerbates these problems. The challenge is to ensure that the rules provide effective support and guidance for managing discovery practice as it changes with technology.

The rules proposals are as follows: amending Rules 26(f) and 16(b) and Form 35 to prompt early discussion of issues relating to electronically stored information and of handling privilege issues, and to call for the results of such discussions to be reported to the judge; amending Rule 34(a) to clarify and modernize the definition of discoverable material; amending Rule 34(b) to provide for the form of producing electronically stored information; amending Rule 33(d) to provide for electronically stored information a parallel option to produce business records to answer interrogatories; amending Rule 26(b)(2) to provide that electronically stored information that is not reasonably accessible need not be produced unless a court so orders on a showing of good cause; amending Rule 26(b)(5) to provide a procedure that applies when a party asserts an inadvertent production of information privileged or protected from discovery, carefully avoiding any determination on the outcome of the privilege assertion; and amending Rule 45 to incorporate these changes. The Advisory Committee was nearly unanimous in recommending that these proposals be published for comment.

The Advisory Committee debated at length what may be the most controversial of the proposals, the creation of a limited safe harbor in Rule 37 that would apply only to information destroyed or lost as a result of the routine operation of computer systems, such as the loss or destruction of information as a result of recycling back-up tapes or the automatic overwriting of "deleted" information. Much of the discussion heard at the Fordham Conferences and other meetings supporting a limited safe harbor emphasized the need for balancing the need for litigants to obtain information and the need of every organized entity, public and private, to continue the routine operations of computer systems. Such a limited and narrow safe harbor would recognize the unique features of electronically stored information necessary to business and government operations. These features include the routine automatic destruction or recycling necessary to business operations and the dynamic nature of the data that makes it change automatically, without the operator's involvement or even awareness. Reducing this to rule language is challenging. The Committee agreed that the proposed rule should be limited to loss of electronically stored information that results from routine operation of a party's computer system. But the Committee divided over two primary features of the proposed rule: whether it should offer some protection when a party's reasonable efforts to preserve fail to prevent a loss of electronically stored information that violates a court preservation order in the action.

This report sets out the proposals for rule amendments that the Committee recommends the Standing Committee publish for comment. As noted, the Committee was virtually unanimous as to

all the proposals except the safe harbor provision. As to this provision, a clear majority of the Committee expressed a preference for what is presented here as Alternative 1. All members of the Committee voted in favor of publishing Alternative 1 for comment. The only significant Committee disagreement on the recommendation to the Standing Committee was over whether to recommend that only Alternative 1 be published for comment, or that both Alternative 1 and what is presented here as Alternative 2, for which there was also support, be published for comment, stating the Committee's preference for Alternative 1. As to that question, the Committee divided evenly.

It should be emphasized that a majority of the Committee prefers Alternative 1 to Alternative 2. As discussed more fully below, those in favor of publishing only Alternative 1 for comment believe that Alternative 2 should not be formally published for comment, given the Committee's preference for Alternative 1 and absence of a majority favoring the publication of Alternative 2. Those in favor of publishing Alternative 2 are also concerned that Alternative 2 goes too far and that publishing Alternative 2 may have a polarizing effect. Those in favor of publishing both Alternatives 1 and 2 for comment recognize that the safe harbor is both important and difficult and believe that public comment will be better focused if both formulations are presented.

This final question is perhaps more one of form than substance, pertaining only to one aspect of one of the electronic discovery proposals. As to this one aspect, whether we publish only Alternative 1 or both, we will need to ask for public comment addressing the issues framed by Alternative 2. Public comment is likely to be robust and informative, whether Alternative 1 is the only proposed formulation formally published or not. But because the Committee was evenly divided on whether to recommend the publication for comment of only Alternative 1, or the publication for comment of both Alternative 1 and 2 accompanied by a statement that a majority of the Committee preferred Alternative 1, both proposals for a Rule 37(f) safe harbor are discussed in this report.

I. Early Discussion of Electronic Discovery Issues — Rules 26(f), Form 35, and Rule 16(b)*

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in categories of proceedings exempted from initial disclosure under Rule

* Proposed revisions based on rules as amended by the Style Project.

26(a)(1)(B) or when otherwise ordered, the parties must hold a conference as soon as practicable — and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues relating to preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a)(1), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced;

(D) whether, upon agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information; and

(E~~C~~) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F~~D~~) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the conference to occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed fewer than 14 days after the conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

* * * * *

Committee Note

The Committee has repeatedly been told that problems associated with discovery of various types of information generated by or stored on computers need attention in the rules. Among other things, electronically stored information is distinctive in its volume. *See Manual for Complex Litigation (4th)* § 11.446 (describing the "sheer volume" of such information). Electronic information may exist in dynamic databases that do not correspond readily to hard-copy documents traditionally subject to discovery. The ordinary operation of computers — including the simple act of turning a computer on — can alter or destroy electronically stored information; computer systems often automatically discard or overwrite data as a part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard-copy documents. Electronically stored information may be "deleted," yet continue to exist, but in forms difficult to locate, retrieve, or search. Together, these and other

distinctive features of electronically stored information justify specific attention in the rules.

Rule 34(a) is amended to make clear that electronically stored information is subject to discovery. The broad definition of "electronically stored information" should be applied at other points in the rules where the expression is used, such as in Rule 26(f)(3)((C). Rule 33(d) is similarly amended to make clear that the option to produce business records includes electronically stored information. Rule 45 is amended to make clear that electronically stored information may also be obtained by subpoena. Although courts have generally not had difficulty concluding that electronically stored information is properly a subject of discovery, these changes make the rule language consistent with practice.

Other amendments address specific aspects of discovery of electronically stored information. Rule 34(b) is amended to authorize a party to specify the form in which electronically stored information should be produced and to authorize the responding party to object to that request. Rule 26(b)(2)(C) is added to provide that a party need not provide discovery of electronically stored information that is not reasonably accessible unless the court orders discovery for good cause. Rule 37(f) is added to address a party's inability to provide discovery of electronically stored information lost as a result of the routine operation of the party's electronic information system. Rule 26(b)(5) is amended by the addition of Rule 26(b)(5)(B), which provides a procedure for assertion of privilege after production of privileged information. In addition, Rule 45 is amended to include provisions parallel to those added to the party discovery rules.

Subdivision (f). Early attention to managing discovery of electronically stored information can be important. Rule 26(f)(3) is amended to direct the parties to discuss these subjects during their discovery-planning conference. *See Manual for Complex Litigation (4th)* § 11.446 ("The judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case"). The rule focuses on "issues related to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, addressing the issues at the outset should often avoid problems that

might otherwise arise later in the litigation, when they are more difficult to resolve.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation (4th)* § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period regarding which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(C). The form or format in which a party keeps such information also may be considered, as well as the forms in which it might be produced for review by other parties. "Early agreement between the parties regarding the forms of production will help eliminate waste and duplication." *Manual for Complex Litigation (4th)* § 11.446. Even if there is no agreement, discussion of this topic may prove useful. Rule 34(b)(1)(B) is amended to permit a party to specify the form in which it wants electronically stored information produced. An informed request is more likely to avoid difficulties than one made without adequate information.

Form 35 is also amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court, thus enabling the court to address the topic in its Rule 16(b) order.

Provision for any aspects of disclosing or discovering electronically stored information that are suitable for discussion under Rule 26(f) may be included in the report to the court. Any that call for court action, such as the extent of the search for information, directions on evidence preservation, or cost allocation, should be included.

Rule 26(f)(2) is amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations. *Cf. Manual for Complex Litigation (4th)* § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") Rule 37(f) addresses these issues by limiting sanctions for loss of electronically stored information due to the routine operation of a party's electronic information system. The parties' discussion should aim toward specific provisions, balancing the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business. Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, may rarely be warranted. Failure to attend to these issues early in the litigation increases uncertainty and raises a risk of later unproductive controversy. Although these issues have great importance with regard to electronically stored information, they are also important with hard copy and real evidence. Accordingly, the rule change should prompt discussion about preservation of all evidence, not just electronically stored information.

Rule 26(f)(3) is also amended by adding to the discovery plan any agreement that the court enter a case-management order facilitating discovery by protecting against privilege waiver. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege are often difficult to identify, and failure to withhold even one such item may result in waiver of privilege as to all other privileged materials

on that subject matter. Not only may this effort impose substantial costs on the party producing the material, but the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems can become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Some information associated with operation of computers poses particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic document files but not apparent to the creator of the document or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic document file but not make them apparent to the reader. Other data describe the history, tracking, or management of an electronic document (sometimes called "metadata"), and are usually not apparent to the reader viewing a printout or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

The *Manual for Complex Litigation* notes these difficulties:

> A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Manual for Complex Litigation (4th) § 11.446.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide requested materials for initial examination without waiving any privilege — sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements — sometimes called "clawback agreements" — that production without intent to waive privilege should not be a waiver so long as the producing party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation.

As noted in the *Manual for Complex Litigation*, these agreements can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and reducing the cost and burden of review by the producing party. As the Manual also notes, a case-management order implementing such agreements can further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent privilege forfeiture or waiver that the parties have reached, and Rule 16(b) is amended to emphasize the court's entry of an order recognizing and implementing such an agreement as a case-management order. Rule 26(f)(3)(D) is modest; the entry of such a case-management order merely implements parties' agreement. But if the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to provide an additional protection against inadvertent privilege waiver by establishing a procedure for assertion of privilege after such production, leaving the question of waiver to later determination by the court if production is still sought.

Form 35. Report of Parties' Planning Meeting

* * * * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: _____ (brief description of subjects on which discovery will be needed)_____

Disclosure or discovery of electronically stored information should be handled as follows: _____(brief description of parties' proposals) _____

The parties have agreed to a privilege protection order, as follows: (brief description of provisions of proposed order)

All discovery commenced in time to be competed by _____(date)_____. [Discovery on _____(issue for early discovery)_____to be completed by _____(date)_____.]

* * * * *

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Planning.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule as inappropriate, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail , or other suitable means.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served with the complaint and within 90 days after any defendant has appeared.

(3) ***Contents of the Order.***

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) adopt the parties' agreement for protection against waiving privilege;

(~~viii~~viii) set dates for other conferences and for trial; and

(~~viiv~~viv) include other appropriate matters.

(4) ***Modifying Schedule.*** A schedule may be modified only for good cause and by leave of the district judge or, when authorized by local rule, of a magistrate judge.

* * * * *

Committee Note

Rule 26(f)(3) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise later.

Rule 26(f)(3) has also been amended by adding to the discovery plan any proposal that the court include in the case-management order the parties' agreement to facilitate discovery by minimizing the risk of waiver of privilege. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege to enable the party seeking production to designate the materials desired for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged information is inadvertently produced the producing party may by timely notice assert the privilege and obtain return of the materials without waiving the privilege. Other arrangements are possible. A case-management

order to effectuate the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation (4th)* § 11.446. Rule 16(b)(3)(B)(iv) recognizes the propriety of including such directives in the court's case management order. Court adoption of the chosen procedure by order advances enforcement of the agreement between the parties and adds protection against nonparty assertions that privilege has been waived. The rule does not provide the court with authority to enter such a case-management order without party agreement, or limit the court's authority to act on motion.

II. Option to Produce Electronically Stored Information in Response to Interrogatories — Rule 33(d)

Rule 33. Interrogatories to Parties

* * * * *

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, inspecting, compiling, abstracting, or summarizing a party's business records, including electronically stored information, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to permit the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine, audit, and inspect the records and to make copies, compilations, abstracts, or summaries.

Committee Note

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term "electronically stored information" has the same broad meaning in Rule 33(d) as in Rule 34(a). Much business information is stored

only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its format or because it is dependent on a particular computer system. Rule 33(d)(1) says that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it "as readily as the responding party," and Rule 33(d)(2) provides that the responding party must give the interrogating party a reasonable opportunity to examine the information. Depending on the circumstances of the case, satisfying these provisions may require the responding party to provide some combination of technological support, information on application software, access to the pertinent computer system, or other assistance. The key question is whether such support enables the interrogating party to use the electronically stored information as readily as the responding party.

III. Definition of Electronically Stored Information — Rule 34(a)

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. Any party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, ~~and~~ copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated electronically stored information or any designated documents — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium — from which information can be obtained either directly or after the responding party translates it into a reasonably usable form, or

(B) any designated tangible things ~~— and to test or sample these things~~; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that

the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

* * * * *

Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to authorize discovery of data compilations in anticipation that the use of computerized information would grow in importance. Since that time, the growth in electronically stored information and in the variety of systems for creating and storing such information have been dramatic. It is difficult to say that all forms of electronically stored information fit within the traditional concept of a "document." Accordingly, Rule 34(a) is amended to acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. The title of Rule 34 is modified to acknowledge that discovery of electronically stored information stands on equal footing with discovery of documents. Although discovery of electronically stored information has been handled under the term "document," this change avoids the need to stretch that word to encompass such discovery. At the same time, a Rule 34 request for production of "documents" should be understood to include electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against attempting a limiting or precise definition of electronically stored information. The definition in Rule 34(a)(1)(A) is expansive, including any type of information that can be stored electronically. A common example that is sought through discovery is electronic communications, such as e-mail. A reference to "images" is added to clarify their inclusion in the listing already provided. The reference to "data or data compilations" includes any databases currently in use or developed in the future. The rule covers information stored "in any medium," to encompass future developments in computer technology. Rule

34(a)(1)(A) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive definition. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the definition in Rule 34(a)(1)(A) is invoked in a number of other amendments, such as those to Rules 26(b)(2)(C), 26(b)(5)(B), 26(f)(3), 34(b) and 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1)((A).

The definition of electronically stored information is broad, but whether material within this definition should be produced, and in what form, are separate questions that must be addressed under Rule 26(b)(2)(C), Rule 26(c), and Rule 34(b).

Rule 34(a) is amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly provides that such discovery is permitted. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2)(B) and 26(c).

Rule 34(a)(1)(B) is amended to make clear that tangible things must — like documents and entry onto land sought through discovery — be designated in the request.

IV. Form of production — Rule 34(b)

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * * * *

(b) Procedure.

(1) ***Form of the Request.*** The request ~~must~~:

(A) must describe with reasonable particularity each item or category of items to be inspected; ~~and~~

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; ~~.~~ and

(C) may specify the form in which electronically stored information is to be produced.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be directed by the court or stipulated by the parties under Rule 29.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection

and related activities will be permitted as requested or state an objection to the request, including an objection to the requested form for producing electronically stored information, stating the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection and related activities with respect to the rest.

(D) *Producing the documents or electronically stored information.* Unless the parties otherwise agree, or the court otherwise orders,

(i) a party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to the categories in the request.

(ii) if a request for electronically stored information does not specify the form of production, a party must produce it in a form in which the producing party ordinarily maintains it, or in an electronically searchable form. The party need only produce such information in one form.

40 * * * * *

Committee Note

Subdivision (b). Rule 34(b)(1)(B) permits the requesting party to designate the form in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although one format a requesting party could designate would be hard copy. Specification of the desired form may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The parties should exchange information about the form of production well before production actually occurs, such as during the early opportunity provided by the Rule 26(f) conference. Rule 26(f)(3)(C) now calls for discussion of form of production during that conference.

The rule does not require the requesting party to choose a form of production; this party may not have a preference, or may not know what form the producing party uses to maintain its electronically stored information. If the request does not specify a form of production for electronically stored information, Rule 34(b)(2)(D)(ii) provides the responding party with options analogous to those provided in Rule 34(b)(2)(D)(i) with regard to hard-copy materials. The responding party may produce the information in a form in which it ordinarily maintains the information. If it ordinarily maintains the information in more than one form, it may select any such form. But the responding party is not required to produce the information in a form in which it is maintained. Instead, the responding party may produce the information in a form it selects for the purpose of production, providing the form is electronically searchable. Although this option is not precisely the same as the option under Rule 34(b)(2)(D)(i) to produce hard copy materials organized and labelled to correspond to the requests, it should be functionally analogous because it will enable the party seeking production to locate pertinent information.

If the requesting party does specify a form of production, Rule 34(b)(2)(B) permits the responding party to object. The grounds for objection depend on the circumstances of the case. When such an

objection is made, Rule 37(a)(2)(B)[1] requires the parties to confer about the subject in an effort to resolve the matter in a mutually satisfactory manner before a motion to compel is filed. If they cannot agree, the court will have to resolve the issue. The court is not limited to the form initially chosen by the requesting party, or to the alternatives in Rule 34(b)(2)(D)(ii), in ordering an appropriate form or forms for production. The court may consider whether a form is electronically searchable in resolving objections to the form of production.

Rule 34(b)(D)(ii) provides that electronically stored information ordinarily need be produced in only one form, but production in an additional form may be ordered for good cause. One such ground might be that the information cannot be used by the party seeking production in the form in which it was produced. Advance communication about the form that will be used for production might avoid that difficulty.

As a part of the general restyling of the Civil Rules, the redundant reminder of Rule 37(a) procedure in the final sentence of former Rule 34(b) is omitted as no longer useful.

---

[1] In the ongoing Style Project, the designation of Rule 37(a)(2)(B) has been changed to 37(a)(3)(B).

V. Reasonably Accessible Information — Rule 26(b)(2)(C)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits

* * * * *

(2) ***Limitations on Frequency and Extent***

(A) ***When Permitted.*** By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) ***When Required.*** The court must limit the frequency or extent of discovery otherwise permitted by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving the issues.

(C) ***Electronically Stored Information.*** A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information sought is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause.

(~~D~~C) ***On Motion or the Court's Own Initiative.*** The court may act on motion or on its own after reasonable notice.

* * * * *

Committee Note

Rule 26(b)(2)(C) is designed to address some of the distinctive features of electronically stored information — the volume of that

information and the variety of locations in which it might be found. In many instances, the volume of potentially responsive information that is reasonably accessible will be very large, and the effort and extra expense needed to obtain additional information may be substantial. The rule addresses this concern by providing that a responding party need not provide electronically stored information that it identifies as not reasonably accessible. If the requesting party moves to compel additional discovery under Rule 37(a), the responding party must show that the information is not reasonably accessible. Even if the information is not reasonably accessible, the court may nevertheless order discovery for good cause, subject to the provisions of Rule 26(b)(4)(B).

The *Manual for Complex Litigation (4th)* § 11.446 illustrates that problems of volume that can arise with electronically stored information:

> The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

With volumes of these dimensions, it is sensible to limit initial discovery to that which is reasonably accessible.

Whether given information is "reasonably accessible" may depend on a variety of circumstances. One referent would be whether the party itself routinely accesses or uses the information. If the party does routinely use the information — sometimes called "active data" — it would ordinarily seem that the information should be considered reasonably accessible. The fact that the party does not routinely access the information does not necessarily mean that it cannot do so without substantial effort or cost.

Other information is not reasonably accessible. Many parties have significant quantities of electronically stored information that can be located, retrieved, or reviewed only with very substantial effort

or expense. For example, some information may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes. Time-consuming and costly restoration of the data may be required and it may not be organized in a way that permits searching for information relevant to the action.

Technological developments may change what is "reasonably accessible" by removing obstacles to using some electronically stored information. But technological change can also impede access. Some information may be "legacy" data that remains from obsolete systems; such data is no longer used and may be costly and burdensome to restore and retrieve. Other information may have been deleted in a way that makes it inaccessible using normal means, even though technology provides the capability to retrieve and produce it through extraordinary efforts. Ordinarily such information would not be considered reasonably accessible under current technology.

Rule 26(b)(2)(C) excuses a party responding to a discovery request from providing electronically stored information on the ground that it is not reasonably accessible if the responding party identifies such information. The specificity the responding party must use in identifying such electronically stored information will vary with the circumstances of the case. For example, a category of information, such as information stored solely for disaster recovery purposes, can be specified. In other cases, the difficulty of accessing the information — as with "legacy" data stored on obsolete systems — can be provided. The goal is that the requesting party be sufficiently apprised of the circumstances to know that some requested information has not been reviewed or provided on this ground, the nature of this information, and the grounds for the responding party's contention that the information is not reasonably accessible.

If the requesting party moves to compel discovery, the responding party must show that the information sought is not reasonably accessible to invoke this rule. Such a motion would provide the occasion for the court to determine whether the information is reasonably accessible; if it is, this rule does not limit discovery, although other limitations — such as those in Rule 26(b)(4)(B) — may apply. Similarly, if the responding party sought to be relieved from providing such information, as on a motion under Rule 26(c), it

would have to demonstrate that the information is not reasonably accessible to invoke the protections of this rule.

When the responding party demonstrates that the information is not reasonably accessible, the court may nevertheless order discovery if the requesting party shows good cause. The good-cause analysis would balance the requesting party's need for the information and the burden on the responding party. Courts addressing such concerns have properly referred to the limitations in Rule 26(b)(2)(B) for guidance in deciding when and whether the effort involved in obtaining such information is warranted. Thus *Manual for Complex Litigation (4th)* § 11.446 invokes Rule 26(b)(2), stating that "the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems." It adds: "More expensive forms of production, such as production of word-processing files with all associated metadata or production of data in specified nonstandard format, should be conditioned upon a showing of need or sharing expenses."

The proper application of those principles can be developed through judicial decisions in specific situations. Caselaw has already begun to develop principles for making such determinations. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002); *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2000). Courts will be able to adapt the principles of Rule 26(b)(2) to the specific circumstances of each case in light of evolving technology.

VI. Belated Assertion of Privilege — Rule 26(b)(5)(B)

Rule 26. Duty to Disclose; General Provisions Regarding Discovery

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Privileged information withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i)~~(A)~~ expressly make the claim; and

(ii)~~(B)~~ describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) *Privileged 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 its claim of privilege. After being notified, a party must promptly return 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.

* * * * *

Committee Note

The Committee has repeatedly been advised that privilege waiver, and the review required to avoid it, add to the costs and delay of discovery. Rule 26(f)(3) is amended to direct the parties to discuss privilege issues in their discovery plan, and Rule 16(b) is amended to alert the court to consider a case-management order to provide for protection against waiver of privilege.

Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on grounds of privilege to make a privilege claim so that the requesting party can contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party that has inadvertently produced privileged information to assert the privilege claim and permit the matter to be presented to the court for its determination.

Rule 26(b)(5)(B) does not address the question whether there has been a privilege waiver. Orders entered under Rule 16(b)(3)(B)(iv) may have provisions bearing on whether a waiver has occurred. In addition, the courts have developed principles for determining whether waiver results from inadvertent production of privileged information. *See* 8 *Fed. Prac. & Pro.* § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for addressing these issues.

Under Rule 26(b)(5)(B), a party that has produced privileged information must notify the parties who received the information of its claim of privilege within a "reasonable time." Many factors bear on whether the party gave notice within a reasonable time in a given case, including the date when the producing party learned of the production, the extent to which other parties had made use of the information in connection with the litigation, the difficulty of discerning that the material was privileged, and the magnitude of production.

The rule does not prescribe a particular method of notice. As with the question whether notice has been given in a reasonable time, the manner of notice should depend on the circumstances of the case. It may be that in many cases informal but very rapid and effective means of asserting a privilege claim as to produced information would be a reasonable means of initial notice, followed by more formal notice. Whatever the method, the notice should be as specific as possible about the information claimed to be privileged, and about the producing party's desire that the information be promptly returned or destroyed.

Each party that received the information must promptly return or destroy it on being notified. The option of destroying the information is included because the receiving party may have incorporated some of the information in protected trial-preparation materials. A party that has disclosed or provided the information to a nonparty should attempt to obtain the return of the information or arrange for it to be destroyed.

Whether the information is returned or not, the producing party must assert its privilege in compliance with Rule 26(b)(5)(A) and preserve the information pending the court's ruling on whether the privilege is properly asserted and whether it was waived. As with claims of privilege made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

If the party that received the information contends that it is not privileged, or that the privilege has been waived, it may present the issue to the court by moving to compel production of the information.

VII. "Safe Harbor" on Sanctions — Rule 37(f)

As explained in the introduction, two alternative versions of this rule are presented because the Advisory Committee divided on which to prefer. Both versions are included so that the Standing Committee can consider both in deciding whether to publish both. All members of the Advisory Committee favor publishing Alternative 1, but that committee was closely divided on whether to publish Alternative 2 also.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

Alternative 1

(f) Electronically stored information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions 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 to 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.

* * * * *

Committee Note

Subdivision (f) is new. It addresses a distinctive feature of computer operations, the routine deletion of information that attends ordinary use. Rule 26(f)(2) is amended to direct the parties to address issues of preserving discoverable information in cases in which they are likely to arise. In many instances, their discussion may result in an agreed protocol for preserving electronically stored information and management of the routine operation of a party's information system to avoid loss of such information. Rule 37(f) provides that, unless a court order requiring preservation of electronically stored information is violated, the court may not impose sanctions on a party when such information is lost because of the routine operation of its electronic information system if the party took reasonable steps to preserve discoverable information.

The prerequisite in Rule 37(f)(1) that the party take reasonable steps to preserve discoverable information — sometimes called a "litigation hold" — provides an important assurance that needed information will be available for discovery. Subdivision (f)(1) says that the party must take those steps when it "knew or should have known the information to be discoverable in the action." Under some circumstances, a party will have such knowledge before the action is actually commenced. It is widely recognized that preservation obligations arise in some instances before the filing of a suit. *See, e.g., American Bar Association, Civil Discovery Standards*, Standard 10 (1999) (lawyer should inform client of duty to preserve on learning "that litigation is probable"). Each case must be decided on its own circumstances; the question is whether a party reasonably anticipated litigation based on the circumstances that gave rise to the action. Cf. Rule 26(b)(3) (offering protection against discovery for matters prepared "in anticipation of litigation").

Rule 37(f) provides that, once litigation is sufficiently foreseeable, the party is insulated against sanctions in the action for failure to preserve only if it takes "reasonable steps" to preserve information. Like the foreseeability of litigation, the reasonableness of the steps taken is determined by the circumstances presented. The party is to preserve information "it knew or should have known to be discoverable." Application of this standard depends on what the party knew about the nature of the litigation. That knowledge should inform its judgment about what subjects are pertinent to the action,

and which people are likely to have relevant information. In some instances, it may be necessary for a party to preserve electronically stored information that it would not usually access if it is relevant and is not otherwise available. In assessing the steps taken by the party when asked to impose sanctions, the court should bear in mind what the party reasonably knew or should have known when it took steps to preserve information. Often, taking no steps at all would not suffice, but the specific steps to be taken would vary widely depending on the nature of the party's electronic information system and the nature of the litigation.

One consideration that may sometimes be important in evaluating the reasonableness of steps taken is the existence of a statutory or regulatory provision for preserving information, if it required retention of the information sought through discovery. *See, e.g.,* 15 U.S.C. § 78u-4(b)(3)(C); Securities & Exchange Comm'n Rule 17a-4. Although violation of such a provision does not automatically preclude the protections of Rule 37(f), the court may take account of the statutory or regulatory violation in determining whether the party took reasonable steps to preserve the information in light of the prospect of litigation. Whether or not Rule 37(f) is satisfied, violation of such a statutory or regulatory requirement for preservation may subject the violator to sanctions in another proceeding — either administrative or judicial — but the court may not impose sanctions in the action if it concludes that the party's steps satisfy Rule 37(f)(1).

Rule 37(f) does not apply if the party's failure to provide information resulted from its violation of an order in the action requiring preservation of the information. An order that directs preservation of information on identified topics ordinarily should be understood to include electronically stored information. Should such information be lost even though a party took "reasonable steps" to comply with the order, the court may impose sanctions. If such an order was violated in ways that are unrelated to the party's current inability to provide the electronically stored information at issue, the violation does not deprive the party of the protections of Rule 37(f). The determination whether to impose a sanction, and the choice of sanction, will be affected by the party's reasonable attempts to comply.

If Rule 37(f) does not apply, the question whether sanctions should actually be imposed on a party, and the nature of any sanction to be imposed, is for the court. The court has broad discretion to determine whether sanctions are appropriate and to select a proper sanction. *See, e.g.,* Rule 37(b). The fact that information is lost in circumstances that do not satisfy Rule 37(f) does not imply that a court should impose sanctions.

Failure to preserve electronically stored information may not totally destroy the information, but may make it difficult to retrieve or restore. Even determining whether the information can be made available may require great effort and expense. Rule 26(b)(2)(C) governs determinations whether electronically stored information that is not reasonably accessible should be provided in discovery. If the information is not reasonably accessible because a party has failed to take reasonable steps to preserve the information, it may be appropriate to direct the party to take steps to restore or retrieve information that the would might otherwise not direct.

Alternative 2

(f) Electronically Stored Information. A court may not impose sanctions on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the deletion or loss was intentional or reckless.

Committee Note

Subdivision (f) is new. It addresses a distinctive feature of computer operations, the routine deletion and alteration of information that attends ordinary use. If the filing or prospect of litigation meant that this routine operation of electronic information systems could not continue, many governmental and business entities could not function. Rule 37(f) is intended to provide a limited "safe harbor" for the continuing routine operation of such systems without the threat of sanctions in the action.

Rule 26(f)(2) is amended to direct the parties to address issues of preserving discoverable information in cases in which such issues are likely to arise. In many instances, their discussion may result in an agreed protocol for preserving electronically stored information that addresses the effects of the routine operation of electronic information systems. Rule 37(f) provides that the court may not sanction a party for failure to preserve electronically stored information that results from such routine operation unless the party's failure was intentional or reckless.

The protection provided by Rule 37(f) is limited to a party's inability to provide electronically stored information that is caused by the routine operation of the party's electronic information system. The party invoking the subdivision must show that such operation caused the loss of the information in question. If that is proven, the party seeking sanctions must show that the failure to preserve the information resulted from the fault of the party sought to be sanctioned.

The determination whether the party's failure to preserve was intentional or reckless may take account of all relevant circumstances. One might be the party's awareness of the manner in which its electronic information system retains or discards information. Although a party's failure to become familiar with such operations might be reckless, there may be instances in which the party's knowledge of its system does not support that conclusion. The party's sophistication in general, and with respect to electronic information systems in particular, may be relevant to this consideration. That sophistication may also be relevant to whether the loss of the information would be intentional, for a finding that it was intentional would often depend on the party's awareness of the way in which its electronic information system operates.

Another circumstance is the party's knowledge of the litigation and the scope of likely discoverable information. One important factor is whether the litigation has been filed and served. A party may have sufficient information before those events to make its failure to prevent the loss of electronically stored information as a result of the routine operation of its electronic information system intentional or reckless. Before filing suit a plaintiff, for example, is likely to be aware of the allegations that will be made. Similarly, a prospective defendant may anticipate litigation before it is formally commenced

and know the identity of the people with pertinent knowledge, and the areas of information likely to be significant to the action. Coupled with familiarity with the manner of operation of its electronic information system, this awareness may support the conclusion that the party acted recklessly or intentionally in failing to preserve information that would be discarded by its electronic information system. In some circumstances, a party's failure to arrange for preservation of certain electronically stored information relevant to a contemplated or pending action — sometimes called a "litigation hold" — may be intentional or reckless. A party that knows its electronic information system automatically removes discoverable information may also be found to have acted intentionally in failing to prevent that deletion.

Another consideration would be the nature and extent of any preservation obligations. The existence of any statutes or regulations requiring retention of the information sought may bear on whether the failure to preserve such information was intentional or reckless. *See, e.g.*, 15 U.S.C. § 78u-4(b)(3)(C); Securities & Exchange Comm'n Rule 17a-4. Failure to honor such requirements may be viewed as reckless or intentional conduct under Rule 37(f), and therefore to deprive the party of the protections of Rule 37(f). The violation of such a provision may subject the violator to sanctions in another proceeding — either administrative or judicial — even if Rule 37(f) protects against sanctions in the action.

Failure to comply with an order in the action that the information in question be retained would often be even more pertinent to Rule 37(f)'s culpability standard. An order to preserve information often provides greater direction and focus than a statue or regulation. Particularly if the order refers explicitly to electronically stored information, it would emphasize the need for the party to become sufficiently familiar with the operation of its electronic information system to determine what intervention would be needed to comply with the order. Failure to preserve information that would not be intentional or reckless in the absence of such an order may be reckless or intentional after an order is entered. Preservation of all information instantly — even when a court so orders — may be impossible. But unless the party took reasonable steps to comply with the court's preservation order, the failure to comply may support a finding that the party acted recklessly or intentionally in failing to prevent the loss of the information through the routine operation of

its electronic information system. If such an order was violated in ways that are unrelated to the party's current inability to provide the electronically stored information at issue, the violation does not deprive the party of the protections of Rule 37(f). The rule deals with sanctions for failure to provide the information that the order directed be preserved but was not.

If Rule 37(f) does not apply, the question whether sanctions should actually be imposed on a party, and the nature of any sanction to be imposed, is for the court. The court has broad discretion in determining whether sanctions are appropriate and in selecting a proper sanction. *See, e.g.,* Rule 37(b). The purpose of subdivision (f) is to ensure that parties who satisfy its requirements are not sanctioned because discoverable information was lost due to the routine operation of their computer systems. The fact that information is lost in circumstances that do not satisfy Rule 37(f) does not require that a court impose sanctions.

Failure to preserve electronically stored information may not totally destroy the information, but may make it difficult to retrieve or restore. Even determining whether the information can be made available may require great effort and expense. Rule 26(b)(2)(C) governs determinations whether electronically stored information that is not reasonably accessible should be provided in discovery. If the information is not reasonably accessible because a party has failed to take reasonable steps to preserve the information, it may be appropriate to direct the party to take steps to restore or retrieve information that the would might otherwise not direct.

VIII. Subpoena for Electronically Stored Information — Rule 45

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) *Requirements.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; or produce and permit the inspection, ~~and~~ copying, testing, or sampling of designated documents, electronically stored information, or tangible things in that person's possession, custody, or control, or permit the inspection of premises; and

(iv) set forth the text of Rule 45(c) and (d).

(B) *Command to Produce Evidence or Permit Inspection.* A command to produce evidence or to permit inspection, testing, or sampling may be included in a subpoena commanding attendance at a

deposition, hearing, or trial, or may be set forth in a separate subpoena. A subpoena may specify the form in which electronically stored information is to be produced.

(2) ***Issued from Which Court.*** A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production, ~~and~~ inspection, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production, ~~or~~ inspection, testing, or sampling is to be made.

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney, as an officer of the court, may also issue and sign a subpoena from:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court in which the action is pending.

(b) Service.

(1) ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena on a named person requires delivering a copy to that person and, if the subpoena commands that person's attendance, tendering to that person the fees for one day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served on the named person, a notice must be served on each party as provided in Rule 5(b).

(2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the court from which it issued;

(B) outside that district but within 100 miles of the place of the deposition, hearing, trial, production, ~~or~~ inspection, testing, or sampling specified in the subpoena;

(C) within the state of the court from which it issued if a state statute or court rule permits serving a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, ~~or~~ inspection, testing, or sampling specified in the subpoena; or

(D) that the court authorizes, if a United States statute so provides, upon proper application and for good cause.

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs the issuance and service of a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the court from which the subpoena issued a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and must impose on a party or attorney who fails to comply with the duty an appropriate sanction, which may include lost earnings and reasonable attorney's fees.

(2) ***Command to Produce Materials, or to Permit Inspection, Testing, or Sampling.***

(A) *Appearance Not Required.* A person commanded to produce and permit the inspection, ~~and~~ copying, testing, or sampling of designated electronically stored information, documents, or tangible things, or to permit the inspection of premises, need not appear

in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* Subject to Rule 45(d)(2), a person commanded to produce and permit inspection ~~and~~ copying, testing, or sampling may serve on the party or attorney designated in the subpoena a written objection to providing ~~inspecting or copying~~ any or all of the designated materials — or to providing information in the form requested — or to inspecting the premises. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court from which the subpoena issued for an order compelling production, inspection, ~~or~~ copying, testing, or sampling.

(ii) Inspection, ~~and~~ copying, testing, or sampling may be done only as directed in the order, and the

order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court from which a subpoena issued must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from the place where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), such a person may be commanded to attend a trial by traveling from any place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court from which it issued may, on timely motion, quash or modify the subpoena if it requires:

(i) disclosure of a trade secret or other confidential research, development, or commercial information;

(ii) disclosure of an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) travel of more than 100 miles to attend trial by a person who is neither a party nor a party's officer, as a result of which the person will incur substantial expense.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the party on whose behalf the subpoena

was issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena

(1) (A) *Producing Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business, or organize and label them according to the categories of the demand.

(B) *Form for Producing Electronically Stored Information.* If the subpoena does not specify the form for producing electronically stored information, a person responding to a subpoena must produce it in a form in which the person ordinarily maintains it or in an electronically searchable form. The person producing electronically stored information need only produce it in one form.

(C) *Reasonably Accessible Electronically Stored Information.* A person responding to a subpoena need not provide discovery of electronically stored

information that the person identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information sought is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause.

(2) ***Claiming Privilege or Protection***

(A) *Privileged materials withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i)~~(A)~~ expressly assert the claim; and

(ii)~~(B)~~ describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the applicability of the privilege or protection.

(B) *Privileged materials produced.* When a person 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, any party must promptly return or destroy the specified information and any copies. The person who produced the information must comply with Rule 45(d)(2)(A) with regard to the information and preserve it pending a ruling by the court.

(e) Contempt. The court from which a subpoena issued may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place not within the limits of Rule 45(c)(3)(A)(ii).

Committee Note

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(A)(iii) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. As under Rule 34(b), Rule 45(a)(1)(B) is amended to provide that the subpoena can designate a form for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b)(2)(B), to authorize the party served with a subpoena to object to the requested form. In addition, as under Rule 34(b)(2)(D)(ii), Rule 45(d)(1)(B) is amended to provide that the party served with the subpoena must produce electronically stored information either in a form in which it is usually maintained or in an electronically searchable form, and that

the party producing electronically stored information should not have to produce it in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding party. The Rule 45(c) protections should guard against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Rule 45(d)(1)(C) is added to provide that the responding party need only provide reasonably accessible electronically stored information, unless the court orders additional discovery for good cause. In many cases, advance discussion about the extent, manner, and form of producing electronically stored information should alleviate such concerns.

Rule 45(a)(1)(B) is also amended, as is Rule 34(a)(1), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege after inadvertent production of privileged information.

Throughout Rule 45, further amendments have been made to conform the rule to the changes described above.

Rules for Publication (2): Supplemental Rule G, with A, C, and E

Introduction

Civil forfeiture proceedings are governed by the Supplemental Rules for Certain Admiralty and Maritime Claims. Reliance on the Supplemental Rules reflects tradition, the in rem character of forfeiture, and many forfeiture statutes that expressly invoke the Supplemental Rules. But the relationship has come under some strain. Procedures developed over the centuries to respond to the peculiar needs of admiralty practice do not always respond well to the needs of civil forfeiture proceedings. The tensions have increased as the number of civil forfeiture proceedings continues to grow. The Supplemental Rules were amended in 2000 to adopt some distinctions between admiralty and forfeiture practice. The Supreme Court transmitted these changes to Congress at the same time as Congress adopted the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). An immediate consequence was that some details of the amendments had to be revised to avoid superseding statutory provisions that could not have been foreseen when the amendments were working their way through the Enabling Act process. Beyond those particular details, CAFRA made many other changes that suggested the need for further work on civil forfeiture procedures.

Soon after CAFRA was enacted, the Department of Justice approached the Civil Rules Committee with the suggestion that the time had come to consolidate civil forfeiture procedure into a single supplemental rule that would be consistent with the statute. An Advisory Committee subcommittee was appointed and met frequently by conference call, with a day-long meeting last December. The Subcommittee was greatly assisted in this specialized area by both the Department of Justice and the National Association of Criminal Defense Lawyers, which made suggestions, reviewed drafts, and provided comments. After two years of examination, drafting, and redrafting, the Committee recommends the publication of proposed new Rule G for comment from bench and bar.

Rule G seeks to accomplish several goals. Separating civil forfeiture procedures from most admiralty procedure reduces the danger — already a source of concern — that the distinctive needs of forfeiture procedure will distort the interpretation of common provisions in ways that interfere with best admiralty practice, or vice versa. New statutory provisions can be reflected — one example is forfeiture of property located in a foreign country. Developing constitutional law doctrines also can be reflected — one example is the first-ever provision for direct notice to known potential claimants. Distinctive procedural needs can be accommodated — one example is present Rule C(6)(c), which provides for serving interrogatories with the complaint in terms broader than civil forfeiture practice requires (see Rule G(6)). Still other changes reflect developments in technology, such as the provision for publishing notice on the internet (G(4)(a)(iv)(c)).

The Subcommittee and full Committee considered in depth whether the Rule should define "standing" to assert a claim after the government initiates a civil forfeiture action, to make clear who can put the government to its burden of proof in a forfeiture case. The Department of Justice

proposed that the Rule limit claim standing to a person who would qualify as an "owner" within the CAFRA definition of the innocent-owner defense. After extensive study and discussion, the Committee decided not to include a definition of claim standing in the Rule itself. The proposed Rule instead includes provisions addressing the procedures for pretrial determination of standing. The Rule includes procedural protections for both claimants, such as direct notice requirements, and for the government, providing for interrogatories addressing claim standing that must be answered before a motion to dismiss can be granted.

The Committee recommends publication for comment of the following Rule G and Committee Note:

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule G. Forfeiture Actions In Rem

(1) **Application.** This rule governs a forfeiture action in rem arising from a federal statute. To the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.

(2) **Complaint.** The complaint must:

(a) be verified;

(b) state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant property, and venue;

(c) describe the property with reasonable particularity;

(d) if the property is tangible, state its location when any seizure occurred and — if different — its location when the action is filed;

(e) identify the statute under which the forfeiture action is brought; and

(f) state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

(3) Judicial Authorization and Process.

(a) Real Property. If the defendant is real property, the government must proceed under 18 U.S.C. § 985.

(b) Other Property; Arrest Warrant. If the defendant is not real property:

(i) the clerk must issue a warrant to arrest the property if it is in the government's possession;

(ii) the court – on finding probable cause – must issue a warrant to arrest the property if it is not in the government's possession and is not subject to a judicial restraining order;

(iii) a warrant is not necessary if the property is subject to a judicial restraining order.

(c) Execution of Process.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to

execute it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or (D) any United States officer or employee.

(ii) The authorized person or organization must execute the warrant and any supplemental process on property in the United States as soon as practicable unless:

(A) the property is in the government's possession; or

(B) the court orders a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause.

(iii) The warrant and any supplemental process may be executed within the district or, when authorized by statute, outside the district.

(iv) If executing a warrant on property outside the United States is required, the warrant may be transmitted to an appropriate authority for serving process where the property is located.

(4) Notice.

(a) Notice by Publication.

(i) When Publication is Required. A judgment of forfeiture may be entered only if the government has published notice of the action within a reasonable time after filing the complaint or at a time the court orders. But notice need not be published if:

(A) the defendant property is worth less than $1,000 and direct notice is sent under subdivision (4)(b) to every person the government can reasonably identify as a potential claimant; or

(B) the court finds that the cost of publication exceeds the property's value and that other means of notice would satisfy due process.

(ii) Content of the Notice. Unless the court orders otherwise, the notice must:

(A) describe the property with reasonable particularity;

(B) state the times under subdivision (5) to file a claim and to answer; and

(C) name the government attorney to be served with the claim and answer.

(iii) Frequency of Publication. Published notice must appear

(A) once a week for three consecutive weeks, or

(B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an official internet government forfeiture site for at least 30 consecutive days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under subdivision (4)(a)(iv).

(iv) Means of Publication. The government should select from the following options a means of publication reasonably calculated to notify potential claimants of the action:

(A) if the property is in the United States, publication in a newspaper generally circulated in the district where the action is filed, where the

property was seized, or where property that was not seized is located;

(B) if the property is outside the United States, publication in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or in legal notices published and generally circulated in the country where the property is located; or

(C) instead of (A) and (B), posting a notice on an official internet government forfeiture site for at least 30 consecutive days.

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under subdivision (5)(a)(ii)(B).

(ii) Content of the Notice. The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than 20 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

(iii) Sending Notice.

(A) The notice must be sent by means reasonably calculated to reach the potential claimant.

(B) Notice may be sent to the potential claimant or 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.

(C) Notice sent to a potential claimant who is incarcerated must be sent to the place of incarceration.

(D) Notice to a person arrested in connection with an offense giving rise to the forfeiture who is not incarcerated when notice is sent may be sent to the

address that person last gave to the agency that arrested or released the person.

(E) Notice to a person from whom the property was seized who is not incarcerated when notice is sent may be sent to the last address that person gave to the agency that seized the property.

(iv) When Notice is Sent. Notice by the following means is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail.

(v) Actual Notice. A potential claimant who had actual notice of a forfeiture action may not oppose or seek relief from forfeiture because of the government's failure to send the required notice.

(5) Responsive Pleadings.

(a) Filing a Claim.

(i) A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending. The claim must:

(A) identify the specific property claimed;

(B) identify the claimant and state the claimant's interest in the property;

(C) be signed by the claimant under penalty of perjury; and

(D) be served on the government attorney designated under subdivision (4)(a)(ii)(C) or (b)(ii)(D).

(ii) Unless the court for good cause sets a different time, the claim must be filed:

(A) by the time stated in a direct notice sent under subdivision (4)(b);

(B) if notice was published but direct notice was not sent to the claimant or the claimant's attorney, no later than 30 days after final publication of newspaper notice or legal notice under subdivision (4)(a) or no later than 60 days after the first day of publication on an official internet government forfeiture site; or

(C) if notice was not published and direct notice was not sent to the claimant or the claimant's attorney:

(1) if the property was in government possession when the complaint was filed, no later than 60 days after the filing, not counting any time when the complaint was under seal or when the action was stayed before execution of a warrant issued under subdivision (3)(b); or

(2) if the property was not in government possession when the complaint was filed, no later than 60 days after the government complied with 18 U.S.C. § 985(c) as to real property, or 60 days after process was executed on the property under (3).

(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor.

(b) Answer. A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 20 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(6) Special Interrogatories.

(a) Time and Scope. The government may serve special interrogatories under Rule 33 limited to the claimant's identity and relationship to the defendant property without the court's leave 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.

(b) Answers or Objections. Answers or objections to these interrogatories must be served within 20 days after the interrogatories are served.

(c) Government's Response Deferred. The government need not respond to a claimant's motion to dismiss the action under subdivision (8)(b) until 20 days after the claimant has answered these interrogatories.

(7) Preserving and Disposing of Property; Sales.

(a) Preserving Property. When the government does not have actual possession of the defendant property the court, on motion or on its own, may enter any order necessary to preserve the property and to prevent its removal or encumbrance.

(b) Interlocutory Sale or Delivery.

(i) Order to Sell. On motion by a party or a person having custody of the property, the court may order all or part of the property sold if:

(A) the property is perishable or at risk of deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or is disproportionate to its fair market value;

(C) the property is subject to a mortgage or to taxes on which the owner is in default; or

(D) the court finds other good cause.

(ii) Who Makes the Sale. A sale must be made by a United States agency that has custody of the property, by the agency's contractor, or by any person the court designates.

(iii) Sale Procedures. The sale is governed by 28 U.S.C. §§ 2001, 2002, and 2004, unless all parties, with the court's approval, agree to the sale, aspects of the sale, or different procedures.

(iv) Sale Proceeds. Sale proceeds are a substitute res subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account maintained by the United States pending the conclusion of the forfeiture action.

(v) Delivery on a Claimant's Motion. The court may order that the property be delivered to the claimant pending the conclusion of the action if the claimant shows circumstances that would permit sale under (i) and gives security under these rules.

(c) Disposing of Forfeited Property. Upon entry of a forfeiture judgment, the property or proceeds from selling the property must be disposed of as provided by law.

(8) Motions.

(a) Motion to Suppress Use of the Property as Evidence. If the defendant property was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence. Suppression does not affect forfeiture of the property based on independently derived evidence.

(b) Motion to Dismiss the Action.

(i) A claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).

(ii) In an action governed by 18 U.S.C. § 983(a)(3)(D) the complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property. The sufficiency of the complaint is governed by subdivision (2).

(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 subdivisions (5) or (6); or

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

(ii) The government's motion must be decided before any motion by the claimant to dismiss the action.

(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 the

burden of establishing standing based on a preponderance of the evidence.

(d) Petition to Release Property.

(i) If a United States agency or an agency's contractor holds property for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f), a person who has filed a claim to the property may petition for its release under § 983(f).

(ii) If a petition for release is filed before a judicial forfeiture action is filed against the property, the petition may be filed either in the district where the property was seized or in the district where a warrant to seize the property issued. If a judicial forfeiture action against the property is later filed in another district – or if the government shows that the action will be filed in another district – the petition may be transferred to that district under 28 U.S.C. § 1404.

(e) Excessive Fines. A claimant may seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment by motion for summary judgment or by motion made after entry of a forfeiture judgment if:

(i) the claimant has pleaded the defense under Rule 8, and

(ii) the parties have had the opportunity to conduct civil discovery on the defense.

(9) Trial.

Trial is to the court unless any party demands trial by jury under Rule 38.

Committee Note

Rule G is added to bring together the central procedures that govern civil forfeiture actions. Civil forfeiture actions are in rem proceedings, as are many admiralty proceedings. As the number of civil forfeiture actions has increased, however, reasons have appeared to create sharper distinctions within the framework of the Supplemental Rules. Civil forfeiture practice will benefit from distinctive provisions that express and focus developments in statutory, constitutional, and decisional law. Admiralty practice will be freed from the pressures that arise when the needs of civil forfeiture proceedings counsel interpretations of common rules that may not be suitable for admiralty proceedings.

Rule G generally applies to actions governed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) and also to actions excluded from it. The rule refers to some specific CAFRA provisions; if these statutes are amended, the rule should be adapted to the new provisions during the period required to amend the rule.

Rule G is not completely self-contained. Subdivision (1) recognizes the need to rely at times on other Supplemental Rules and the place of the Supplemental Rules within the basic framework of the Civil Rules.

Supplemental Rules A, C, and E are amended to reflect the adoption of Rule G.

Subdivision (1)

Rule G is designed to include the distinctive procedures that govern a civil forfeiture action. Some details, however, are better supplied by relying on Rules C and E. Subdivision (1) incorporates those rules for issues not addressed by Rule G. This general incorporation is at times made explicit — subdivision (7)(b)(v), for example, invokes the security provisions of Rule E. But Rules C and E are not to be invoked to create conflicts with Rule G. They are to be used only when Rule G, fairly construed, does not address the issue.

The Civil Rules continue to provide the procedural framework within which Rule G and the other Supplemental Rules operate. Both Rule G(1) and Rule A state this basic proposition. Rule G, for example, does not address pleadings amendments. Civil Rule 15 applies, in light of the circumstances of a forfeiture action.

Subdivision (2)

Rule E(2)(a) requires that the complaint in an admiralty action "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Application of this standard to civil forfeiture actions has evolved to the standard stated in subdivision (2)(f). The complaint must state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. *See U.S. v. Mondragon*, 313 F.3d 862 (4th Cir.2002). Subdivision (2)(f) carries this forfeiture case law forward without change.

Subdivision (3)

Subdivision (3) governs in rem process in a civil forfeiture action.

Paragraph (a). Paragraph (a) reflects the provisions of 18 U.S.C. § 985.

Paragraph (b). Paragraph (b) addresses arrest warrants when the defendant is not real property. Subparagraph (i) directs the clerk to issue a warrant if the property is in the government's possession. If

the property is not in the government's possession and is not subject to a restraining order, subparagraph (ii) provides that a warrant issues only if the court finds probable cause to arrest the property. This provision departs from former Rule C(3)(a)(i), which authorized issuance of summons and warrant by the clerk without a probable-cause finding. The probable-cause finding better protects the interests of persons interested in the property. Subparagraph (iii) recognizes that a warrant is not necessary if the property is subject to a judicial restraining order. The government remains free, however, to seek a warrant if it anticipates that the restraining order may be modified or vacated.

Paragraph (c). Subparagraph (ii) requires that the warrant and any supplemental process be served as soon as practicable unless the property is already in the government's possession. But it authorizes the court to order a different time. The authority to order a different time recognizes that the government may have secured orders sealing the complaint in a civil forfeiture action or have won a stay after filing. The seal or stay may be ordered for reasons, such as protection of an ongoing criminal investigation, that would be defeated by prompt service of the warrant. Subparagraph (ii) does not reflect any independent ground for ordering a seal or stay, but merely reflects the consequences for execution when sealing or a stay is ordered. A court also may order a different time for service if good cause is shown for reasons unrelated to a seal or stay. Subparagraph (iv) reflects the uncertainty surrounding service of an arrest warrant on property not in the United States. It is not possible to identify in the rule the appropriate authority for serving process in all other countries. Transmission of the warrant to an appropriate authority, moreover, does not ensure that the warrant will be executed. The rule requires only that the warrant be transmitted to an appropriate authority.

Subdivision (4)

Paragraph (a). Paragraph (a) reflects the traditional practice of publishing notice of an in rem action.

Subparagraph (i) recognizes two exceptions to the general publication requirement. Publication is not required if the defendant property is worth less than $1,000 and direct notice is sent to all reasonably identifiable potential claimants as required by subdivision

(4)(b). Publication also is not required if the cost would exceed the property's value and the court finds that other means of notice would satisfy due process. Publication on a government-established internet forfeiture site, as contemplated by subparagraph (iv), would be at a low marginal publication cost, which would likely be the cost to compare to the property value.

Subparagraph (iv) states the basic criterion for selecting the means and method of publication. The purpose is to adopt a means reasonably calculated to reach potential claimants. A reasonable choice of the means most likely to reach potential claimants at a cost reasonable in the circumstances suffices.

If the property is in the United States and newspaper notice is chosen, publication may be where the action is filed, where the property was seized, or — if the property was not seized — where the property is located. Choice among these places is influenced by the probable location of potential claimants.

If the property is not in the United States, account must be taken of the sensitivities that surround publication of legal notices in other countries. A foreign country may forbid local publication. If potential claimants are likely to be in the United States, publication in the district where the action is filed may be the best choice. If potential claimants are likely to be located abroad, the better choice may be publication by means generally circulated in the country where the property is located.

Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives. Paragraph (iv)(C) contemplates a government-created internet forfeiture site that would provide a single easily identified means of notice. Such a site could allow much more direct access to notice as to any specific property than publication provides.

Paragraph (b). Paragraph (b) is entirely new. For the first time, Rule G expressly recognizes the due process obligation to send notice to any person who reasonably appears to be a potential claimant.

Subparagraph (i) states the obligation to send notice. Many potential claimants will be known to the government because they

have filed claims during the administrative forfeiture stage. Notice must be sent, however, no matter what source of information makes it reasonably appear that a person is a potential claimant. The duty to send notice terminates when the time for filing a claim expires.

Notice of the action does not require formal service of summons in the manner required by Rule 4 to initiate a personal action. The process that begins an in rem forfeiture action is addressed by subdivision (3). This process commonly gives notice to potential claimants. Publication of notice is required in addition to this process. Due process requirements have moved beyond these traditional means of notice, but are satisfied by practical means that are reasonably calculated to accomplish actual notice.

Subparagraph (ii)(B) directs that the notice state a deadline for filing a claim that is at least 35 days after the notice is sent. This provision applies both in actions that fall within 18 U.S.C. § 983(a)(4)(A) and in other actions. Section 983(a)(4)(A) states that a claim should be filed no later than 30 days after service of the complaint. The variation introduced by subparagraph (ii)(B) reflects the procedure of § 983(a)(2)(B) for nonjudicial forfeiture proceedings. The nonjudicial procedure requires that a claim be filed "not later than the deadline set forth in a personal notice letter (which may be not earlier than 35 days after the date the letter is sent) * * *." This procedure is as suitable in a civil forfeiture action as in a nonjudicial forfeiture proceeding. Thirty-five days after notice is sent ordinarily will extend the claim time by no more than a brief period; a claimant anxious to expedite proceedings can file the claim before the deadline; and the government has flexibility to set a still longer period when circumstances make that desirable.

Subparagraph (iii) begins by stating the basic requirement that notice must be sent by means reasonably calculated to reach the potential claimant. No attempt is made to list the various means that may be reasonable in different circumstances. It may be reasonable, for example, to rely on means that have already been established for communication with a particular potential claimant. The government's interest in choosing a means likely to accomplish actual notice is bolstered by its desire to avoid post-forfeiture challenges based on arguments that a different method would have been more likely to accomplish actual notice. Flexible rule language accommodates the rapid evolution of communications technology.

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, administrative forfeiture proceeding, or criminal case. This provision should be used only when notice to counsel reasonably appears to be the most reliable means of notice.

Subparagraph (iii)(C) reflects the basic proposition that notice to a potential claimant who is incarcerated must be sent to the place of incarceration. Notice directed to some other place, such as a pre-incarceration residence, is less likely to reach the potential claimant. This provision does not address due process questions that may arise if a particular prison has deficient procedures for delivering notice to prisoners. *See Dusenbery v. U.S.*, 534 U.S. 161 (2002).

Items (D) and (E) of subparagraph (iii) authorize the government to rely on an address given by a person who is not incarcerated. The address may have been given to the agency that arrested or released the person, or to the agency that seized the property. The government is not obliged to undertake an independent investigation to verify the address.

Subparagraph (iv) identifies the date on which notice is considered to be sent for some common means, without addressing the circumstances for choosing among the identified means or other means. The date of sending should be determined by analogy for means not listed. Facsimile transmission, for example, is sent upon transmission. Notice by personal delivery is sent on delivery.

Subparagraph (v), finally, reflects the purpose to effect actual notice by providing that a potential claimant who had actual notice of a forfeiture proceeding cannot oppose or seek relief from forfeiture because the government failed to comply with subdivision (4)(b).

Subdivision (5)

Paragraph (a). Paragraph (a) establishes that the first step of contesting a civil forfeiture action is to file a claim. A claim is required by 18 U.S.C. § 983(a)(4)(A) for actions covered by § 983. Paragraph (a) applies this procedure as well to actions not covered by § 983. "Claim" is used to describe this first pleading because of the statutory references to claim and claimant. It functions in the same

way as the statement of interest prescribed for an admiralty proceeding by Rule C(6), and is not related to the distinctive meaning of "claim" in admiralty practice.

If the claimant states its interest in the property to be as bailee, the bailor should be identified.

The claim must be signed under penalty of perjury by the person making it. An artificial body that can act only through an agent may authorize an agent to sign for it. Excusable inability of counsel to obtain an appropriate signature may be grounds for an extension of time to file the claim.

Paragraph (a)(ii) sets the time for filing a claim. Item (C) applies in the relatively rare circumstance in which notice is not published and the government did not send direct notice to the claimant because it did not know of the claimant or did not have an address for the claimant.

Paragraph (b). Under 18 U.S.C. § 983(a)(4)(B), which governs many forfeiture proceedings, a person who asserts an interest by filing a claim "shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim." Paragraph (b) recognizes that this statute works within the general procedures established by Civil Rule 12. Rule 12(a)(4) suspends the time to answer when a Rule 12 motion is served within the time allowed to answer. Continued application of this rule to proceedings governed by § 983(a)(4)(B) serves all of the purposes advanced by Rule 12(a)(4), *see U.S. v. $8,221,877.16*, 330 F.3d 141 (3d Cir. 2003); permits a uniform procedure for all civil forfeiture actions; and recognizes that a motion under Rule 12 can be made only after a claim is filed that provides background for the motion.

Failure to present an objection to in rem jurisdiction or to venue by timely motion or answer waives the objection. Waiver of such objections is familiar. An answer may be amended to assert an objection initially omitted. But Civil Rule 15 should be applied to an amendment that for the first time raises an objection to in rem jurisdiction by analogy to the personal jurisdiction objection provision in Civil Rule 12(h)(1)(B). The amendment should be permitted only if it is permitted as a matter of course under Rule 15(a).

A claimant's motion to dismiss the action is further governed by subdivisions (6)(c), (8)(b), and (8)(c).

Subdivision (6)

Subdivision (6) illustrates the adaptation of an admiralty procedure to the different needs of civil forfeiture. Rule C(6) permits interrogatories to be served with the complaint in an in rem action without limiting the subjects of inquiry. Civil forfeiture practice does not require such an extensive departure from ordinary civil practice. It remains useful, however, to permit the government to file limited interrogatories at any time after a claim is filed, to gather information that bears on the claimant's standing. Subdivisions (8)(b) and (c) allow a claimant to move to dismiss only if the claimant has standing, and recognize the government's right to move to dismiss a claim for lack of standing. Subdivision (6) interrogatories are integrated with these provisions in that the interrogatories are limited to the claimant's identity and relationship to the defendant property. If the claimant asserts a relationship to the property as bailee, the interrogatories can inquire into the bailor's interest in the property and the bailee's relationship to the bailor. The claimant can accelerate the time to serve subdivision (6) interrogatories by serving a motion to dismiss — the interrogatories must be served within 20 days after the motion is served. Integration is further accomplished by deferring the government's obligation to respond to a motion to dismiss until 20 days after the claimant moving to dismiss has answered the interrogatories.

The statement that subdivision (6) interrogatories are served under Rule 33 recognizes that these interrogatories are included in applying the numerical limit in Rule 33(a).

Subdivision (6) supersedes the discovery "moratorium" of Rule 26(d) and the broader interrogatories permitted for admiralty proceedings by Rule C(6).

Subdivision (7)

Paragraph (a). Subdivision (7) is adapted from Rule E(9)(b). It provides for preservation orders when the government does not have actual possession of the defendant property.

Paragraph (b). Paragraph (b)(i)(C) recognizes the authority, already exercised in some cases, to order sale of property subject to a defaulted mortgage or to defaulted taxes. The authority is narrowly confined to mortgages and tax liens; other lien interests may be addressed, if at all, only through the general good-cause provision. The court must carefully weigh the competing interests in each case. This provision does not address the questions whether a mortgagee or other lien holder can force sale of property held for forfeiture or whether the court can enjoin the sale. Neither does it attempt to account for the interest that a crime victim may have in restoration of forfeited property under 18 U.S.C. § 981(e)(6).

Paragraph (b)(i)(D) establishes authority to order sale for good cause. Good cause may be shown when the property is subject to diminution in value — the classic example is a load of fresh fish. Care should be taken before ordering sale to avoid diminished value. In some cases the government and claimants will agree to sale. But this ground should be invoked with restraint in circumstances that do not involve physical deterioration. An automobile, for example, is likely to lose value continually unless it is a collector's item. Shares of stock are subject to market-value fluctuations. But the government's interest in maximizing the value gained upon forfeiture and in avoiding storage costs must be balanced against the claimant's interests. A claimant may prefer to regain the specific asset, or to retain a voice in the timing of sale in relation to market fluctuations through the agreed-sale provisions of (b)(iii).

Paragraph (b)(iii) recognizes that if the court approves, the interests of all parties may be served by their agreement to sale, aspects of the sale, or sale procedures that depart from governing statutory procedures.

Paragraph (c) draws from Rule E(9)(a), (b), and (c). Disposition of the proceeds as provided by law may require resolution of disputed issues. A mortgagee's claim to the property or sale proceeds, for example, may be disputed on the ground that the mortgage is not genuine. An undisputed lien claim, on the other hand, may be recognized by payment after an interlocutory sale.

Subdivision (8)

Subdivision (8) addresses a number of issues that are unique to civil forfeiture actions.

Paragraph (a). Standing to suppress use of seized property as evidence is governed by principles distinct from the principles that govern claim standing. A claimant with standing to contest forfeiture may not have standing to seek suppression. Rule G does not of itself create a basis of suppression standing that does not otherwise exist.

Paragraph (b). Paragraph (b)(i) is one element of the system that integrates the procedures for determining a claimant's standing to claim and for deciding a claimant's motion to dismiss the action. Under paragraph (c)(ii), a motion to dismiss the action cannot be addressed until the court has decided any government motion to strike the claim or answer. This procedure is reflected in the (b)(i) reminder that a motion to dismiss the forfeiture action may be made only by a claimant who establishes claim standing. The government, moreover, need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered any subdivision (6) interrogatories.

Paragraph (b)(ii) mirrors 18 U.S.C. § 983(a)(3)(D). It applies only to an action independently governed by § 983(a)(3)(D), implying nothing as to actions outside § 983(a)(3)(D). The adequacy of the complaint is measured against the pleading requirements of subdivision (2), not against the quality of the evidence available to the government when the complaint was filed.

Paragraph (c). As noted with paragraph (b), paragraph (c) governs the procedure for determining whether a claimant has standing.

Paragraph (c)(i)(A) provides that the government may move to strike a claim or answer for failure to comply with the pleading requirements of subdivision (5) or to answer subdivision (6) interrogatories. As with other pleadings, the court should strike a claim or answer only if satisfied that an opportunity should not be afforded to cure the defects under Rule 15. So too, not every failure to respond to subdivision (6) interrogatories warrants an order striking the claim. But the special role that subdivision (6) plays in the scheme for determining claim standing may justify a somewhat

more demanding approach than the general approach to discovery sanctions under Rule 37.

Paragraph (d). The hardship release provisions of 18 U.S.C. § 983(f) do not apply to a civil forfeiture action exempted from § 983 by § 983(i).

Paragraph (d)(ii) reflects the venue provisions of 18 U.S.C. § 983(f)(3)(A) as a guide to practitioners. In addition, it makes clear the status of a civil forfeiture action as a "civil action" eligible for transfer under 28 U.S.C. § 1404. A transfer decision must be made on the circumstances of the particular proceeding. The district where the forfeiture action is filed has the advantage of bringing all related proceedings together, avoiding the waste that flows from consideration of the different parts of the same forfeiture proceeding in the court where the warrant issued or the court where the property was seized. Transfer to that court would serve consolidation, the purpose that underlies nationwide enforcement of a seizure warrant. But there may be offsetting advantages in retaining the petition where it was filed. The claimant may not be able to litigate, effectively or at all, in a distant court. Issues relevant to the petition may be better litigated where the property was seized or where the warrant issued. One element, for example, is whether the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial. Another is whether continued government possession would prevent the claimant from working — whether seizure of the claimant's automobile prevents work may turn on assessing the realities of local public transit facilities.

Paragraph (e). The Excessive Fines Clause of the Eighth Amendment forbids an excessive forfeiture. *U.S. v. Bajakajian*, 524 U.S. 321 (1998). 18 U.S.C. § 983(g) provides a "petition" "to determine whether the forfeiture was constitutionally excessive" based on finding "that the forfeiture is grossly disproportional to the offense." Paragraph (e) describes the procedure for § 983(g) mitigation petitions, and adopts the same procedure for forfeiture actions that fall outside § 983(g). The procedure is by motion, either for summary judgment or for mitigation after a forfeiture judgment is entered. The claimant must give notice of this defense by pleading, but failure to raise the defense in the initial answer may be cured by amendment under Rule 15. The issues that bear on mitigation often are separate from the issues that determine forfeiture. For that reason it may be

convenient to resolve the issue by summary judgment before trial on the forfeiture issues. Often, however, it will be more convenient to determine first whether the property is to be forfeited. Whichever time is chosen to address mitigation, the parties must have had the opportunity to conduct civil discovery on the defense. The extent and timing of discovery are governed by the ordinary rules.

Subdivision (9)

Subdivision (9) serves as a reminder of the need to demand jury trial under Rule 38.

Supplemental Rules A, C, E Amended To Conform to G

Rule A. Scope of Rules

(1) These Supplemental Rules apply to:

(A) the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(i~~1~~) maritime attachment and garnishment,~~;~~

(ii~~2~~) actions in rem,~~;~~

(iii~~3~~) possessory, petitory, and partition actions, and~~;~~

(iv~~4~~) actions for exoneration from or limitation of liability;~~.~~

(B) forfeiture actions in rem arising from a federal statute; and

(C) ~~These rules also apply to~~ the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

(2) The ~~general~~ Federal Rules of Civil Procedure ~~for the United States District Courts are~~ also ~~applicable~~ apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

Committee Note

Rule A is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions. Rule G(1) contemplates application of other Supplemental Rules to the extent that Rule G does not address an issue. One example is the Rule E(4)(c) provision for arresting intangible property.

Rule C. In Rem Actions: Special Provisions

(1) An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

* * * * *

(2) Complaint. In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable particularity the property that is the subject of the action; and

(c) ~~in an admiralty and maritime proceeding~~ state that the property is within the district or will be within the district while the action is pending~~;~~

~~**(d)** in a forfeiture proceeding for violation of a federal statute, state:~~

~~**(i)** the place of seizure and whether it was on land or on navigable waters;~~

~~**(ii)** whether the property is within the district, and if the property is not within the district the statutory basis for the court's exercise of jurisdiction over the property; and~~

~~**(iii)** all allegations required by the statute under which the action is brought.~~

(3) Judicial Authorization and Process.

(a) ***Arrest Warrant.***

~~**(i)** When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the~~

~~United States must proceed under applicable statutory procedures.~~

(iii)~~(A) In other actions, t~~The court must review the complaint and any supporting papers.

* * * * *

(ii~~B~~) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) *Service.*

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a

person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or (D) in an action brought by the United States, any officer or employee of the United States.

* * * * *

(6) Responsive Pleading; Interrogatories.

~~**(a)** *Civil Forfeiture.* In an in rem forfeiture action for violation of a federal statute:~~

~~**(i)** a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:~~

~~**(A)** within 30 days after the earlier of (1) the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or~~

~~**(B)** within the time that the court allows.~~

~~**(ii)** an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and~~

~~(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.~~

(a~~b~~) *Maritime Arrests and Other Proceedings.* ~~In an rem action not governed by Rule C(6)(a).~~

* * * * *

(b~~c~~) *Interrogatories.*

* * * * *

Committee Note

Rule C is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

Rule E. Actions in Rem and Quasi in Rem: General Provisions

* * * * *

(3) Process.

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

~~(b) in forfeiture cases process in rem may be served within the district or outside the district when authorized by statute.~~

(b~~c~~) *Issuance and Delivery.*

* * * * *

(5) Release of Property.

(a) *Special Bond.* ~~Except in cases of seizures for forfeiture under any law of the United States, w~~Whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

* * * * *

(9) Disposition of Property; Sales.

~~**(a)** *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.~~

(a~~b~~) *Interlocutory Sales; Delivery.*

* * * * *

(ii) In the circumstances described in ~~Rule E(9)~~ subdivision (a~~b~~)(i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

(b~~c~~) *Sales, Proceeds.*

* * * * *

Committee Note

Rule E is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures.

* * * * *

(E) The following categories of proceedings are exempt from initial disclosures under Rule 26(a)(1):

* * * * *

(ii) a forfeiture action in rem arising from a federal statute;

(~~ii~~iii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(~~iii~~iv) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(~~iv~~v) an action to enforce or quash an administrative summons or subpoena;

(~~v~~vi) an action by the United States to recover benefit payments;

(~~vi~~**vii)** an action by the United States to collect on a student loan guaranteed by the United States;

(~~vii~~**viii)** a proceeding ancillary to proceedings in other courts; and

(~~viii~~**ix)** an action to enforce an arbitration award.

* * * * *

Committee Note

Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Rules for Publication (3): 50(b)Rule 50(b): Trial Motion Prerequisite; Hung Jury

The Advisory Committee recommends publication for comment of the following amended Rule 50(b). The Style form of present Rule 50(a) is included to illustrate the context of the Rule 50(b) proposal without recommending that Style Rule 50(a) be published now.*

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) determine the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) ***Motion.*** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

* Proposed amendments to Rule 50(b) based on existing language of the rule.

(b) Renewing the Motion ~~for Judgment~~ After Trial; Alternative Motion for a New Trial. If~~, for any reason,~~ the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under [subdivsion] (a), the court is ~~considered~~ deemed to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment, or — if the motion addresses a jury issue not decided by a verdict — by filing a motion no later than 10 days after the jury was discharged. ~~—and~~ The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

37 * * * * *

Committee Note

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. As amended, the rule permits renewal of any Rule 50(a) motion for judgment as a matter of law. Because the Rule 50(b) motion is only a renewal of the earlier motion, it can be supported only by arguments made in support of the earlier motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935).

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

Finally, an explicit time limit is added for making a post-trial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

Discussion

Many reported appellate decisions continue to wrestle with the problems that arise when a party has moved for judgment as a matter of law before the close of all the evidence but has failed to renew the motion at the close of all the evidence. No doubt the problems occur more frequently than appears in reported appellate decisions. The appellate decisions have begun to permit slight relaxations of the requirement that a post-verdict motion be supported by — be a renewal of — a motion made at the close of all the evidence. These departures seem desirable, but come at the price of increasingly uncertain doctrine that in turn may invite still more frequent appeals. The proposed amendment reflects the belief that a motion made during trial serves all of the functional needs served by a motion at the close of all the evidence. As now, the post-trial motion renews the trial motion and can be supported only by arguments made to support the trial motion. The opposing party has had clear notice of the asserted deficiencies in the case and a final opportunity to correct them. Satisfying these functional purposes equally satisfies Seventh Amendment concerns.

Separately, the proposal provides a sensible time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion.

The attached memorandum discusses in detail the long history of the close-of-the-evidence motion requirement and describes the cases that in some rather limited circumstances have departed from the requirement.

The Advisory Committee agenda has carried for some years the question whether to revise Rule 50(b) to establish a clear time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict. The question was raised by Judge Stotler while she chaired the Standing Committee. The problem appears on the face of the rule, which seems to allow a motion at the close of the evidence at the first trial to be renewed at any time up to ten days after judgment is entered following a second (or still later) trial. It would be folly to disregard the sufficiency of the evidence at a second trial in favor of deciding a motion based on the evidence at the first trial, and unwise to allow the question to remain open indefinitely during the period leading up to the second trial. There is authority saying that the motion must be renewed ten days after the jury is discharged. See C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d*, § 2357, p. 353. This authority traces to the 1938 version of Rule 50(b), which set the time for a judgment n.o.v. motion at ten days after the jury was discharged if a verdict was not returned. This provision was deleted in 1991, but the Committee Note says only that amended Rule 50(b) "retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment." Research into the Advisory Committee deliberations that led to the 1991 amendment has failed to show any additional explanation. It now seems better to restore the 1991 deletion.

Rule 50(b) Background Memorandum

The Advisory Committee considered this memorandum in deliberating its Rule 50(b) recommendations. It is included to provide a detailed description of the Seventh Amendment developments that first established the legitimacy of judgments notwithstanding the verdict. It also describes a cross-section of the appellate decisions that have begun to erode, if only at the edges, the requirement that there be a motion at the close of all evidence. The concluding sections discuss a few additional topics that do not bear on the present recommendations; they are included only to fill out the picture.

Rule 50(b): Trial Motion Prerequisite for Post-Trial Motion

The Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association has recommended an amendment of Civil Rule 50(b). 03-CV-A. The amendment would soften the rule that a motion for judgment as a matter of law made after trial can advance only grounds that were raised by a motion made at the close of all the evidence. The Committee's specific proposal would add a few words to Rule 50(b):

> If, for any reason, the court does not grant a motion for judgment as a matter of law made after the non-moving party has been heard on an issue or rested, or at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

The alternative proposed below is based on the current Style version of Rule 50(b):

(b) Renewing the Motion After Trial; Alternative Motion for New Trial. If the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment * * *.

The effect of this amendment would be to carry forward the requirement that there be a pre-verdict motion for judgment as a matter of law at trial, but to eliminate the requirement that an earlier motion be renewed by a duplicating motion at the close of all the evidence.

This proposal renews a question that was considered by the Advisory Committee when it developed the 1991 Rule 50 amendments. Failure to move in this direction appears to have been affected by lingering Seventh Amendment concerns. The concerns may have been affected by considering a proposal that would eliminate any requirement for a pre-verdict motion. There was little doubt then that a more functional approach would provide real benefits. It is difficult to believe that lingering Seventh Amendment concerns dictate the precise point at which a pre-verdict motion must be made during trial. There is at least good reason to believe that the Seventh Amendment

permits a more aggressive approach that would ask only whether the issue raised by a post-verdict motion was clearly disclosed to the opposing party before the close of all the evidence. This proposal does not go that far, for the reasons suggested in Part IV.

One further question might be considered. An old question was renewed during the Style project. Rule 50(b) does not clearly provide a time to renew a trial for judgment as a matter of law after the jury fails to agree on a verdict. Read literally, the rule would permit a motion made during the first trial to be renewed at any time up to entry of judgment following a second (or still later) trial. That is not a good idea. There is authority for the proposition that the motion must be renewed within 10 days after the jury is discharged. 9A *Federal Practice & Procedure*: § 2537, p. 353. That result could be built into the rule:

> * * * The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment, or if a complete verdict was not returned by filing a motion no later than 10 days after the jury was discharged. ~~— and~~ The movant may alternatively request a new trial or join a motion for a new trial under Rule 59. * * *

These notes begin with a brief sketch of the Seventh Amendment history. The reasons for considering Rule 50(b) amendments are then illustrated by adding a random selection of cases to those described by the Committee on Federal Procedure. These cases are but a few among many that convincingly demonstrate that failures to heed the clear requirements of Rule 50(b) are all too common. The cases also provide strong support for the proposition that some change is desirable. The final sections explore alternative approaches to amending Rule 50(b). The first recommendation is set out above — it would require only that a post-verdict motion be supported by a motion for judgment as a matter of law made during trial. The advantages of some formalism justify the costs that will follow when a lawyer fails to honor even this easily-remembered stricture.

I. Seventh Amendment History

The Seventh Amendment history can be recalled in brief terms. The beginning is *Slocum v. New York Life Ins. Co.*, 1913, 228 U.S. 364, 33 S.Ct. 523. The defendant's motion for a directed verdict at the close of all the evidence was denied. Judgment was entered on the verdict for the plaintiff, denying the defendant's post-verdict motion for judgment notwithstanding the verdict. The court of appeals ordered judgment notwithstanding the verdict, drawing on Pennsylvania judgment n.o.v. practice. The Supreme Court reversed, ruling that the Seventh Amendment prohibits judgment notwithstanding the verdict. It agreed that the trial court should have directed a verdict for the defendant. But the Court ruled that conformity to state practice could not thwart the Seventh Amendment in federal court. A jury must resolve the facts; even if the court directs a verdict, the jury must return a verdict according to the direction The most direct statement was:

> When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination,

> according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before.
>
> * * * [T]his procedure was regarded as of real value, because, in addition to fully recognizing [the right of trial by jury], it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record it may enable her to supply omissions in her own evidence, or to show inaccuracies in that of the defendant * * *. 228 U.S. at 380-381.

The Court also observed that it is the province of the jury to settle the issues of fact, and that

> while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment; and this * * * consists of the court and jury, unless there be a waiver of the latter. 228 U.S. 387-388.

(Justice Hughes was joined in dissent by Justices Holmes, Lurton, and Pitney. He concluded that the result achieved by a judgment n.o.v. could "have been done at common law, albeit by a more cumbrous method." There is no invasion of the jury's province when there is no basis for a finding by a jury. "We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record. * * * [T]his court is departing from, instead of applying, the principles of the common law * * *." 228 U.S. at 428.

It took some time, but Justice Van Devanter, author of the Court's opinion in the Slocum case, came to write the opinion for a unanimous Court that gently reversed the Slocum decision by resorting to fiction. *Baltimore & Carolina Line v. Redman*, 1935, 297 U.S. 654, 55 S.Ct. 890, was similar to the Slocum case in almost every detail except that it came out of a federal court in New York, not Pennsylvania. The defendant moved for a directed verdict "[a]t the conclusion of the evidence." The court of appeals concluded that judgment on the verdict for the plaintiff must be reversed for insufficiency of evidence, but that the Slocum case required it to direct a new trial rather than entry of judgment for the defendant. The Supreme Court reversed. It noted that the trial court "reserved its decision" on the directed verdict motion, and "submitted the case to the jury subject to its opinion on the questions reserved * * *. No objection was made to the reservation[] or to this mode of proceeding." Then it explained that the "aim" of the Seventh Amendment

> is to preserve the substance of the common-law right of trial by jury [that existed under the English common law], as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury * * *. 295 U.S. at 657

In the Slocum case, the "request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence * * *; and the verdict for the plaintiff was taken unconditionally, and not subject to the court's opinion on the sufficiency of the evidence."

In the Redman case, on the other hand, the trial court expressly reserved its ruling. And

> [w]hether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties. 295 U.S. at 659

Common-law practice included "a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved * * *." This practice was well established when the Seventh Amendment was adopted. Some states, including New York, have statutes that "embody[] the chief features of the common-law practice" and apply it to questions of the sufficiency of the evidence. Following this practice, entry of judgment notwithstanding the verdict "will be the equivalent of a judgment for the defendant on a verdict directed in its favor."

As to the Slocum decision,

> it is true that some parts of the opinion * * * give color to the interpretation put on it by the Court of Appeals. In this they go beyond the case then under consideration and are not controlling. Not only so, but they must be regarded as qualified by what is said in this opinion. 295 U.S. at 661.

In 1935 it would not have been easy to guess whether anything turned on the several possible limits. The trial court expressly reserved its ruling on the sufficiency of the evidence. No party objected. The Court actually asserted that the "tacit consent of the parties" must be found. It would be strange to allow this practice under the Seventh Amendment only if the parties actually consent, and only if the trial judge remembers to make an express reservation. But arguments could be found for that result.

These possible uncertainties were promptly addressed by the original adoption of Rule 50(b) in 1938:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict * * *. (308 U.S. 645, 725-726.)

Rule 50(b) does not require the opposing party's consent, and does not require an express reservation by the court. To the contrary, the court is "deemed" to have reserved the question even if the court expressly denies the motion. The fiction created by "deemed" carries the Seventh Amendment burden.

II. Functional Values

Sixty-five years of fiction is enough. The question today is not whether the Seventh Amendment commands that a post-verdict motion for judgment be supported by a motion at the close of all the evidence in order to rely on the ancient practice of reserving a ruling.[2] The question is whether there are functional advantages in a close-of-the evidence motion that might be read into the Seventh

---

[2] This flat assertion seems safe in all reason. But the weight of Seventh Amendment tradition cannot be shrugged off without some effort. An illustration is provided by *Duro-Last, Inc. v. Custom Seal, Inc.*, Fed.Cir.2003, 321 F.3d 1098, 1105-1108. The plaintiff moved for judgment as a matter of law at the close of the evidence. The verdict found the plaintiff's patent invalid for obviousness. The plaintiff renewed its motion and won judgment as a matter of law holding the patent not invalid. The Federal Circuit reversed because it concluded that the motion made at the close of all the evidence did not sufficiently specify the obviousness issue as a ground. "The requirement for specificity is not simply the rule-drafter's choice of phrasing. In view of a litigant's Seventh Amendment rights, it would be constitutionally impermissible for the district court to re-examine the jury's verdict and to enter JMOL on grounds not raised in the pre-verdict JMOL."

The Federal Circuit cited Morante v. American Gen. Fin. Center, 5th Cir.1998, 157 F.3d 1006, 1010. The court reversed judgment as a matter of law on an agency question, citing several decisions for the rule that a post-verdict motion cannot assert a ground that was not included in a motion made at the close of the evidence. This paragraph concludes by citing *Sulmeyer v. Coca Cola Co.*, 5th Cir.1975, 515 F.2d 835, 846 n. 17. The body of the Sulmeyer opinion ruled that the plaintiff's post-verdict motion for judgment n.o.v. could not be supported by arguing a claim that had not been presented in any way at trial. The footnote observed: "It would be a constitutionally impermissible re-examination of the jury's verdict for the district court to enter judgment n.o.v. on a ground not raised in the motion for directed verdict. *Compare Baltimore & Carolina Line, Inc. v. Redman* * * * with *Slocum v. New York Life Ins. Co.* * * *."

As interesting as this tenacious bit of history is, it does not justify the conclusion that the Seventh Amendment demands that a post-verdict motion can be supported only on grounds stated in a motion made at the close of all the evidence. At most, the Seventh Amendment might be said to require that the ground have been raised during trial. The proposal suggested below retains that requirement.

Amendment and that in any event justify carrying forward the requirement as a matter of good procedure.

The central functional purpose in requiring a close-of-the-evidence motion is to afford the opposing party one final notice of the evidentiary insufficiency. Courts repeatedly state this purpose. The benefits flow to the court and the moving party as well as to the opposing party. The opposing party, given this final notice, may in fact supply sufficient evidence that otherwise would not be provided. But if the opposing party does not fill in the gap, the final clear notice makes it easier for the court after verdict to deny any second opportunity by way of a new trial or dismissal without prejudice. Another advantage may be reflected in statements that the close-of-the-evidence motion enables the trial court to reexamine the sufficiency of the evidence (*e.g., Polanco v. City of Austin*, 5th Cir.1996, 78 F.3d 968, 973-975). Although courts commonly prefer to take a verdict in order to avoid the retrial that would be required by reversal of a pre-verdict judgment, there are advantages in directing a verdict. These advantages are more likely to be realized if a ruling is prompted by a close-of-the-evidence motion.

The need to point out a perceived deficiency in the evidence is real. But this need ordinarily is satisfied repeatedly as the case progresses toward the close of all evidence. The deficiencies are likely to be pointed out in pretrial conference, by motion for summary judgment, in arguments, and in jury instruction requests. And a motion for judgment as a matter of law at the close of the plaintiff's case frequently points out deficiencies that are not cured by the examination and cross-examination of the defendant's witnesses. The need to alert the adversary to the claimed deficiencies can be served by many means.

The question, then, is how far to approach a rule that permits a post-verdict motion to rest on any argument clearly made on the record before the action was submitted to the jury. In the end, the cautious answer may be to require a Rule 50(a) motion for judgment as a matter of law, but to accept a Rule 50(a) motion made at any time during trial. Lower courts are gingerly working part way toward this solution, but cannot get there without the assistance of a Rule 50(b) amendment.

III. Relaxations of Rule 50(b)

Rule 50(b) does not say directly that a post-trial motion for judgment as a matter of law must be supported by a motion made at the close of all the evidence. In its present form, it is captioned: "Renewing Motion for Judgment After Trial * * *." It begins much as it began in 1938: "If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law * * *." The 1991 Committee Note makes express the apparent implication that only a motion made at the close of all the evidence may be renewed. Subdivision (b) "retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the

Seventh Amendment. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion."

Since the 1991 amendments, courts have continued to recognize the close-of-the-evidence motion requirement. The most straight-forward cases are those in which the issue raised by post-verdict motion or by the court was not raised by any pre-verdict motion. *See American & Foreign Ins. Co. v. Bolt*, 6th Cir.1997, 106 F.3d 155, 159-160. In others, a motion made at the close of the plaintiff's case but not renewed at the close of the evidence is held not sufficient to support a post-verdict motion. *E.g., Mathieu v. Gopher News Co.*, 8th Cir.2001, 273 F.3d 769, 774-778, stating that Rule 50(b) cannot be ignored simply because its purposes have been fulfilled; *Frederick v. District of Columbia*, D.C.Cir.2001, 254 F.3d 156, ruling that a motion at the close of the plaintiff's case cannot stand duty as a close-of-the-evidence motion merely because the district court took the motion under advisement.

The close-of-the-evidence motion requirement retained by Rule 50(b) has been relaxed in a number of ways. Some of the decisions rely on general procedural theories and others look directly to Rule 50(b).

Forfeiture and plain error principles have been applied to the close-of-the evidence motion requirement. Issues not raised in a close-of-the-evidence motion have been considered on a post-verdict motion when the opposing party did not object to the post-verdict motion on the ground that the issues had not been raised by a close-of-the-evidence motion. *See Thomas v. Texas Dept. of Criminal Justice*, C.A.5th, 2002, 297 F.3d 361, 367; *Williams v. Runyon*, C.A.3d, 1997, 130 F.3d 568, 571-572 (listing decisions from the 5th, D.C., 2d, 7th, and 6th Circuits). And some courts say that "plain error" principles permit review to determine whether there is "any" evidence to support a verdict, despite the failure to make a close-of-the-evidence motion. *See Dilley v. SuperValu, Inc.*, 10th Cir.2002, 296 F.3d 958, 962-963 ("'plain error constituting a miscarriage of justice'"; the usually stringent standard for judgment as a matter of law "is further heightened"); *McKenzie v. Lee*, 5th Cir.2001, 246 F.3d 494 (reverses judgment on jury verdict; assuming that the defendant's vague acts did not satisfy the close-of-the-evidence-motion requirement, plain error appears because there was no evidence to support the verdict); *Kelly v. City of Oakland*, 9th Cir.1999, 198 F.3d 779, 784, 785 (the court's statement that one defendant "is without liability in this case" may indicate a direction that judgment be entered without a new trial); *Campbell v., Keystone Aerial Surveys, Inc.*, 5th Cir.1998, 138 F.3d 996, 1006; *O'Connor v. Huard*, 1st Cir.1997, 117 F.3d 12, 17; *Patel v. Penman*, 9th Cir.1996, 103 F.3d 868, 878-879 (finding no evidence and remanding for further proceedings — apparently a new trial). (These cases generally do not say whether the remedy for clear error could be entry of judgment notwithstanding the verdict or can only be a new trial. A new trial would not be inconsistent with the Slocum decision.)

Other cases directly relax the close-of-the-evidence motion requirement. Many of them are summarized in the Committee on Federal Procedure submission. In some ways the least adventuresome are those that emphasize action by the trial court that seemed to induce reliance by

expressly reserving for later decision a motion for judgment as a matter of law made at the close of the plaintiff's case. *Tamez v. City of San Marcos*, C.A.5th, 1997, 118 F.3d 1085, 1089-1091, presented a variation. The court denied the motion at the close of the plaintiff's case but "agree[d] to revisit the issue after the jury verdict." At the close of the evidence, the defendant requested that the court consider judgment as a matter of law after the verdict and the court agreed. The extensive discussion with the court at that point was tantamount to a renewed motion.

A somewhat similar principle is involved in cases that treat a Rule 51 request for jury instructions as satisfying the functions of a close-of-the-evidence motion. *See Bartley v. Euclid, Inc.*, 5th Cir.1998, 158 F.3d 261, 275 (objection to any instruction on an issue not supported by evidence); *Bay Colony, Ltd. v. Trendmaker, Inc.*, 5th Cir.1997, 121 F.3d 998 (objection to instruction on same grounds as advanced in motion for judgment at close of the plaintiff's case); *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 5th Cir.1996, 81 F.3d 606, 610-611 & n. 14. When the instruction request explicitly presents a "no sufficient evidence" argument, it seems easy enough to treat it as equivalent to a motion for judgment as a matter of law on that issue.

An example of a somewhat more expansive principle is provided by Judge Posner's opinion in *Szmaj v. American Tel. & Tel. Co.*, 7th Cir.2002, 291 F.3d 955, 957-958. The court took under advisement a motion made at the close of the plaintiff's case. The defendant did not renew the motion at the close of the evidence. The court affirmed judgment as a matter of law for the defendant. It observed that if the motion at the close of the plaintiff's case is denied, the plaintiff may assume that the denial "is the end of the matter." But if the motion is taken under advisement, the plaintiff knows that the defendant's demand for judgment as a matter of law remains alive. "There is no mousetrapping of the plaintiff in such a case." Neither Rule 50(b) nor the Committee Note state that renewal of the motion is required, and it would be wasteful to require renewal.

This approach blends into a still more open approach that excuses de minimis departures. Justice White, writing for the Eighth Circuit, articulated the elements of this approach, assuming but not deciding that it would be adopted by the Circuit. *Pulla v. Amoco Oil Co.*, 8th Cir.1995, 72 F.3d 648, 654-657. This approach excuses failure to make a close-of-the-evidence motion:

> where (1) the party files a Rule 50 motion at the close of the plaintiff's case; (2) the district court defers ruling on the motion; (3) no evidence related to the claim is presented after the motion; and (4) very little time passes between the original assertion and the close of the defendant's case.

The Fifth Circuit has taken an openly flexible approach in a number of opinions that may represent the furthest general reach of the pragmatic view. In *Polanco v. City of Austin*, 5th Cir.1996, 78 F.3d 968, 973-975, the court confessed that it has strayed from the strict requirement of Rule 50(b) only where "the departure from the rule was 'de minimis,' and the purposes of the rule were deemed accomplished." The purpose is to enable the trial court to reexamine the sufficiency of the evidence and to alert the opposing party to the insufficiency of the evidence. "This generally

requires (1) that the defendant made a motion for judgment as a matter of law at the close of the plaintiff's case and that the district court either refused to rule or took the motion under advisement, and (2) an evaluation of whether the motion sufficiently alerted the court and the opposing party to the sufficiency issue." In *Serna v. City of San Antonio*, 5th Cir.2001, 244 F.3d 479, 481-482, the court took this approach to the point of ordering judgment as a matter of law on the basis of a motion made after the jury had retired and begun deliberating. It noted that the district court chose to rule on the merits of the motion — if the district court had rejected the motion as untimely "we would be faced with a very different situation."

IV. How Much Flexibility?

A. Require a Rule 50(a) Trial Motion For Judgment As a Matter of Law

Collectively, the voice of experience speaks through these and other decisions. The requirement that an earlier motion for judgment as a matter of law be reinforced by a new motion at the close of all the evidence is repeatedly ignored by lawyers who should know better. Sixty-five years have not proved sufficient to condition the requirement in all lawyers' reflexes. One reason the requirement is ignored is that it seems to serve no purpose when the very same point has been made by an earlier motion. And the semblance seems to be the truth. An explicit motion that challenges the sufficiency of the evidence, made at a time that satisfies the Rule 50(a) requirement that the opposing party have been fully heard on the issue, is all the notice that should be required. The opposing party cannot fairly rely on the moving party to provide the missing evidence. If the party opposing the motion has more evidence to be introduced, a motion made during trial gives sufficient opportunity to introduce the evidence or to request procedural accommodation for later presentation. Satisfying this functional concern should satisfy the Seventh Amendment as well; the formal ritual of a separate motion at the close of all the evidence adds too little to count.

The rule can be changed easily in a format that carries forward the fiction that the "legal question" of the sufficiency of the evidence is reserved, no matter what the trial court says about the motion. This approach accepts any motion made, as permitted by Rule 50(a)(2), "at any time before submission of the case to the jury." Because the Rule 50(b) motion continues to be a renewal of the Rule 50(a) motion, it may be supported only by arguments made in support of the Rule 50(a) motion.

> **(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request

for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment * * *.

Committee Note

Rule 50(b) is amended to mollify the limit that permits renewal of a motion for judgment as a matter of law after submission to the jury only if the motion was made at the close of all the evidence. As amended, the rule permits renewal of any Rule 50(a) motion for judgment as a matter of law. Because the Rule 50(b) motion is only a renewal of the earlier motion, it can be supported only by arguments properly made in support of the earlier motion. The earlier motion thus suffices to inform the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide any additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by disposing of some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Since 1938 Rule 50(b) has responded to the ruling in *Baltimore & Carolina Line v. Redman*, 1935, 297 U.S. 654, 55 S.Ct. 890, by adopting the convenient fiction that no matter what action the court takes on a motion made for judgment as a matter of law before submission to the jury, the sufficiency of the evidence is automatically reserved for later decision as a matter of law. Expansion of the times for motions that are automatically reserved does not intrude further on Seventh Amendment protections.

This change responds to many decisions that have begun to drift away from the requirement that there be a motion for judgment as a matter of law at the close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The most common occasion for omitting a motion at the close of all the evidence is that a motion is made at the close of the plaintiff's case, advancing all the arguments that the defendant wants to renew after a verdict for the plaintiff or a new trial. In many of the cases the trial court either takes the motion under advisement or gives some more positive indication that the question will be decided after submission to the jury. The niceties of the close-of-the-evidence requirement are overlooked by both court and parties. The present rule continues to trap litigants who, properly understanding that there is no functional value served by repeating an

> earlier motion at the close of the evidence, overlook the formal requirement. The courts are slowly working away from the formal requirement, but amendment carries the process further and faster.
>
> Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.
>
> Evidence introduced at trial after the pre-verdict motion may bear on the post-verdict motion. Evidence favorable to the party opposing the motion must be considered. The court also may consider evidence unfavorable to the party opposing the motion if it is evidence that the jury must believe unless there is reason to believe the opposing party had no fair opportunity to meet that evidence.

B. Require Sufficiency Issue To Be Raised

The conservative amendment just proposed is not the only approach that might be taken. The central need is to have a pre-verdict foundation for a post-submission motion to ensure that the opposing party have clear notice of an asserted deficiency in the evidence. That need can be served by means other than a motion for judgment as a matter of law. As noted above, the purpose is clearly served by a request for jury instructions that challenges the sufficiency of the evidence to support any instruction on an issue, at least if the request is made during trial. A motion for summary judgment that accurately anticipates the trial record serves the same function. Explicit discussions of the parties' contentions during a pretrial conference also may do the job. There is some attraction to a rule that would allow a post-submission motion to be based on any argument that was clearly made on the record. But implementation of such a rule would require difficult case-specific inquiries that probably are not worth the effort. An explicit Rule 50(a) motion requirement provides a clear guide. And it does not seem too much to ask that trial lawyers remember the need to make some explicit motion during trial.

Another possibility suggested and rejected by the Committee on Federal Procedure would rely on a case-specific determination whether the opposing party was prejudiced by the failure to make a pre-submission motion. Rejection seems wise. The inquiry inevitably would turn into arguments whether there was other evidence to be had, whether it would have been obtained and introduced, and whether it would have raised the case above the sufficient-evidence threshold. Again, it does not seem too much to ask that lawyers avoid these problems by making a Rule 50(a) motion during trial.

V. Other Rule 50(b) Issues

At least two other Rule 50(b) issues might be considered. Should the court be able to grant a motion made during trial after submission to the jury even if the motion is not renewed — and should appellate review be available if the trial court does not act in the absence of a renewed motion? Should there be a time limit for making a renewed motion after a mistrial? These issues are described here, with a draft rule that addresses them. But no recommendation is made. There are persuasive arguments that a motion made during trial need not be repeated to preserve trial-court power to act on the trial motion after trial, and that appellate review should be available. But there is not as much apparent distress over this requirement as arises from the requirement that a trial motion be repeated at the close of the evidence. Perhaps there is little need to take on this question. A time limit to renew after a mistrial may add a small bit of order, but does not seem important.

A. Renewed Motion Requirement

Rule 50(b) should continue to permit renewal after trial of a motion made during trial. But the express provision that the action is submitted to the jury subject to later deciding the motion suggests that the court should be able to grant the motion even without renewal. The court may have submitted the action to the jury only to avoid the need for a new trial if a judgment as a matter of law is reversed on appeal, and be prepared to act promptly after the jury has decided or failed to agree. A formal renewal of the motion can advance only grounds that were urged in support of the motion made during trial. Although it seems wise to require notice to the parties that the court plans to make the automatically reserved ruling, little is gained by requiring formal renewal of the motion.

Rule 50(b) does not say in so many words that the pre-submission motion must be renewed. It says only that the movant may renew its request by filing a motion no later than 10 days after entry of judgment. The somewhat muddled opinion in *Johnson v. New York, N.H. & H.R.R.*, 1952, 344 U.S. 48, 73 S.Ct. 125, however, seems to prohibit entry of judgment as a matter of law unless the motion is renewed. This decision has been severely criticized. See, e.g., 9A Wright & Miller, Federal Practice & Procedure: Civil 2d, § 2537, pp. 355-356. [The authors, having condemned the rule, nonetheless find wrong decisions recognizing the trial court's authority to act on the reserved motion without a renewed motion.]

The alternative Rule 50(b) draft set out below expressly recognizes the authority to act on a trial motion for judgment as a matter of law without renewal after trial. The trial court can act on the trial motion, and even if the trial court does not act an appellate court can review the failure to grant the Rule 50(a) motion.

B. Time For Motion After Mistrial

Judge Stotler, while chair of the Standing Committee, urged that Rule 50(b) should be amended to impose a time limit for renewing a trial motion after a mistrial. The rule now allows a motion to

be renewed by filing a motion no later than 10 days after entry of judgment. Earlier versions set the limit at 10 days after the jury is discharged. A series of amendments, culminating in 1995, established uniform time limits for post-trial motions under Rules 50, 52, and 59. It is easy enough to restore a special pre-judgment time limit for a Rule 50(b) motion after a mistrial.

It is not clear that a special time limit is needed. If there is to be a new trial, the court can readily set a case-specific time for pretrial motions. Expiration of the time for making a Rule 50(b) motion, moreover, might lead a party to recast the motion as one for summary judgment based on the trial record. The alternative Rule 50(b) draft, however, illustrates a 10-day limit for moving after a mistrial.

C. Other Possible Rule 50 Questions

Rule 50 may deserve more thorough reconsideration. It goes to great lengths to maximize the prospect that discretionary second-chance arguments will be made to the trial court before the first appeal. Two related arguments may be advanced for relaxation. The first is that a discretionary second chance is not likely to be given — and indeed is less and less likely as courts become less inclined to grant new trials on weight-of-the-evidence grounds, and as the Supreme Court has become willing to allow final disposition on appeal. The second is that the procedure is more intricate than warranted by the slight prospect that one party or the other will persuade the trial court to grant a second chance. The intricacy question becomes more poignant when it is recognized that Rule 50 does not address all the questions that might arise. For example, what happens if both parties move at the close of all the evidence and judgment as a matter of law is entered for one. Is the loser required to renew the unsuccessful motion under Rule 50(b) to be entitled to judgment as a matter of law on appeal if indeed it is the one who should prevail? Why not allow the verdict winner who has lost by judgment as a matter of law to invoke Rule 50(c)(2) by asking for a conditional second chance — I want to appeal to get judgment reinstated on my verdict, but I want the trial judge to tell the court of appeals that if the judgment as a matter of law is affirmed I should have a second chance to make out a sufficient case?

The response to these conceptual questions may be simple. They do not arise with any frequency — at least the cases do not show frequent struggles with them. For the most part we are living well enough with the oddities of Rule 50 procedure. Until real problems arise — as with the close-of-the-evidence requirement — we should let well enough be.

Rule 50(b): Alternative Draft

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

(1) ***Reserved Decision.*** If, for any reason, the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

(2) ***Time To Move or Act.*** The time to move or act on the legal questions reserved by a Rule 50(a) motion is as follows:

(A) ***Renewed Motion.*** The movant may renew the Rule 50(a) motion by filing a motion no later than 10 days after entry of judgment, or if a complete verdict was not returned by filing a motion no later than 10 days after the jury was discharged. The movant also may move for a new trial under Rule 59 as joint or alternative relief. Failure to renew the Rule 50(a) motion does not waive review of the court's failure to grant the motion.

(B) ***Action by Court.*** The court, after giving notice to the parties no later than 10 days after the jury was discharged, may act on the Rule 50(a) motion without a renewed motion.

(3) ***Relief.*** In ruling on a reserved Rule 50(a) motion the court may:

(A) enter judgment on the verdict;

(B) order a new trial; or

(C) direct entry of judgment as a matter of law.

Committee Note

[The material above: a trial motion no longer need be repeated at the close of all the evidence.]

In addition, the requirement that a Rule 50(a) motion properly made during trial be renewed after trial is deleted. A motion made during trial supports a post-trial ruling by the trial court under the longstanding provision that the case is submitted to the jury subject to a later decision. So too, there is no need to repeat the motion to support appellate review: the court of appeals may review any issue raised by the trial motion. Both trial and appellate courts, however, should consider the motion in light of all the evidence in the record. The fact that the motion should have been granted on the record as it stood at the time of the motion does not justify judgment as a matter of law if consideration of the full record shows sufficient evidence to defeat the motion.

Finally, an explicit time limit is added for making a post-trial motion when the trial ends without a complete jury verdict disposing of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

C. Rules for Later Publication (1): Style Rules 38-63, Minus 45

A possibility discussed at the January Standing Committee meeting has come to fruit. The project to style all of the Civil Rules is progressing more smoothly than could have been expected at the beginning. This splendid progress is due to the herculean efforts of the many people involved — the Style Subcommittee and its consultants; the Advisory Committee's Style Subcommittees, reporters and consultants; Administrative Office staff; and the Standing Committee itself. It now seems possible to recommend that the complete set of styled Civil Rules be published in a single package in February 2005 if the Standing Committee approves the submission to be made at its January 2005 meeting. Publication in a single package will provide many advantages. The public comment period can be longer than the usual six months without impeding progress toward ultimate adoption. The longer comment period will enable the many Civil Rules constituencies to study the package once, in concentrated fashion and with the necessary opportunity to organize group review projects. It also will facilitate comprehensive review of the proposals that will be recommended for publication on a separate "Style-Substance" track to be described in part I C (2) below.

The package of Style Rules 38 to 63 does not include Rule 45, which was approved for deferred publication by the Standing Committee in January 2004 as part of the package that included the discovery rules. As usual, hundreds of questions were addressed in the first drafting stages. These questions were threshed out by the consultants and reporter, then by the Style Subcommittee, then by the Advisory Committee Style Subcommittees A and B, and finally at an Advisory Committee meeting attended by all members of the Style Subcommittee. Although all aspects of these rules are open for discussion, the initial Advisory Committee presentation will focus only on a few of the changes that have seemed to bear comment in the Committee Notes.

VI. TRIALS **Rule 38. Jury Trial of Right**	**TITLE VI. TRIALS** **Rule 38. Right to Jury Trial; Demand**
(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.	**(a) Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as provided by a federal statute — is preserved to the parties inviolate.
(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) 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, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.	**(b) Demand.** On any issue triable of right by a jury, a party may demand a jury trial by: **(1)** serving the other parties with a written demand — which may be made in a pleading — no later than 10 days after the last pleading directed to the issue is served; and **(2)** filing the demand as required by Rule 5(d).
(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the 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 of fact in the action.	**(c) Specifying Issues.** In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is deemed to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within 10 days of being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.
(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.	**(d) Waiver; Withdrawal.** A party waives a jury trial unless its demand is properly served and filed. A demand that complies with this rule may be withdrawn only if the parties consent.
(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).	**(e) Admiralty and Maritime Claims.** These rules do not create a right to a jury trial on issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Committee Note

The language of Rule 38 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 39. Trial by Jury or by the Court	Rule 39. Trial by Jury or by the Court
(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or of all those issues does not exist under the Constitution or statutes of the United States.	**(a) After a Demand.** When trial by jury has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless: **(1)** the parties or their attorneys file a written stipulation to a nonjury trial or so stipulate on the record; or **(2)** the court, on motion or on its own, finds that on some or all of those issues there is no right to a jury trial under the Constitution or federal statutes.
(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.	**(b) When No Demand Is Made.** Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.
(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.	**(c) Advisory Jury; Jury Trial by Consent.** In an action not triable of right by a jury, the court, on motion or on its own: **(1)** may try any issue with an advisory jury; or **(2)** may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

Committee Note

The language of Rule 39 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 40. Assignment of Cases for Trial	**Rule 40. Scheduling Cases for Trial**
The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.	Each court must provide by rule for scheduling trials without request — or on a party's request with notice to the other parties. The court must give priority to actions entitled to priority by federal statute.

Committee Note

The language of Rule 40 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 41. Dismissal of Actions	Rule 41. Dismissal of Actions
(a) Voluntary Dismissal: Effect Thereof. **(1) By Plaintiff; By Stipulation.** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) 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, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.	**(a) Voluntary Dismissal.** **(1)** ***By the Plaintiff.*** **(A)** *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing: **(i)** a notice of dismissal before the adverse party serves either an answer or a motion for summary judgment; or **(ii)** a stipulation of dismissal signed by all parties who have appeared. **(B)** *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any action in federal or state court based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.
(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.	**(2)** ***By Court Order; Effect.*** Except as provided in (1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.	**(b) Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order specifies otherwise, a dismissal under this subdivision (b) and any dismissal not provided for in this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.
(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.	**(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.** This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under (a)(1)(A)(i) must be made before a responsive pleading is served or, if there is none, before evidence is introduced at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.	**(d) Costs of a Previously Dismissed Action.** If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: **(1)** may order the plaintiff to pay all or part of the costs of that previous action; and **(2)** may stay the proceedings until the plaintiff has complied.

Committee Note

The language of Rule 41 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

When Rule 23 was amended in 1966, Rules 23.1 and 23.2 were separated from Rule 23. Rule 41(a)(1) was not then amended to reflect the Rule 23 changes. In 1968 Rule 41(a)(1) was amended to correct the cross-reference to what had become Rule 23(e), but Rules 23.1 and 23.2 were inadvertently overlooked. Rules 23.1 and 23.2 are now added to the list of exceptions in Rule 41(a)(1)(A). This change does not affect established meaning. Rule 23.2 explicitly incorporates Rule 23(e), and thus was already absorbed directly into the exceptions in Rule 41(a)(1). Rule 23.1 requires court approval of a compromise or dismissal in language parallel to Rule 23(e) and thus supersedes the apparent right to dismiss by notice or dismissal.

Rule 42. Consolidation; Separate Trials	Rule 42. Consolidation; Separate Trials
(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.	**(a)** If actions before the court involve a common question of law or fact, the court may: **(1)** join for hearing or trial any or all matters at issue in the actions; **(2)** consolidate the actions; and **(3)** make any other orders to avoid unnecessary cost or delay.
(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.	**(b) Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more claims, crossclaims, counterclaims, third-party claims, or separate issues. When ordering a separate trial, the court must preserve any federal right to a jury trial

Committee Note

The language of Rule 42 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 43. Taking of Testimony	Rule 43. Taking Testimony
(a) **Form.** In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.	(a) **In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal law, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. In compelling circumstances and with appropriate safeguards, the court may allow testimony in open court by contemporaneous transmission from a different location.
(b) **[Abrogated.]**	
(c) **[Abrogated.]**	
(d) **Affirmation in Lieu of Oath.** Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.	(b) **Affirmation Instead of Oath.** When these rules require an oath, a solemn affirmation suffices.
(e) **Evidence on Motions.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.	(c) **Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may order that it be heard wholly or partly on oral testimony or on depositions.
(f) **Interpreters.** The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.	(d) **Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

Committee Note

The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 44. Proof of Official Record	Rule 44. Proving an Official Record
(a) Authentication. **(1) Domestic.** An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.	**(a) Means of Proving.** **(1)** ***Domestic Record.*** The following evidences an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States: **(A)** an official publication of the record; or **(B)** a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody. The certificate must be made under seal: **(i)** by a judge of a court of record of the district or political subdivision where the record is kept; or **(ii)** by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) **Foreign.** A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.	(2) ***Foreign Record.*** **(A)** *In General.* The following evidences a foreign official record — or an entry in it — that is otherwise admissible: **(i)** an official publication of the record; **(ii)** a copy attested by an authorized person and accompanied by a final certification of genuineness; **(iii)** a record and attestation certified as provided in a treaty or convention to which the United States and a country where the record is located are parties; or **(iv)** other means ordered by the court under (C).
A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.	**(B)** *Final Certification of Genuineness.* A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. **(C)** *Other Means of Proof.* If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either: **(i)** admit an attested copy without final certification; or **(ii)** allow the record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.	**(b) Lack of a Record.** A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under (a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).
(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.	**(c) Other Proof.** A party may prove an official record — or an entry or lack of an entry in it — by any other method authorized by law.

Committee Note

The language of Rule 44 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 44.1. Determination of Foreign Law	Rule 44.1. Determining Foreign Law
A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.	A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Committee Note

The language of Rule 44.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 46. Exceptions Unnecessary	Rule 46. Objecting to a Ruling or Order
Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.	A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

Committee Note

The language of Rule 46 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 47. Selection of Jurors	Rule 47. Selecting Jurors
(a) **Examination of Jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.	(a) **Examining Jurors.** The court must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.
(b) **Peremptory Challenges.** The court shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870.	(b) **Peremptory Challenges.** The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.
(c) **Excuse.** The court may for good cause excuse a juror from service during trial or deliberation.	(c) **Excusing a Juror.** During trial or deliberation, the court may excuse a juror for good cause.

Committee Note

The language of Rule 47 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 48. Number of Jurors— Participation in Verdict	**Rule 48. Number of Jurors; Participating in the Verdict**
The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.	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). Unless the parties stipulate otherwise, the verdict must be unanimous and be returned by a jury of at least 6 members.

Committee Note

The language of Rule 48 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 49. Special Verdicts and Interrogatories	Rule 49. Special Verdict; General Verdict and Interrogatories
(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.	**(a) Special Verdict.** **(1)** ***In General.*** The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact The court may do so by: **(A)** submitting written questions susceptible of a categorical or other brief answer; **(B)** submitting written forms of the special findings that might properly be made under the pleadings and evidence; or **(C)** using any other method that the court considers appropriate.
The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.	**(2)** ***Instructions.*** The court must instruct the jury to enable it to make its findings on each submitted issue . **(3)** ***Issues Not Submitted.*** A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. The court may make a finding on any issue omitted without a demand; if the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.	**(b) General Verdict with Answers to Interrogatories.** **(1)** ***In General.*** The court may submit to the jury forms for a general verdict, together with written interrogatories on one or more issues of fact that must be decided. The court must instruct the jury to enable it to render a general verdict and answer the interrogatories in writing, and must direct the jury to do both. **(2)** ***Verdict and Answers Consistent.*** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers. **(3)** ***Answers Inconsistent With the Verdict.*** When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may: **(A)** approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict; **(B)** direct the jury to further consider its answers and verdict; or **(C)** order a new trial. **(4)** ***Answers Inconsistent With Each Other and the Verdict.*** When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

Committee Note

The language of Rule 49 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings	**Rule 50. Judgment as a Matter of Law in a Jury Trial; Alternative Motion for a New Trial; Conditional Ruling**
(a) Judgment as a Matter of Law. **(1)** If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. **(2)** Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.	**(a) Judgment as a Matter of Law.** **(1)** ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: **(A)** determine the issue against the party; and **(B)** grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. **(2)** ***Motion.*** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: **(1)** if a verdict was returned: **(A)** allow the judgment to stand, **(B)** order a new trial, or **(C)** direct entry of judgment as a matter of law; or **(2)** if no verdict was returned: **(A)** order a new trial, or **(B)** direct entry of judgment as a matter of law.	**(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is deemed to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: **(1)** allow judgment on the verdict, if the jury returned a verdict; **(2)** order a new trial; or **(3)** direct the entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion. **(1)** If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. **(2)** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.	**(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.** **(1)** ***In General.*** If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial. **(2)** ***Effect of a Conditional Ruling.*** Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; and if the judgment is reversed, the case must proceed in accordance with the appellate court's order. **(3)** ***Timing of the Motion for a New Trial.*** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.	**(d) Denying the Motion for Judgment as a Matter of Law.** If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Committee Note

The language of Rule 50 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 50(b) stated that the court reserves ruling on a motion for judgment as a matter of law made at the close of all the evidence "[i]f, for any reason, the court does not grant" the motion. The words "for any reason" reflected the proposition that the reservation is automatic and inescapable. The ruling is reserved even if the court explicitly denies the motion. The same result follows under the amended rule. If the motion is not granted, the ruling is reserved.

Amended Rule 50(d) identifies the appellate court's authority to direct the entry of judgment. This authority was not described in former Rule 50(d), but was recognized in *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), and in *Neely v. Martin K. Eby Construction Company*, 386 U.S. 317 (1967). When Rule 50(d) was drafted in 1963, the Committee Note stated that "[s]ubdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied * * *." Express recognition of the authority to direct entry of judgment does not otherwise supersede this caution.

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error	**Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error**
(a) Requests. (1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests. **(2)** After the close of the evidence, a party may: **(A)** file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and **(B)** with the court's permission file untimely requests for instructions on any issue.	**(a) Requests.** **(1)** ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court directs, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give. **(2)** ***After the Close of the Evidence.*** After the close of the evidence, a party may: **(A)** file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and **(B)** with the court's permission, file untimely requests for instructions on any issue.
(b) Instructions. The court: **(1)** must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments; **(2)** must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and **(3)** may instruct the jury at any time after trial begins and before the jury is discharged.	**(b) Instructions.** The court: **(1)** must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments; **(2)** must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and **(3)** may instruct the jury at any time before the jury is discharged.

(c) Objections. **(1)** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection. **(2)** An objection is timely if: **(A)** a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or **(B)** a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.	**(c) Objections.** **(1)** ***How to Make.*** A party who objects to a proposed instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection. **(2)** ***When to Make.*** An objection is timely if: **(A)** a party objects at the opportunity provided under (b)(2); or **(B)** a party was not informed of an instruction or action on a request before the time to object under (b)(2), and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.
(d) Assigning Error; Plain Error. **(1)** A party may assign as error: **(A)** an error in an instruction actually given if that party made a proper objection under Rule 51(c), or **(B)** a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c). **(2)** A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).	**(d) Assigning Error; Plain Error.** **(1)** ***Assigning Error.*** A party may assign as error: **(A)** an error in an instruction actually given, if that party made a proper objection; or **(B)** a failure to give an instruction, if that party made a proper request under (a) and — unless the court rejected the request in a definitive ruling on the record — also made a proper objection under (c). **(2)** ***Plain Error.*** A court may consider a plain error in the instructions that has not been preserved as required by (d)(1) if the error affects substantial rights.

Committee Note

The language of Rule 51 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 52. Findings by the Court; Judgment on Partial Findings	Rule 52. Findings and Conclusions in Nonjury Proceedings; Judgment on Partial Findings
(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.	**(a) Findings and Conclusions by the Court.** **(1)** ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence, or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58. **(2)** ***For Interlocutory Injunctions.*** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action. **(3)** ***For Motions.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or Rule 56 or, unless these rules provide otherwise, on any other motion. **(4)** ***Effect of a Master's Findings.*** A master's findings, to the extent adopted by the court, must be considered the court's findings. **(5)** ***Questioning the Evidentiary Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings. **(6)** ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.	**(b) Amended or Additional Findings.** On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.
(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.	**(c) Judgment on Partial Findings.** If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by (a).

Committee Note

The language of Rule 52 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 52(a) said that findings are unnecessary on decisions of motions "except as provided in subdivision (c) of this rule." Amended Rule 52(a)(3) says that findings are unnecessary "unless these rules provide otherwise." This change reflects provisions in other rules that require Rule 52 findings on deciding motions. Rules 23(e), 23(h), and 54(d)(2)(C) are examples.

Amended Rule 52(a)(5) includes provisions that appeared in former Rule 52(a) and 52(b). Rule 52(a) provided that requests for findings are not necessary for purposes of review. It applied both in an action tried on the facts without a jury and also in granting or refusing an interlocutory injunction. Rule 52(b), applicable to findings "made in actions tried without a jury," provided that the sufficiency of the evidence might be "later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings." Former Rule 52(b) did not explicitly apply to decisions granting or refusing an interlocutory injunction. Amended Rule 52(a)(5) makes explicit the application of this part of former Rule 52(b) to interlocutory injunction decisions.

Former Rule 52(c) provided for judgment on partial findings, and referred to it as "judgment as a matter of law." Amended Rule 52(c) refers only to "judgment," to avoid any confusion with a Rule 50 judgment as a matter of law in a jury case. The standards that govern judgment as a matter of law in a jury case have no bearing on decision under Rule 52(c).

Rule 53. Masters	Rule 53. Masters
(a) Appointment. **(1)** Unless a statute provides otherwise, a court may appoint a master only to: **(A)** perform duties consented to by the parties; **(B)** hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by **(i)** some exceptional condition, or **(ii)** the need to perform an accounting or resolve a difficult computation of damages; or **(C)** address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.	**(a) Appointment.** **(1)** ***Scope***. Unless a statute provides otherwise, a court may appoint a master only to: **(A)** perform duties agreed to by the parties; **(B)** hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by: **(i)** some exceptional condition; or **(ii)** the need to perform an accounting or resolve a difficult computation of damages; or **(C)** address pretrial and posttrial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.
(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification. **(3)** In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.	**(2)** ***Disqualification***. A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, agree to the appointment after the master discloses any potential grounds for disqualification. **(3)** ***Possible Expense or Delay***. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing Master. **(1) Notice.** The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment. **(2) Contents.** The order appointing a master must direct the master to proceed with all reasonable diligence and must state: **(A)** the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c); **(B)** the circumstances — if any — in which the master may communicate ex parte with the court or a party; **(C)** the nature of the materials to be preserved and filed as the record of the master's activities; **(D)** the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and **(E)** the basis, terms, and procedure for fixing the master's compensation under Rule 53(h). **(3) Entry of Order.** The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification. **(4) Amendment.** The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.	**(b) Order Appointing a Master.** **(1)** ***Notice.*** Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment. **(2)** ***Contents.*** The order appointing a master must direct the master to proceed with all reasonable diligence and must state: **(A)** the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under (c); **(B)** the circumstances, if any, in which the master may communicate ex parte with the court or a party; **(C)** the nature of the materials to be preserved and filed as the record of the master's activities; **(D)** the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and **(E)** the basis, terms, and procedure for fixing the master's compensation under (h). **(3)** ***Entry.*** The court may enter the order only after: **(A)** the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and **(B)** if a ground is disclosed, the parties, with the court's approval, agree to waive the disqualification. **(4)** ***Amendment.*** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) **Master's Authority.** Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.	(c) **Master's General Authority.** Unless the appointing order directs otherwise, a master may regulate all proceedings and take all appropriate measures to perform the assigned duties fairly and efficiently. The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.
(d) **Evidentiary Hearings.** Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.	(d) **Evidentiary Hearings.** Unless the appointing order directs otherwise, a master who conducts an evidentiary hearing may exercise the appointing court's power to compel, take, and record evidence.
(e) **Master's Orders.** A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.	(e) **Master's Orders.** A master who makes an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.
(f) **Master's Reports.** A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.	(f) **Master's Reports.** A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party unless the court directs otherwise.

(g) Action on Master's Order, Report, or Recommendations. **(1) Action.** In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions. **(2) Time To Object or Move.** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time. **(3) Fact Findings.** The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that: **(A)** the master's findings will be reviewed for clear error, or **(B)** the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final. **(4) Legal Conclusions.** The court must decide de novo all objections to conclusions of law made or recommended by a master. **(5) Procedural Matters.** Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.	**(g) Action on the Master's Order, Report, or Recommendations.** **(1)** ***Action.*** In acting on a master's order, report, or recommendations, the court must give the parties an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions. **(2)** ***Time to Object or Move to Adopt or Modify.*** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days after a copy is served, unless the court sets a different time. **(3)** ***Reviewing Factual Findings.*** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, agree that: **(A)** the findings will be reviewed for clear error; or **(B)** the findings of a master appointed under (a)(1)(A) or (C) will be final. **(4)** ***Reviewing Legal Conclusions.*** The court must decide de novo all objections to conclusions of law made or recommended by a master. **(5)** ***Reviewing Procedural Matters.*** Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(h) Compensation. **(1) Fixing Compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard. **(2) Payment.** The compensation fixed under Rule 53(h)(1) must be paid either: **(A)** by a party or parties; or **(B)** from a fund or subject matter of the action within the court's control. **(3) Allocation.** The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.	**(h) Compensation.** **(1)** ***Fixing Compensation.*** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after notice and an opportunity to be heard. **(2)** ***Payment.*** The compensation must be paid either: **(A)** by a party or parties; or **(B)** from a fund or subject matter of the action within the court's control. **(3)** ***Allocating Payment.*** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.
(i) Appointment of Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.	**(i) Appointing a Magistrate Judge.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

Committee Note

The language of Rule 53 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VII. JUDGMENT **Rule 54. Judgments; Costs**	**TITLE VII. JUDGMENT** **Rule 54. Judgment; Costs**
(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.	**(a) Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment must not include recitals of pleadings, a master's report, or a record of prior proceedings.
(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.	**(b) Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may enter a final judgment on one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the court enters judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) **Demand for Judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.	(c) **Demand for Judgment.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.
(d) **Costs; Attorneys' Fees.** (1) **Costs Other than Attorneys' Fees.** Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court. (2) **Attorneys' Fees.** (A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial. (B) Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.	(d) **Costs; Attorney's Fees.** (1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent permitted by law. The clerk may tax costs on one day's notice. On motion served within the next 5 days, the court may review the clerk's action. (2) ***Attorney's Fees.*** (A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. (B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must: (i) be filed no later than 14 days after the entry of judgment; (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award; (iii) state the amount sought or provide a fair estimate of it; and (iv) disclose, if the court directs, the terms of any agreement about fees for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a).	(C) **Proceedings.** Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(e) or Rule 78. The court may decide issues of liability for fees before receiving submissions relating to the evaluation of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).
(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of Rule 53(a)(1) and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.	(D) **Special Procedures by Local Rule; Reference to a Master.** By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.
(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.	(E) **Exceptions.** Paragraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or under 28 U.S.C. § 1927.

Committee Note

The language of Rule 54 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 54(b) required two steps to enter final judgment as to fewer than all claims among all parties. The court must make an express determination that there is no just reason for delay and also make an express direction for the entry of judgment. Amended Rule 54(b) eliminates the express direction for the entry of judgment. There is no need for an "express direction" when the court expressly determines that there is no just reason for delay and enters a final judgment.

The words "or class member" have been removed from Rule 54(d)(2)(C) because Rule 23(h)(2) now addresses objections by class members to attorney-fee motions. Rule 54(d)(2)(C) is amended to recognize that Rule 23(h) now controls those aspects of attorney fee motions in class actions to which it is addressed.

Rule 55. Default	**Rule 55. Default; Default Judgment**
(a) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.	**(a) Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.
(b) **Judgment.** Judgment by default may be entered as follows: (1) **By the Clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person. (2) **By the Court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.	**(b) Entering a Default Judgment.** **(1)** ***By the Clerk.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and is neither a minor nor an incompetent person. **(2)** ***By the Court.*** In all other cases, the party must apply for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to: **(A)** conduct an accounting; **(B)** determine the amount of damages; **(C)** establish the truth of any averment by evidence; or **(D)** investigate any other matter.

(c) **Setting Aside Default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).	(c) **Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).
(d) **Plaintiffs, Counterclaimants, Cross-Claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).	
(e) **Judgment Against the United States.** No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.	(d) **Judgment Against the United States.** A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

Committee Note

The language of Rule 55 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 55(a) directed the clerk to enter a default when a party failed to plead or otherwise defend "as provided by these rules." The implication from the reference to defending "as provided by these rules" seemed to be that the clerk should enter a default even if a party did something showing an intent to defend, but that act was not specifically described by the rules. Courts in fact have rejected that implication. Acts that show an intent to defend have frequently prevented a default even though not connected to any particular rule. "[A]s provided by these rules" is deleted to reflect Rule 55(a)'s actual meaning.

Amended Rule 55 omits former Rule 55(d), which included two provisions. The first recognized that Rule 55 applies to described claimants. The list was incomplete and unnecessary. Rule 55(a) applies Rule 55 to any party against whom a judgment for affirmative relief is requested. The second provision was a redundant reminder that Rule 54(c) limits the relief available by default judgment.

Rule 56. Summary Judgment	Rule 56. Summary Judgment
(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment 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 with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.	**(a) By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after 20 days from commencement of the action or after the adverse party serves a motion for summary judgment.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.	**(b) By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.
(c) Motion and Proceedings Thereon. 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. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.	**(c) Serving the Motion; Proceedings.** The motion must be served at least 10 days before the day set for the hearing. An adverse party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.	**(d) Case Not Fully Adjudicated on the Motion.** **(1)** ***Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then enter an order specifying what facts are not genuinely at issue, including the amount of damages or other relief. The facts so specified must be treated as established in the action **(2)** ***Establishing Liability***. An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.
(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.	**(e) Affidavits; Further Testimony.** **(1)** ***In General.*** Supporting and opposing affidavits must be made on personal knowledge, set forth facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits. **(2)** ***Adverse Party's Obligation to Respond.*** When a motion for summary judgment is properly made and supported, an adverse party may not rely merely on allegations or denials in its own pleading; rather, the adverse party's response must — by affidavits or as otherwise provided in this rule — set forth specific facts showing a genuine issue for trial. If the adverse party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.	**(f) When Affidavits Are Unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: **(1)** deny the motion; **(2)** order a continuance to permit affidavits to be obtained, depositions to be taken, or discovery to be undertaken; or **(3)** make any other appropriate order.
(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.	**(g) Affidavit Submitted in Bad Faith.** If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses it incurred as a result, including reasonable attorney's fees. An offending party or attorney may also be held in contempt.

Committee Note

The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them ore easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or cross-claim or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). [Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728.] "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgment — that there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

Rule 57. Declaratory Judgments	Rule 57. Declaratory Judgment
The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.	These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. A party may demand a jury trial under Rules 38 and 39. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action and may advance it on the calendar.

Committee Note

The language of Rule 57 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 58. Entry of Judgment	Rule 58. Entering Judgment
(a) Separate Document. **(1)** Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion: **(A)** for judgment under Rule 50(b); **(B)** to amend or make additional findings of fact under Rule 52(b); **(C)** for attorney fees under Rule 54; **(D)** for a new trial, or to alter or amend the judgment, under Rule 59; or **(E)** for relief under Rule 60.	**(a) Separate Document.** Every judgment and amended judgment must be set forth in a separate document, but a separate document is not required for an order disposing of a motion: **(1)** for judgment under Rule 50(b); **(2)** to amend or make additional findings of fact under Rule 52(b); **(3)** for attorney's fees under Rule 54; **(4)** for a new trial, or to alter or amend the judgment, under Rule 59; or **(5)** for relief under Rule 60.
(2) Subject to Rule 54(b): **(A)** unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: **(i)** the jury returns a general verdict, **(ii)** the court awards only costs or a sum certain, or **(iii)** the court denies all relief; **(B)** the court must promptly approve the form of the judgment, which the clerk must promptly enter, when: **(i)** the jury returns a special verdict or a general verdict accompanied by interrogatories, or **(ii)** the court grants other relief not described in Rule 58(a)(2).	**(b) Entering Judgment.** **(1)** ***Without the Court's Direction.*** Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: **(A)** the jury returns a general verdict; **(B)** the court awards only costs or a sum certain; or **(C)** the court denies all relief. **(2)** ***Court's Approval Required.*** Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when: **(A)** the jury returns a special verdict or a general verdict with answers to interrogatories; or **(B)** the court grants other relief not described in this subdivision (b).

(b) **Time of Entry.** Judgment is entered for purposes of these rules (1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and (2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs: (A) when it is set forth in a separate document, or (B) when 150 days have run from entry in the civil docket under Rule 79(a).	(c) **Time of Entry.** Judgment is entered for purposes of these rules as follows: (1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or (2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs: (A) it is set forth in a separate document; or (B) 150 days have run from the entry in the civil docket.
(c) **Cost or Fee Awards.** (1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2). (2) When 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.	(d) **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 a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and 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.
(d) **Request for Entry.** A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).	(e) **Request for Entry.** A party may request that judgment be set forth in a separate document as required by (a).

Committee Note

The language of Rule 58 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 59. New Trials; Amendment of Judgments	Rule 59. New Trial; Amending a Judgment
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.	**(a) In General** **(1)** ***New Trial.*** The court may, on motion, grant a new trial on all or some of the issues: **(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; and **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court. **(2)** ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct entry of a new judgment.
(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.	**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of the judgment.
(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.	**(c) Time to Serve Affidavits.** When a motion for new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after service to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may allow reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.	**(d) New Trial on the Court's Initiative or for Reasons Not in the Motion**. No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own or for a reason not stated in the motion, the court must specify the grounds in its order.
(e) Motion to Alter or Amend a Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.	**(e) Motion to Alter or Amend Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after entry of the judgment.

Committee Note

The language of Rule 59 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 60. Relief From Judgment or Order	Rule 60. Relief from a Judgment or Order
(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein 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 and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.	**(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission, whenever found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice 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.
(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.	**(b) Grounds for Relief From Judgment.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: **(1)** mistake, inadvertence, surprise, or excusable neglect; **(2)** newly discovered evidence that, with due diligence, could not have been discovered in time to move for a new trial under Rule 59(b); **(3)** fraud (whether intrinsic or extrinsic), misrepresentation, or misconduct by an adverse party; **(4)** the judgment is void; **(5)** the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or **(6)** any other reason that justifies relief.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.	**(c) Timing and Effect of the Motion.** **(1)** ***Timing.*** A motion under (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 or the date of the proceeding. **(2)** ***Effect on Finality.*** The motion does not affect the finality of a judgment or suspend its operation.
This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.	**(d) Independent Action.** This rule does not limit a court's power to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief under 28 U.S.C. § 1655 to a defendant who is not personally notified of the action; or to set aside a judgment for fraud on the court.
Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.	**(e) Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela,

Committee Note

The language of Rule 60 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 60(b) also said that the procedure for obtaining any relief from a judgment was by motion as prescribed in the Civil Rules or by an independent action. That provision is deleted as unnecessary. Relief continues to be available only as provided in the Civil Rules or by independent action.

Rule 61. Harmless Error	**Rule 61. Harmless Error**
No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.	Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or defect in a party's acts or omissions — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors or defects that do not affect any party's substantial right.

COMMITTEE NOTE

The language of Rule 61 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 62. Stay of Proceedings To Enforce a Judgment	Rule 62. Stay of Proceedings to Enforce a Judgment
(a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.	**(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.** Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken for its enforcement, until 10 days have passed after its entry. But unless the court orders otherwise, the following are not automatically stayed after being entered, even if an appeal is taken: **(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or **(2)** a judgment or order that directs an accounting in an action for patent infringement.
(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).	**(b) Stay Pending the Disposition of a Motion.** On appropriate conditions for the adverse party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions: **(1)** under Rule 50, for judgment as a matter of law; **(2)** under Rule 52(b), to amend the findings or for additional findings; **(3)** under Rule 59, for a new trial or to alter or amend a judgment; or **(4)** under Rule 60, for relief from a judgment or order.
(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.	**(c) Injunction Pending an Appeal.** After an appeal is taken from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the adverse party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either: **(1)** by that court sitting in open session; or **(2)** by the assent of all its judges, as evidenced by their signatures.
(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.	**(d) Stay on Appeal.** If an appeal is taken, the appellant may, by supersedeas bond, obtain a stay, subject to the exceptions in (a). The bond may be given upon or after filing the notice of appeal or upon obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.	**(e) Stay in Favor of the United States, Its Officers, or Its Agencies.** The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.
(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.	**(f) Stay in Favor of a Judgment Debtor Under State Law.** If a judgment is a lien on the judgment debtor's property under state law where the court sits, the court must, on motion, grant the same stay of execution that the judgment debtor would be entitled to receive under that state's law.
(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.	**(g) Appellate Court's Power Not Limited.** While an appeal is pending, this rule does not limit the power of the appellate court or one of its judges or justices to: **(1)** stay proceedings; **(2)** suspend, modify, restore, or grant an injunction; or **(3)** make an order to preserve the status quo or the effectiveness of the judgment to be entered
(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.	**(h) Multiple Claims or Parties.** A court may stay the enforcement of a final judgment directed under Rule 54(b) until it enters a later judgment or judgments, and may prescribe conditions necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

Committee Note

The language of Rule 62 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 63. Inability of a Judge To Proceed	Rule 63. Judge's Inability to Proceed
If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.	If the judge who commenced a hearing or trial is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Committee Note

The language of Rule 63 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

8D

C. Rules for Later Publication (2): "Style-Substance Track"

The Style Project has required intimate and repeated review of every word and punctuation mark of each rule. Such close reading reveals many opportunities for improvement. Improvement, however, lies outside the Project confines. The sole permissible object is to express present meaning as clearly as can be but without change. The Project will fail if these limits are not honored.

To the extent that time and Advisory Committee resources permit, it might be possible to publish significant rules changes for comment in tandem with the Style Rules. The attempt could easily divert attention from the Style Rules, however, and might generate concern that other substantive changes might lurk in the Style Rules. Many interesting and potentially valuable suggestions for improvement have been deferred to a "Reform Agenda" to be addressed at stages over the indefinite future.

Continuing debates over the Style Rules have nonetheless revealed a small number of reforms that seem beyond reasonable controversy. These are reforms that in some sense change the apparent meaning of the present rule and that cannot be readily defended on the ground that because they make such good sense they must reflect what everyone is doing. The Advisory Committee has concluded that it will be useful to publish these few recommendations for noncontroversial substantive revision in tandem with the Style Rules. Tentatively identified as the "Style-Substance Track," the hallmark of these proposals is that they must be obviously right. Any proposal that encounters significant doubt should be rejected from this track. The advantage of this approach is that it will enable simultaneous adoption of the Style Rules and a set of simple improvements, leaving the stage clear for ongoing development of more difficult rules changes.

The following proposals include all of the Style-Substance Track proposals contemplated for Rules 1 through 63. No more than brief discussion, if any, is offered to supplement the designation of the amendment and the accompanying Committee Note. Any proposal that requires greater discussion is likely to be unfit for the Style-Substance Track.

Rule 4(k)(1)(C)

This provision is unfortunate in several ways. It is redundant because 4(k)(1)(D) addresses service "authorized by a United States statute." It does not directly address interpleader service for two reasons: 4(k) begins by speaking of jurisdiction over a "defendant," while the interpleader service provisions provide for service on "all claimants"; and the interpleader service provisions actually appear in 28 U.S.C. § 2361.

Rule 4. Summons*

* * * * *

(k) Territorial Limits of Effective Service.

* Proposed revisions based on rules as amended by the Style Project.

(1) ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

* * * * *

~~(C) who is subject to federal interpleader jurisdiction under 28 U.S.C. § 1335; or~~

(~~D~~C) when authorized by a federal statute.

* * * * *

Committee Note

The former provision describing service on interpleader claimants is deleted as redundant in light of the general provision in (k)(1)(C) recognizing personal jurisdiction authorized by a federal statute.

Rule 8(a)(3)

The Style draft carries forward the present rule's reference to "relief in the alternative." The style consultants wanted to change to "alternative forms * * * of relief." The change "felt substantive." But the motive for putting it on the Style-Substance track would be to improve style, not to change meaning. The rule would read:

Rule 8. General Rules of Pleadings.

(a) Claims for Relief. A pleading that states a claim for relief — whether an original claim, a counterclaim, a crossclaim, or a third-party claim — must contain:

* * * * *

(3) a demand for the relief sought, which may include ~~relief in the~~ alternative forms or different types of relief.

* * * * *

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) In General. Each averment must be simple, concise, and direct. ~~No technical form is required.~~

* * * * *

Committee Note

Subdivision (a) — "alternative forms * * * of relief" is a style improvement of the present rule's "relief in the alternative." No changed meaning is intended.

Subdivision (d) — Former Rule 8(e)(1) stated that "No technical forms of pleadings or motions are required." That proposition is now embedded in practice and no longer needs express statement.

Rule 9(h)(2)

It would be easy enough to delete this seemingly redundant reference to Rule 15. But the reference may be useful to avoid arguments about sliding into and out of the Supplemental Rules and whether that utility outweighs the presumption against redundant references.

Rule 9. Pleading Special Matters

(h) Admiralty or Maritime Claim.

* * * * *

~~(2) Amending a Designation. Amending a pleading to add or withdraw a designation is governed by Rule 15.~~

(32) ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Committee Note

Rule 15 governs pleading amendments of its own force. The former redundant statement that Rule 15 governs an amendment that adds or withdraws a Rule 9(h) designation as an admiralty or maritime claim is deleted. The elimination of paragraph (2) means that "(3)" will be redesignated as "(2)" in Style Rule 9(h).

Rule 11(a)

It is easy to add e-mail addresses, at least if we know how to describe them properly (shades of defining computer-based discovery). We also could delete the phrase "if any" and avoid deciding whether it modifies only telephone number or also address: do we want to recognize in the rule that a party (or attorney) may not have a physical address?

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is not represented by an attorney. The paper must state the signer's address, electronic-mail address, and telephone number ~~if any~~.

[address, e-mail address if any, and telephone number if any]

Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

* * * * *

Committee Note

Providing an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail.

Rule 14(b)

Rule 14(b) now, and in the Style version, says only that a plaintiff may bring in a third party when a counterclaim is made. That is incomplete. Subject to the quirks of diversity jurisdiction, one plaintiff may crossclaim against another — most obviously when a counterclaim is made against them. Third-party practice should be available to a plaintiff just as it is to a defendant.

Rule 14. Third-Party Practice

* * * * *

(b) When a Plaintiff May Bring in a Third Party. When a ~~counterclaim~~ claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

* * * * *

Committee Note

A plaintiff should be on equal footing with the defendant in making third-party claims, whether the claim against the plaintiff is asserted as a counterclaim or as another form of claim. The limit imposed by the former reference to "counterclaim" is deleted.

Rule 16(c)(1)

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(c) Attendance and Matters for Consideration at Pretrial Conferences.

(1) ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by ~~telephone~~ other means to consider possible settlement.

* * * * *

Committee Note

When a party or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(g) Signing Disclosures, 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 — or by the party personally, if unrepresented — and must state the signer's address, telephone number, and electronic-mail address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

* * * * *

(B) with respect to a discovery request, response, or objection, it is:

* * * * *

(ii) consistent with these rules and warranted by existing law or a good-faith argument for

extending, modifying, or reversing existing law, or establishing new law; and

* * * * *

Committee Note

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

Rule 30(b)(3)(A) and 30(b)(6)

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements.

* * * * *

(3) ***Method of Recording.***

(A) *Method Stated in the Notice.* The party noticing the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The party noticing the deposition bears the recording costs. Any

party may arrange to transcribe a deposition ~~that was taken nonstenographically~~.

* * * * *

(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, or other entity, and describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf; and it may set forth the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The designees must testify about information known or reasonably available to the organization. This paragraph does not preclude depositions by any other procedure authorized in these rules.

* * * * *

Committee Note

The right to arrange a deposition transcription should be open to any party, regardless of the means of recording and regardless of who noticed the deposition.

"[O]ther entity" is added to the list of organizations that may be named as deponent. The purpose is to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization. Nothing is gained by wrangling over the place to fit into current rule language such entities as limited liability companies, limited liability partnerships, business trusts, more exotic common-law creations, or forms developed in other countries.

Rule 31(c)

Rule 31. Depositions by Written Questions

* * * * *

(c) Notice of <u>Completion or</u> Filing.

<u>**(1)** ***Notice of Completion.*** The party who noticed the deposition must notify all other parties when it is completed.</u>

<u>**(2) Notice of Filing.**</u> A party who files the deposition must promptly notify all other parties of the filing.

Committee Note

The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition.

Rule 36(b)

Rule 36. Requests for Admission

* * * * *

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. ~~Subject to Rule 16(d) and (e), t~~The court may permit withdrawal or amendment of an admission that has not been incorporated in a pretrial order if ~~it~~ doing so would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is for purposes of the pending action only, is not an admission for any other purpose, and cannot be used against the party in any other proceeding.

Committee Note

An admission that has been incorporated in a pretrial order can be withdrawn or amended only under Rule 16(d) or (e). The standard of Rule 36(b) applies to other Rule 36 admissions.

(Comment: This change is no more than a clearer explanation of the present rule's "Subject to the provision of Rule 16 governing amendment of the pre-trial order." Relying on the Committee Note to accomplish the explicit cross-reference seems better than adding to the rule text a parallel statement that an admission incorporated in a pretrial order may be amended only under Rule 16(d) or (e).)

Rule 40

Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials ~~without request — or on a party's request — after notice to the other parties~~. The court must give priority to actions entitled to priority by federal statute.

Committee Note

The best methods for scheduling trials depend on local conditions. It is useful to ensure that each district adopts an explicit rule for scheduling trials. It is not useful to limit or dictate the provisions of local rules.

(Question: Why carry forward the reminder that courts must honor statutory priorities? Is there a risk that deletion of the second sentence would implicitly delegate § 2072 supersession authority to district courts, even though § 2071(a) and Rule 83(a)(1) both demand that local rules be consistent with Acts of Congress?)

8E

D. Consideration of Noncontroversial "Global" Style Issues

One of the style project's goals is to use words consistently and uniformly to prevent confusion. The Standing Committee's Style Subcommittee has identified and maintained a list of recurring words and phrases in the Civil Rules that seem to have the same meaning but are worded differently. In many cases, the sole issue is apparent and requires only a decision to select one word over another that will be used uniformly throughout the rules, e.g., minor or infant. In other cases, the resolution is more complicated.

The Civil Rules Committee reviewed the list of recurring "global" issues and has recommended resolving 18 global issues that were determined to be noncontroversial. The chart on the next page lists each of the 18 global issues, including its precise location in the rules, and briefly describes the recommended resolution. Copies of the entire set of restyled rules showing the resolution of the global issues in highlighted text will be available at the meeting.

The Civil Rules Committee intends to address the other more difficult global issues identified by the Standing Style Subcommittee, and present a comprehensive set of proposals regarding all global issues to the Standing Committee at its January 2005 meeting with a recommendation that they be incorporated in the stylized rules approved by the Standing Committee to be published for comment. The Civil Rules Committee asks for no action to be taken on these global issues at this meeting and presents them only for informational purposes. The Committee will continue to address these global issues and welcomes any suggestion regarding them.

Civil Rules Style Project — Global Drafting Issues Proposed for Resolution in April, 2004

Issue	Where the Issue Arises in Current Rules	Resolution
"attorney's fees" / "attorneys' fees" / "attorney fees"	4(d), 11(c)(1)(A), 11(c)(2), 16(f), 23(g)(1)(C)(iii), 23(g)(2)(C), 23(h), 23(h)(1), 26(g)(3), 30(d)(3), 30(g)(1), 30(g)(2), 37(a)(4)(A),(B), 37(b)(2), 37(c)(1), 37(c)(2), 37(d), 37(g), 45(c)(1), 54(d), 54(d)(1), 54(d)(2)(A), 54(d)(2)(D), 56(g), 58(a)(1)(C), 58(c)(2)	Uniformly use "attorney's fee(s)."
"in its discretion"	6(b), 16(a), 23(f), 39(b), 43(f), 62(b), 62(c), 71A(h)	Uniformly omit "in its discretion."
"federal statute" / "United States statute" / "Act or act of Congress" Which term(s) should be used to refer to laws enacted by the Congress of the United States?	4(k)(1)(D), 4(n)(1), 4.1(a), 12(a)(1), 17(a), 24(a), 24(b), 24(c), 38(a), 39(a), 39(c), 40, 41(a)(1), 42(b), 45(b)(2), 54(d)(1), 55(b)(2), 62(c), 64, 65(e), 69(a), 71A(h), 81(a)(2), 81(a)(3), 81(e), 83(a)(1)	**Need clarification from Style. Proposal is to uniformly use "federal statute."** <u>Current Status</u>: • *Style 1-37 & 45 use "United States statute," **except** for 24, which uses "Act of Congress."* • *Style 38-63 use "federal statute."*
"federal law" / "United States law" / "Constitution [and/or] laws of the United States" Which term should be used to refer generally to all federal law regardless of source?	4(e), 4(f), 4(h), 4(k)(2), 4.1(b), 17(b), 28(a), 28(b), 43(a), 71A(h), 83(b)	**Need clarification from Style. Proposal is to uniformly use "federal law."** <u>Current Status</u>: •*Style 4(e), 4(f), 4(h), 4(k)(2) and 43(a) use "federal law."* •*Style 4(k)(2) and 17(b) use "United States Constitution and laws."* •*Style 4.1(b), 28(a), and 28(b) use "United States law."*

Issue	Where the Issue Arises in Current Rules	Resolution
"pretrial conference" To what extent can this term be used generically for all types of pretrial judge-party conferences (including scheduling, settlement, and status)?	16, 26(a)(1), 26(f), 33(c), 36(a) "Rule 16(b) conference" appears in 26(f) "Rule 26(f) conference" appears in 26(a)(1)	Use "pretrial conference" when reference is generic, but not when it is specific. Style 16 and 36(a) use "pretrial conference" in a generic sense. Style 26 continues to refer to a "16(b)" conference and, internally, to the "26(f)" conference. These specific references were retained and seem appropriate. (Style 33 no longer makes any reference.)
"attorney" / "counsel"	*"attorney"* appears frequently. *"counsel"* – 23(c), 23(g), 23(h), 26(a)(1)(E)(iii), 30(b)(4), 32(a)(3), 53(a)(2), and 56(d). *"attorney or counsel"* – 28(c)	Uniformly use "attorney" when referring to a party's legal representative.
"crossclaim" / "cross-claim"	5(c), 7(a), 8(a), 12(a)(2), 12(a)(3)(A), 12(a)(3)(B), 12(b), 13(g), 13(h), 13(i), 14(a), 16(a)(13), 18(a), 22(1), 41(c), 42(b), 54(b), 55(d), 56(a), 56(b)	Uniformly use "crossclaim" with no hyphen.
"entry [enter] upon land" / "entry onto land"	5(d)(1), 26(a)(5), 34(a)	Uniformly use "entry onto land." (Style 26 omits the reference.)
"minor" / "infant"	*"infant"* – 4(e), 4(f), 4(g), 17(c), 55(b)(1), 55(b)(2) *"minor"*– 27(a)(2)	Uniformly use "minor" (per Rowe).

Issue	Where the Issue Arises in Current Rules	Resolution
"on its own" / "on its own initiative" / "on its own motion"/ *[note: "sua sponte" does not appear in the rules]*	4(m), 5(c), 11(c)(1)(B), 11(c)(2)(B), 12(f), 16(f), 21, 26(b)(2), 26(g)(3), 39(a), 39(c), 59(d), 60(a), 73(b), 81(c)	Uniformly use "on its own."
"on motion" / "upon motion"	The issue arises throughout the rules.	Uniformly use "on motion."
"state in which the district court is located" / "state in which the district court is held"	*"located"* – 4(e)(1), 4(k)(1)(A), 4(n)(2), 4.1(a) *"held"* – 6(a), 17(b), 64, 69(a), 81(e)	Uniformly use "state where the district court is located."
"Court in the district ...." / "court for the district ...."	*"in"* – 26(c)(1), 27(a)(1), 30(d)(4), 37(a)(1), 37(b)(1) *"for"* – 45(a)(2)	Uniformly use "court for the district." (Style 30 and 37 now omit the reference.)
"for good cause" / "for cause shown" / "for good cause shown" / "shows good cause" / "showing of good cause" / "for valid cause"	*"for good cause"* – 26(a)(3), 26(b)(1), 32(c), 47(c), 59(c) *"for cause shown"* – 6(b), 6(d), 31(a)(4), 45(b)(3), 78(c) *"for good cause shown"* – 4(d)(2), 26(c), 33(b)(4), 35(a), 43(a), 44(a)(2), 55(c), 65(b), 73(b) *"shows good cause"* – 4(m) *"showing of good cause"* – 16(b) *"for valid cause"* – 71A(h)	Uniformly use "for good cause." *Note:* 4(d)(2) and 4(m) have minor variants. (43(a) omits the reference to good cause.)

Issue	Where the Issue Arises in Current Rules	Resolution
"secure" / "obtain[ed][ing][able]"	*The rules use "obtain[ed][ing][able] throughout.* *Rule 37 used both obtain and secure: "secure" at 37(a)(2)(A) and (B), but "obtain" at 37(a)(4)* *"secure" otherwise appears only in 1, 62(c), and 62(h)*	Uniformly use "obtain[]." **Except:** *Rule 1*, because of tradition, and *Rule 62(c) and (h)*, which would either need to retain "secure" or use a different phrasing.
"opportunity to be heard" / "opportunity for hearing"	*"opportunity to be heard"* – 37(a)(4), 37(c), 53(b)(1), 53(b)(4), 53(g)(1), 53(h)(1), 59(d) *"opportunity for hearing"* – 37(g)	Uniformly use "opportunity to be heard."
"fails to obey" / "is not obeyed" / "disobedient" *["disobey" does not appear in the rules]*	*"fail[s][ure] to obey"* – 16(f), 37(b)(2), 45(e) *"is not obeyed"* – 12(e) *"disobedient"* – 37(b)(2), 70	Uniformly use to "fail[] to obey" as verb phrase. Uniformly use "disobedient" as adjective. <u>Note</u>: Style 12 still uses "is not obeyed" because the sentence is in passive voice.
"trial by jury" / "tried before a jury"	*"trial by jury"* – 38(a - e), 39 (a - c), 42(b), 49(a), 50(a)(1), 55(b)(2), 57, 59(a), 65(a)(2), 71A(h), 71A(k), 79(a), 81(c) *"tried before a jury"* – 32(c)	**Need clarification from Style.** Style 1-63 uniformly uses "jury trial," **except for 38 and 39**, which still use both "jury trial" and "trial by jury." It may be that the contents of 38 and 39 defy the uniform phrasing that works elsewhere.

II. Information Items

A. Proposed Rule 5.1 Tabled

The proposals published for comment in August 2003 included a new Rule 5.1. Rule 5.1 is designed to implement 28 U.S.C. § 2403, which requires a court to certify to the United States Attorney General or a state attorney general the fact that the constitutionality of an Act of Congress or a state statute has been drawn in question. Provisions implementing § 2403 are now included in Rule 24(c). Rule 24(c) is not an illogical place for these provisions, since the purpose of notification is to enable the Attorney General to intervene. Perhaps because Rule 24(c) is not an obvious place to look for these provisions, however, experience shows that certification often is not made. Moving the provisions to Rule 5.1 may give them a new prominence that will encourage compliance. As published, Rule 5.1 added a new requirement. Present Rule 24(c) says that a party should call the court's attention to its duty to certify. Rule 5.1 requires that the party not only file a notice of the constitutional challenge but also serve the Attorney General by mail. This party-notice requirement was thought to impose no more than a slight burden in return for improving the prospect that the Attorney General would learn of the litigation in its early stages, perhaps well ahead of the district court's certification.

There were few public comments. In large part they supported the published rule. Renewed Advisory Committee discussion, however, revealed deep divisions. The discussion accepted the requirement that a notice be filed by a party who draws into question the constitutionality of an Act of Congress or a state statute. But the further requirement that a copy of the notice be mailed to the Attorney General generated anguished debate. Many Committee members thought it unnecessary to require a party to give notice to anticipate the court's certification. The discussion is reflected in the Draft Committee Minutes. In the end, the Advisory Committee concluded that the press of other agenda business required that further discussion of Rule 5.1 be tabled.

B. E-Government Act Rule "5.2"

The April agenda materials included materials explaining a draft Civil Rule "5.2" to implement § 205(c)(3) of the E-Government Act. The materials are set out below. They address the two central issues referred to the several advisory committees. The first section sets out a draft rule that includes several variations on the template draft prepared for the E-Government Subcommittee. The second section identifies a number of Civil Rules that may deserve further consideration for possible amendments to reflect the E-Government Act.

The draft Minutes reflect the shortness of the time available for discussion. It was agreed that it will be useful to move forward as quickly as possible. At the same time, several of the issues seemed complex. The Department of Justice, for example, reported that the draft rule would make no sense at all in civil forfeiture actions where the government is required to publish information that under the rule must be redacted from court filings. This example of an area in which the Civil Rule would need to be adjusted may not be the only such problem. More generally, the provisions that

address filing under seal seem to invite routine filing under seal. The result could be enormous burdens for clerks' offices and substantial dilution of open-access traditions. Response to the sealed filing provisions is aggravated not only by the prospect that improving legislation may be enacted but also — at least pending new legislation — by the unclear meaning of § 205(c)(3)(A)(iv). It also was noted that particular problems may emerge from the present rule that discovery materials are to be filed only when used in the action or ordered by the court. The prospect of reviewing and redacting voluminous discovery materials is unattractive. Lawyers already are beginning to adjust in framing discovery questions and answers, but only the most punctilious care could avoid the need for review at the time for filing.

These questions, and others that are likely to emerge, left the Advisory Committee uncertain whether it will be able to finish work on an E-Government Act rule at its fall meeting. The schedule remains to be worked out with the other advisory committees through the E-Government Act Subcommittee.

The Direction to Prescribe A Civil Rule

Section 205 (a) of the E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899, 2913, 44 U.S.C. 101 note, requires each district court to establish a website. Section 205(c)(1) provides that the court "shall make any document that is filed electronically publicly available online." The court "may convert any document that is filed in paper form to electronic form"; if converted to electronic form, the document must be made available online. Section 205(c)(2) provides an exception — a document "shall not be made available online" if it is "not otherwise available to the public, such as documents filed under seal."

Section 205(c)(3) directs adoption of implementing rules:

(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28 * * * to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition[,sic] to, a redacted copy in the public file.

Other Civil Rules

Consideration of the E-Government Act rule may entail consideration of changes in other rules. Possible Civil Rules candidates are described below after presentation of a suggested Civil Rule "5.2" derived from the Template and the Appellate Rule variation. (Designation as Rule 5.2 is a first approximation. This rule is closely related to Rule 5, which includes filing in subdivisions (d) and (e). We have proposed a new Rule 5.1 to address notice of constitutional challenges to federal and state statutes; we might want to redesignate that as Rule 5.2 to bring this filing rule closer to Rule 5. There may be too much here to simply tack privacy onto Rule 5 as a new subdivision (f).)

Rule 5.2. Privacy in Court Filings

(a) Limits on Disclosing Personal Identifiers. A party[3] that files an electronic or tangible paper that includes any of the following personal identifiers may disclose only these elements:

(1) the last four digits of a person's social-security number;[4]

(2) the initials of a minor child's[5] name;[6]

(3) the year of a person's date of birth;

(4) the last four digits of a financial-account number; and

(5) the city and state of a home address.

---

[3] Both Template and Appellate Rule are directed only to a party. Apparently that includes a party who files something in response to a court order to file. It is not clear whether all things filed with a court are filed by a party: what of an amicus? Who files the trial transcript? The court's opinion?

[4] "person" commonly includes artificial entities, such as corporations. Should taxpayer identification numbers be included?

[5] Style: is this redundant? Why not just "minor's name"?

[6] Will this prove awkward when suit is on behalf of a minor?

(b) Exception for a Filing Under Seal. A party may include complete personal identifiers [listed in subdivision (a)] in a filing made under seal. But the court may require the party to file a redacted copy for the public file.[7]

(c) Social Security Appeals; Access to Electronic Files.[8] In an action for benefits under the Social Security Act[9], access to an electronic file is permitted only[10] as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the [an?] administrative record; and

---

[7] With the addition of the bracketed words, this tracks the Appellate Rule. It may leave open the question whether there is a right to file under seal. The Template clearly says that a party who wishes to file complete personal identifiers may file an unredacted document under seal; it goes on to provide that the court may require a redacted copy for the public file. The result seems unintentional — it establishes a right file under seal by simply including a complete personal identifier, and then leaves it up to the court to direct filing a public copy. More thought is needed.

[8] The Template does not include this subdivision. The Appellate Rule does. Failure to include a parallel provision in the Civil Rule would essentially moot the Appellate Rule.

[9] The Appellate Rule formulation is: "In an appeal involving the right to benefits under the Social Security Act * * *." This language may fit the Civil Rules if the only actions we wish to reach are appeals from benefit denials. Actions by the government to recover overpayments may not involve the same level of private information. It would help to have advice from someone familiar with the various forms of social-security benefit actions that may come to the district courts.

[10] The Appellate Rule is "authorized as follows." That seems to mean the same as "permitted only." If so, there is no gap: the rule does not mean to distinguish between "access" in the introduction and "remote electronic access" in paragraphs (1) and (2). The distinction, however, may be important: do we mean to close off electronic access from a public terminal in the clerk's office?

(2) [a person who is not a party or a party's attorney]{other persons} may have remote electronic access to:

(A) the docket maintained under Rule 79(a); and

(B) an opinion, order, judgment, or other written disposition, but not any other part of the case file or the administrative record.

~~**(d) Judicial Conference Standards.** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.~~[11]

Committee Note

(A Committee Note can be adapted from the Template, Appellate Rules, and any other model.)

---

[11] This provision in the Template raises a familiar concern. A recent illustration in the Civil Rules is shown by Rule 7.1. Rule 7.1 requires much less corporate disclosure than had been required by many local rules. Some drafts included a provision that would require additional disclosures as required by the Judicial Conference. Doubts were expressed about this attempt to delegate Enabling Act authority, despite the Rule 5(e) precedent that authorizes Judicial Conference standards for electronic filing. Doubts also were expressed about the practical availability of Judicial Conference standards; those doubts may dwindle as reliance on the Judiciary website becomes universal. There is a separate difficulty with requiring reliance on "interim rules"; initial interim rules will be superseded by adoption of Enabling Act rules. Section 205(c)(3)(B)(i) seems to contemplate interim rules only for the period before adoption of the first set of Enabling Act rules. Unless the Judicial Conference can adopt "interim rules" to bridge gaps between adoption and amendment of Enabling Act rules, the reference to interim rules should be dropped. The Appellate Rule draft omits this subdivision entirely.

The reference to interim rules raises a separate point. Section 205(c)(3)(A)(i) contemplates rules that protect not only privacy but also "security." Nothing in any of the drafts addresses "security" concerns.

Parallel Civil Rules Changes

Each Advisory Committee is to determine whether existing rules should be changed to reflect the new circumstances created by electronic access to materials filed with the court. Several Civil Rules may be candidates for future amendment; some of the more obvious possibilities are described briefly below. It may be premature, however, to consider amendments before gaining any experience with electronic access. Anticipated problems may not arise, and unanticipated difficulties are almost inevitable.

Rule 5(d). The statute requires that any document filed electronically be made available online. Paper documents converted to electronic form also must be made available online. Rule 5(d) now requires filing of "[a]ll papers after the complaint required to be served upon a party." Rule 5(d) was recently amended to forbid filing of discovery papers until they are used in the proceeding or the court orders filing. Rule 5(d) might be amended further to except other papers from filing.

Rule 5, whether in subdivision (d) or otherwise, also might be the place to add provisions on sealing filed papers. Rule 26(c)(6) already authorizes a protective order sealing a deposition. Section 205(c)(2) of the E-Government Act provides that a filed document shall not be made available online if it is "not otherwise available to the public, such as documents filed under seal."

Rule 5(d) also may be used to anticipate a pervasive problem. Filing discovery materials, when that happens, invokes all the limits of the proposed E-Government Act rule. Apparently depositions, responses to interrogatories, documents (including computer-generated information), requests for admission, and perhaps even reports of Rule 35 examinations, must be redacted. Rule 5(d) might be amended to provide a reminder of the duties imposed by Rule "5.2."

Amendments designed to limit filing requirements or to expand sealing practices must be approached with great care. It does not seem likely that these topics should be made part of the initial E-Government Act rules process, unless it seems appropriate to amend Rule 5(d) to refer to the Rule 5.2 duty to redact discovery materials when filed.

Rule 10. Rule 10(a) provides that "the title of the action shall include the names of all the parties." This provision is at odds with subdivision (a)(2) of the proposed rule, which permits only the initials of a "minor child." It might be desirable to add a cross-reference to Rule "5.2." (The E-Government Act might provide an occasion for reconsidering the question of pseudonymous pleading. There has not been any enthusiasm in recent years for considering an amendment that would attempt to guide this practice. But electronic access may suggest further consideration, particularly if it is easily possible to search court filings along with all other online materials that refer to a named person.)

Special problems arise from Rule 10(c), which indirectly reflects the practice of attaching exhibits to a complaint. The exhibit must be redacted to conform to Rule "5.2." It is difficult to guess whether this requirement will impose significant burdens in effecting the redaction, or whether there may be practical difficulties. If Rule "5.2(b)" survives, permitting filing of the complete complaint and exhibits under seal, these difficulties may be substantially reduced.

Again, it is difficult to frame amendments beyond a possible reference to Rule 5.2 in Rule 10(a).

Rule 11. The Minutes of the E-Government Subcommittee meeting reflect discussion of the question whether Rule 11 should be "amended to contemplate violations of the privacy/access rules. Judge [Jerry A. Davis] noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it is better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment."

Rule 11(b)(1) states that an attorney or party presenting a paper to the court certifies that it is not presented for any improper purpose. If it is desirable to use Rule 11 or any other rule of procedure to reach liability for such acts as purposefully filing a defamatory pleading, the present language seems adequate. The determination whether to bend Rule 11 to this purpose at all will be difficult — it at least approaches substantive questions of defamation liability, the right to petition courts, and privilege. It would not be wise to take on these issues by amending Rule 11, unless it be to disclaim any attempt to answer them.

Rule 12(f). The agenda includes a pending question addressed to the effect of a Rule 12(f) order to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Is the stricken material physically or electronically expunged? Or is it preserved to maintain a complete record, for purposes of appeal or otherwise, but sealed? Electronic access to court files may make this question more urgent, but there is no apparent change in the principles that will guide the answer.

Rule 12(f) could be amended to refer directly to an order to strike information that violates Rule "5.2." Authority to strike seems sufficiently supported, however, both by present Rule 12(f) and by the implications of Rule "5.2."

Rule 16. Rule 16(b) or (c) might be amended to include scheduling-order directions or pretrial-conference discussion of electronic-filing issues. The most apparent subjects would be limiting filing requirements or permitting filing under seal. Care would need to be taken to avoid interference with the purposes of the E-Government Act. But there may be an advantage, particularly in early years, from assuring that parties and court think of the privacy and security issues that may arise from electronic access.

Rule 26 or Other Discovery. Rule 5(d) limits on filing discovery materials are noted above. It is conceivable that a reminder of E-Government Act access — and the need to redact filed documents to comply with Rule "5.2" — should be added somewhere in the discovery rules as well.

The protective-order provisions of Rule 26(c) do not seem to need amendment. They provide ample authority to respond on a case-specific basis "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense * * *."

Rule 56. Summary-judgment affidavits are among the papers covered by Rule "5.2." It would be possible to add a cross-reference to Rule 56.

Rule 80(c). Rule 80(c) — inevitably part of the future project to reconcile the Civil Rules with the Evidence Rules — states that whenever stenographically reported testimony is admissible in evidence at a later trial, it may be proved by the transcript. Although the proof might include filing, and a corresponding need to redact under Rule "5.2," there is no apparent need to amend Rule 80(c) to refer back to Rule "5.2."

C. Rule 15

Proposals to revise Rule 15 have lingered long on the agenda. Some of the proposals seem simple, but on closer examination have proved complex. A subcommittee appointed to review the proposals has concluded that they deserve to be carried on the agenda for future consideration, but that they require deeper study than can be provided now in competition with more pressing projects.

D. Federal Judicial Center Studies

The Federal Judicial Center has completed two lengthy studies undertaken at the Advisory Committee's request. The summaries of these two studies are set out below.

The first study examined the impact of recent Supreme Court decisions on attorney choices between state and federal courts. The Advisory Committee's Class-Action Subcommittee maintains a watching brief on these questions, and will rely on the FJC study.

The second study examined the practice of filing sealed settlement agreements. The central empirical part of the study was a survey of 288,846 civil actions. Sealed settlement agreements were filed in 1,272 of those actions. The complaints were left unsealed in 97% of those 1,272 actions, ensuring public access to any information that might be important to public health or safety. The Advisory Committee's Subcommittee on Sealed Settlement Agreements will study the report as a vital source of information in determining whether the Civil Rules should be amended to address the practice of filing sealed settlement agreements.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 15-16, 2004

The Civil Rules Advisory Committee met on April 15 and 16, 2004, at the Administrative Office of the United States Courts in Washington, D.C.. The meeting was attended by Judge Lee H. Rosenthal, Chair; Frank Cicero, Jr., 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 Richard H. Kyle; Professor Myles V. Lynk; Judge H. Brent McKnight; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style Subcommittee members Judge Thomas W. Thrash, Jr., and Dean Mary Kay Kane also attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee, were present. Peter G. McCabe, John K. Rabiej, James Ishida, Robert Deyling, and Professor Steven S. Gensler, Supreme Court Fellow, represented the Administrative Office. Thomas E. Willging, Kenneth Withers, and Tim Reagan represented the Federal Judicial Center. Ted Hirt, Esq., and Elizabeth Shapiro, Esq., Department of Justice, were present. Stefan Cassella, Esq., also attended for the Department of Justice. Observers included Jim Rooks (ATLA); David Smith (National Association of Criminal Defense Lawyers); Ralph Lindeman; Andrea Toy Ohta; Judge Christopher M. Klein; Peter Freeman, Esq. (ABA Litigation Section); Jeffrey Greenbaum, Esq. (ABA Litigation Section Liaison); and Alfred W. Cortese, Jr., Esq..

Judge Rosenthal began the meeting by noting that much hard work had been done since the October meeting, including the February meeting and conference, meetings of the Discovery, Forfeiture, and Style Subcommittees, conference calls, and ongoing drafting.

Minutes

The Minutes for the October 2003 meeting were approved.

March Judicial Conference

Judge Rosenthal reported that the March Judicial Conference meeting was devoted in large part to budget matters. Few rules matters were on the agenda. But it is likely that in the course of this meeting the Advisory Committee will recommend that the Standing Committee transmit some or all of the rules amendments published last August for approval by the Judicial Conference and submission to the Supreme Court.

Administrative Office Staff

The Committee formally recognized Administrative Office staff who support the Committee's work. The staff collectively contribute the essential work that is an indispensable part of the Committee's functioning. The work is always timely, cheerful, and good. Those present to be thanked included Robert Deyling (attorney); Rick White (information technology); Barbara Aron (operations); Peter Kelly (attorney); David Hollenbeck (information technology); Judy Krivit (operations); Dianne Smith (operations); David Van Dyke (information technology); Anne Rustin (operations); and James Ishida (attorney).

Special recognition and thanks were expressed for the many and varied contributions made by Professor Steven S. Gensler, the Supreme Court Fellow who will continue to support Committee projects through the summer. His work has been invaluable. He is a great proceduralist and an indefatigable worker.

Administrative Office Report

John Rabiej delivered the Administrative Office Report. There is little to report on the legislative front. The asbestos bill is expected to come up for a vote during the week of April 19; there is no sense how it will fare. The Class Action Fairness Act may come up soon after the asbestos bill, but it has so often failed to come up as predicted that the timing remains uncertain.

Rules Published for Comment in August 2003

Rule 5.1

Rule 5.1 emerged from public comments on amendments of Appellate Rule 44. The comments showed that the part of Civil Rule 24(c) implementing 28 U.S.C. § 2403 is obscure to many lawyers and perhaps to some judges. Section 2403 requires a court to certify to the Attorney General of the United States or of a state the fact that the constitutionality of an Act of Congress or a state statute has been drawn in question. The purpose of notice is to support the Attorney General's statutory right to intervene. The last part the intervention rule, Rule 24(c), reflects the statute and calls on a party who draws into question the constitutionality of a statute to "call the attention of the court to its consequential duty." Proposed new Rule 5.1 would transfer these provisions to a more prominent place and substantially change them.

Discussion began with a question raised by the Style Subcommittee. The Style Subcommittee prefers to adopt a uniform term for referring to federal legislative enactments; the leading candidate at the moment is "federal statute." "Act of Congress" is not in the running. Section 2403, however, refers to an "Act of Congress." The experts in Congress are uncertain whether "federal statute" would cover everything embraced by "Act of Congress." They are confident that "Act of Congress" embraces everything that Congress enacts. Professor Kimble observed that if indeed Rule 5.1 is intended to include things that do not qualify as federal statutes, the rule should use a different term. But it was agreed that "federal statute" is sufficiently broad; the Committee Note should observe that "federal statute" in Rule 5.1 includes anything that would qualify as an "Act of Congress" in Section 2403.

A second style question arises from the reference to a paper "drawing into question the constitutionality of a federal statute * * *." This is the language of § 2403, and was deliberately restored to earlier drafts of Rule 5.1. The Attorney General may want to be involved when there is a constitutionally based argument that a statute must be construed narrowly. Professor Kimble, however, defended substitution of "challenge" in later subdivisions, pointing out that the rule caption is "Constitutional Challenge," and asserting that the cases refer to constitutional challenges. This is a convenient shorthand. And subdivision (b) begins by requiring certification under § 2403 — that should show that "challenge" has the same meaning as "drawn in question." In the end, "drawing into question" was accepted in subdivision (a), while "constitutional challenge" was retained in (b). In what will become subdivision (c) — published as (d) — the reference to the court's failure to certify the "challenge" will be changed to avoid the issue: "the court's failure to certify ~~the challenge~~ does not forfeit * * *."

A third style question goes to the Style Subcommittee recommendation that the intervention provision published as subdivision (c) should be transferred to become a second sentence of subdivision (b). It was argued that continued exposition as a separate subdivision might better call attention to the question of intervention time, but the transfer was accepted.

Turning to the merits of the proposal, a challenge to the dual notice requirement, rejected at the time of the decision to recommend publication, was renewed. Since 1937, the statute has

required that the court certify the fact that the constitutionality of a statute has been drawn in question. If certification does not occur as often as it should, we can educate judges to do better; some judges are not even aware of § 2403. It is a mistake to add a party-notification requirement not in the statute. The Michigan State Bar Committee comment opposes the party-notice requirement, and they have it right. The public comment process, moreover, is inherently limited. The party-notice requirement will affect pro se litigants, and pro se litigants seldom offer comments on proposed rule amendments. This is not the best use of the rulemaking process. Court certification should suffice.

As a separate matter, it also was protested that although subdivision (c) states that failure to file and serve the required notice does not forfeit a constitutional right otherwise timely asserted, the Committee Note does not comment on this provision. What "right" is it that is not forfeit? That this language is drawn straight from present Rule 24(c) does not justify the failure to comment now.

The response on the party-notice requirement was that the Attorney General experiences "a shockingly low rate of notice." The courts as well as the government are helped by early government intervention. Intervention in some cases has been possible only on appeal. That is far too late. Rule 24(c) now says that a party should call the court's attention to the duty to certify. Framing that as notice, and requiring that the notice also be served on the Attorney General by mail, adds very little to the burden now imposed by Rule 24(c). Retaining these provisions in the rules, moreover, is important. Practitioners are more likely to check the rules books for such issues than to scour the statute books.

It was suggested that lawyers are "overburdened." The judge is in a very good position to decide whether notice is required. But it was responded that during the early stages of an action, the practitioners understand the case better than the judge does. And the value of early notice makes it important that the party have a duty to give notice.

The next question was whether there have been any cases in which a statute has been held invalid without the Department of Justice getting notice? This is the first rule that requires a party to give notice to a nonparty. A lawyer may think it not in his client's interest to give notice. The potential for confusion and burden is great. It is better to educate the judges.

The Department of Justice has no organized records to show how often a statute has been held invalid before the Attorney General got notice of the question. It has looked at the 1996 Telecommunications Act, which attracted many constitutional challenges. In an overwhelming majority of the cases, the Attorney General did not get notice of the challenge. At least one district court held the statute unconstitutional before the Attorney General got notice. The only opportunity to intervene and argue was on appeal in the Fifth Circuit. And there are more examples of failure to certify before the district court decides; in most of these cases the district court upholds the statute, but the Attorney General has lost the opportunity to help build the trial record.

Another example was given of a case in which a defendant asserted First Amendment defenses to sanctions sought under provisions of the wire tap law. The district court held the statute valid without giving notice to the Attorney General. Notice was given only after appeal was taken to the Third Circuit. Eventually the Supreme Court upheld the defendant's position.

It was observed that Appellate Rule 44 does not require a party to give notice to the Attorney General. It says that the party must give notice to the circuit clerk; it is the clerk who certifies the fact of the question to the Attorney General. Why should the Civil Rule be different?

Another question was what happens if you do not give notice. Is the rule only advisory? Will the court devise a sanction as a matter of discretion when a party fails to give or serve the required notice? And this will be another obstacle for attorneys who accept pro bono appointments; they help the court by accepting appointment, and should not be subjected to unnecessary burdens. It was responded that the rule is not simply advisory. It is on the same footing as many other rules that do not provide specific sanctions. The express provision that bars forfeiture of a constitutional right otherwise timely asserted is important. Explicit recognition of other sanctions is not.

A motion was made to adopt a new Rule 5.1 to receive the § 2403 provisions of present Rule 24(c), but to delete the requirement that the party serve the notice on the Attorney General. The party need only give notice to the court. Paragraph (a)(2) of the published proposal would be deleted.

Discussion of the motion began by asking whether the recommendation to the Standing Committee would be to advance the revised Rule 5.1 for adoption, or instead would be to republish the rule. Republication might be appropriate because observers who approved the provisions of Rule 5.1(a)(2) may have refrained from the seemingly unnecessary gesture of telling the Committee that the published rule got it right. In addition, local district rules that require counsel to notify the Attorney General have been caught up in the Local Rules Project. These local rules are inconsistent with present Rule 24(c). But in informing those districts of the inconsistency, it has already been pointed out that the local rules would become consistent with the national rules if Rule 5.1 should be adopted as published. The Bankruptcy Rules Committee, moreover, has an interest — the 60-day intervention period makes it impossible to adopt Rule 5.1 for contested matters, but it would be adopted for adversary proceedings.

The motion to delete 5.1(a)(2) as published, retaining only paragraph (1), was approved, 10 yes and 3 no. A motion to recommend republication was approved. The proposed conforming amendment of Rule 24(c) will carry forward in tandem.

As a result of these motions, the version of Rule 5.1 proposed for republication would read:

Rule 5.1 Constitutional Challenge to a Statute — Notice and Certification

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal statute or a state statute must promptly file a Notice of Constitutional Question stating the question and identifying the paper that raises it.

(b) Certification by the Court; Intervention. The court must, under 28 U.S.C. § 2403, certify to the Attorney General of the United States or of a state that there is a constitutional challenge to a statute. The court must set a time no less than 60 days after the certification for the Attorney General to intervene.

(c) No Forfeiture. A party's failure to file the required notice, or the court's failure to certify, does not forfeit a constitutional right that is otherwise timely asserted.

Following discussion of other matters, a motion was made to reconsider the decision to delete the requirement that a party serve the notice of constitutional question on the Attorney General. The service provision "seems well-intended." In voting to delete this requirement, the movant was concerned that "drawn in question" is not sufficiently pointed. Others who voted to delete were concerned that there is no explicit sanction. But present Rule 24(c) says that a party should call the court's attention to its § 2403 duty and has no express sanction. On balance, Rule 5.1 seems useful, including the requirement that the party notify the Attorney General.

The motion to reconsider was supported by another member who had voted with the majority. The government's concerns about timely notice deserve to be treated with respect. The duty to serve the notice on the Attorney General by registered or certified mail is slight, given that 5.1(a) requires that notice be filed with the court.

It was responded that it is enough to have the party notify the court. The court can then certify as the statute requires. But it was rejoined that service by the party comes earlier. That is better. Everyone gains when the government comes in earlier rather than later. And it was further rejoined that giving notice to the court does not ensure that the judge will see the notice promptly. There may be an extended delay before any procedural step is taken that brings the notice to the judge's attention. In addition, the situation of the pro se party is not much aggravated by the service requirement — the notice requirement continues to be imposed on all parties, pro se and represented parties alike.

The motion to reconsider was opposed on the ground that once an issue has been argued through, repose should be honored. It was not a close vote. Rule 5.1 should be republished without party service and revisited in light of the public comments on that form. This argument was met with the counter that the Committee is obliged to reach the right decision while it continues to sit in a single meeting.

Reconsideration was further opposed on the ground that "we got it right." Practical reasons make it right. It is good to separate these provisions into a new rule and to locate them at a place in the rules where they are more likely to be seen. A party who has a substantial constitutional argument will want the government to come in early, to avoid the delays and burdens that may result from late intervention. When there is a frivolous challenge, on the other hand, there is no need for notice or certification. The court can uphold the statute and move on. Similar comments observed that the district court can function as gatekeeper, refusing to certify an insubstantial question, and avoiding the burden on the Attorney General of receiving notice of questions that will be rejected even before the Attorney General might respond. There will be many cases with "non-serious questions."

The concern about inevitably failing constitutional questions was addressed by observing that the Committee Note says that the court can reject the challenge during the period set for the Attorney General to intervene. It also says that the court may grant an interlocutory injunction during this period. Early notice will not add to delay, and often will expedite proceedings. If it would make the notice and service burden seem less onerous to refer to a constitutional challenge rather than the constitutional question, that change might be made. This observation was repeated later: reference to a "challenge" rather than a "question" would "produce more wheat, less chaff."

The question of sanctions returned. What is the sanction for failure to honor Rule 5.1 requirements? The response was that the situation would be the same as it is today with the Rule 24(c) statement that a party should notify the court. But this response was met with the suggestion that a heightened duty — the party must file a notice, and perhaps must serve the Attorney General — may invite heightened sanctions. A different perspective suggested that the court is able to decide the constitutional question without separate notice when the question is raised for decision on the pleadings, by motion, or at trial. But creation of a new duty to notify the Attorney General "creates a greater injury." The Attorney General, moreover, will take seriously a certification from a court.

The earlier observation about certification was repeated. In a majority of cases, the Department does not get the required certification. The absence of certification is a real injury even when the challenge is rejected. The Department comes into the action late, perhaps only on appeal,

and is unable to shape the trial record. But, it was asked, why then should the Note say that the court can reject the challenge before the Attorney General intervenes? Rejection will deprive the Department of the opportunity to shape the record, just as much as would invalidation before intervention. The Department does not want a 60-day freeze. Its interests are engaged only in cases that involve substantial questions. But how can a Note trump a rule provision that requires a 60-day period to intervene? Should the rule, if reconsidered, be amended to state specifically that a statute may be upheld before intervention? And perhaps also to say that interim relief can be granted before intervention?

The motion to reconsider was approved, 7 yes and 6 no.

Further discussion began by suggesting that "challenging" be substituted for "drawing into question" in 5.1(a): "A party that files a pleading, written motion, or other paper ~~drawing into question~~ challenging the constitutionality of a federal statute or a state statute * * *." It was observed that § 2403 requires the court to certify the fact that constitutionality has been drawn into question; using different words in Rule 5.1 cannot reduce the certification obligation, and the purpose of Rule 5.1 is to support and advance certification. It might do to say "questioning the constitutionality," but it is difficult to find any advantage in that formula over the statutory formula.

The question was again characterized as an effort to separate the few serious cases where timely notice is important from the many where it is not.

A new observation was made. Some states have statutes that require a party to give notice to the state attorney general. Texas and Pennsylvania are examples. It might be useful to find out how well these statutes work in practice.

Then it was asked what happens if the party serves the Attorney General, who does not respond. Then the court certifies the fact of the challenge: can the Department intervene then?

And it was suggested that the party service requirement should be deleted. The court will treat this as a 60-day freeze. The Note cannot properly say that the court can dismiss during this period.

The Committee was reminded that some districts have local rules that require the party to notify the Attorney General. If Rule 5.1 does not, these local rules will be invalid.

Yet another member renewed the observation that the burden of service by mail is slight, and that early notice to the Attorney General will move the case along.

A motion was made to table the Rule 5.1 and parallel Rule 24(c) proposals. Time is not available for adequate further discussion at this meeting. The Standing Committee will be informed that these questions are being held for further study.

Rule 6(e)

Rule 6(e) provides three additional days to respond when service is made by mail, leaving a copy with the clerk's office, electronic means, or other means agreed to in writing. The means of counting these additional days has been uncertain. A proposal to amend Rule 6(e) was published to establish that the 3 days are added after the original period. Public comments, however, revealed continuing ambiguity. The Appellate Rules Committee has worked on the same question as framed by the Appellate Rules, and has urged that Civil Rule 6(e) should be adopted in a form that makes it clear that the extension should be counted by rules that give the maximum additional time. This resolution, so long as it is made clear, will conform to lawyers' instincts to seek the longest time

possible. And it will do no harm; the times involved are seldom critical for any purpose other than setting a clear deadline.

Two specific questions frame the inquiry. Suppose the original period ends on a Saturday. Should Sunday and any intervening legal holiday be counted against the additional 3 days, even though the original period would be extended under Rule 6(a) to the next day after Saturday that is not a Sunday or legal holiday? The Appellate Rules Committee suggests that the 3 days should not start until the original period would end without considering the 3 additional days. Thus if the last day is a Saturday and the following Monday is a legal holiday, the original period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the final day to act.

The second question is illustrated by a period that ends on Friday. Should the following Saturday, Sunday, and perhaps a legal holiday Monday be counted against the 3 additional days? Again, the Appellate Rules Committee recommends that these days should be excluded for reasons similar to the reasons that exclude them in counting periods shorter than 11 days.

Discussion of these questions began with support for extending time as liberally as can be done. If the last day is a Friday before Memorial Day weekend, three days are not really given if Saturday, Sunday, and Memorial Day Monday are counted, requiring filing on Tuesday.

It was suggested that the rule might be made clear by distinguishing business days from calendar days, but it was responded that the Civil Rules have not used these terms anywhere. The Appellate Rules have adopted the calendar day term, but it would be risky to import it into the Civil Rules without a thorough review of all time provisions.

It was agreed that the Civil and Appellate Rules counting procedures should be the same.

It was agreed that the purpose to achieve the maximum extension along with clear expression can be achieved by recommending to the Standing Committee adoption of this modified version of Rule 6(e):

> **(e) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days — excluding intermediate Saturdays, Sundays, or legal holidays — are added after the prescribed period would otherwise expire under [subdivision] (a).

The Committee Note will be revised, drawing on examples suggested by a draft Appellate Rules Note. Thought will be given to adding a statement that the Rule 6(a) problem of days when the clerk's office is inaccessible is adequately covered by Rule 6(a). Inaccessibility of the clerk's office does not bear on the ability to continue work on the response. Only if the office is inaccessible on the day that ends the extended period should inaccessibility cause a further extension.

Rule 27(a)(2)

The proposal to amend Rule 27(a)(2) is designed to correct an outdated reference to service provisions of former Rule 4 that have no precise analog in present Rule 4. The few public comments supported the proposal. Three style changes were recommended and adopted. As styled, the Committee voted to recommend for adoption amended Rule 27(a)(2) as follows:

> **(2) Notice and Service.** At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing ~~on the petition~~. The notice may be

served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided by Rule 4 and to cross-examine the deponent ~~on behalf of persons not served and~~ if an unserved person is not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

It was decided that the Committee Note need not be amended to offer advice on the problems that might arise if a single attorney is appointed to represent unserved persons who may have conflicting interests. The amended rule does not change the present rule in this respect.

Rule 45(a)(2)

The proposal to amend Rule 45(a)(2) was designed to ensure that a nonparty deponent have notice of the method designated for recording the testimony. The Committee voted to recommend the amended rule for adoption, with one style change to conform to the style adopted in the Style Project after Rule 45(a)(2) was published for comment:

(2) A subpoena must issue as follows:

(a) for attendance at a trial or hearing, ~~in the name of~~ from the court for the district where the trial or hearing is to be held;

(b) for attendance at a deposition ~~in the name of~~ from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(c) for production and inspection, if separate from a subpoena commanding a person's attendance, ~~in the name of~~ from the court for the district where the production or inspection is to be made.

Supplemental Rules B, C

The proposals to amend Supplemental Rules B and C were recommended for adoption as published.

Discovery of Computer-Based Information

Judge Rosenthal introduced the report of the Discovery Subcommittee proposing rules to regulate discovery of computer-based information. She began by renewing the Committee's thanks to Professor Dan Capra and the Fordham Law School for hosting the hugely successful February conference on discovering computer-based information.

Discussions have continued "around the country" since the February conference. The Discovery Subcommittee worked hard and continuously to refine the proposals that provided the framework for the February conference. The focus of discussion has advanced from the initial phase in which the question was whether the possible differences between computer-based information and other information warrant adoption of new rules. Now it is recognized that new rules will be helpful. The question has become whether the rules should simply express the better practices that are emerging, or whether an attempt should be made to guide future developments.

The most immediate question has come to ask whether the time has come to publish proposed rules for comment. Good reasons appear to go forward now. There is a growing demand

for rules, reflected in the emergence of local district rules addressed to discovery of computer-based information. A few courts have local rules in place, and several more courts are considering rules. This activity shows that judges and the bar want guidance. These initiatives also present the continuing prospect that adoption of differing local rules by many courts will freeze disuniform practices in place, impeding development of national uniformity. The publication process also is important because public comment is critical. Litigants and lawyers live with these questions in ways that outstrip their ability to educate judges. It may be important to seek comment on thoughtful proposals even though it is not yet clear that they should be adopted as proposed.

Myles Lynk, chair of the Discovery Subcommittee, provided a further introduction. The Subcommittee has worked deliberately over a period of years. It has heard from all segments of the bar and bench. Many drafts have been considered, revised, and at times rejected entirely. Alternative proposals are presented for discussion; one of the questions to be resolved is whether alternative proposals should be published with respect to some of the areas that seem to deserve adoption of some rule.

Professor Marcus introduced the specific proposals.

Rule 26(f) Conference Discussion

Perhaps the least controversial proposal, long on the table, has been to amend Rule 26(f) to address discovery of computer-based information. The first step would amend Rule 26(f)(2) to add evidence preservation to the topics to be discussed. Various formulations have been considered, looking to "preservation of evidence," or "any issues relating to preserving discoverable information."

A second step would amend Rule 26(f)(3) by adding a new subparagraph (C) to include computer-based discovery in the subjects of the discovery plan. Subparagraph (C) in its current draft form describes "any issues relating to disclosure or discovery of electronically stored information, including the form of production." (Rule 34(a) proposals would include a definition of "electronically stored information" as a term to be used throughout the discovery rules.) Parallel changes would be made in Form 35 and in Rule 16(b), including in the Report of the Planning Meeting a description of the proposals for handling discovery of electronically stored information and listing provisions for disclosure or discovery of electronically stored information as a permitted subject for a scheduling order. This version of 26(f)(3) is "softer" than earlier proposals. By describing "any issues," it limits the need to discuss to cases in which the parties anticipate discovery of computer-based information. There would be no need to discuss such discovery if it is not expected. But the form of production should be discussed if such discovery is anticipated. Rule 34 proposals to be discussed later highlight the importance of resolving the form of production as early as possible.

These initial proposals have been noncontroversial.

Another addition to Rule 26(f)(3) would be a new subparagraph (D) addressing privilege waiver. The form in the agenda materials calls for a statement of party views "whether the court should enter an order that facilitates discovery by protecting the right to assert privilege after [inadvertent] production of privileged information." It is likely that this version should be amended at least to include an explicit reference to party agreement, making it clear that the court order should enter only if the parties agree. The reference to "inadvertent" production is uncertain. The topic is deliberately limited to "discovery," excluding disclosure — since disclosure addresses only witnesses, documents, or like information that a party may use to support its position, the problem of inadvertent privilege waiver should not arise.

Discussion of these proposals began with the Subcommittee recommendation that 26(f)(3)(D) should carry forward the reference to "inadvertent" production. The concern continually expressed has addressed the production of privileged documents without realizing that they are privileged. Belated assertions of privilege after deliberate production of documents known to be privileged have not seemed to merit protection by new rule provisions.

The "inadvertent" production question includes the familiar topic of "quick peek" agreements and leads to the more general question whether party agreement should be required. These agreements call for the parties to deliberately allow access to information that may include privileged materials, so that the party who seeks discovery can determine just what information it actually wants to have produced in discovery. Designation of the desired information then leads to privilege screening and logging only with respect to the materials that are formally produced in response to the discovery requests. It is important that the rule require party agreement to these arrangements. A court cannot be authorized to order production of information without the opportunity for thorough privilege screening if a party objects. It may be that party agreement should not be required for other forms of protective orders, such as the "clawback" provisions that allow belated privilege claims after a party becomes aware that privileged materials have been produced. On the other hand, it was observed that parties will resist "clawback" provisions if they are not comfortable enough with the arrangement to agree to it in the particular case. The producing party is the one who is worried about an order to produce on terms that it has not agreed to; the receiving party is worried about surrendering once-produced materials under "clawback" terms that it has not agreed to.

The "quick peek" agreement was described as not inconsistent with a rule protecting against inadvertent production. A party providing materials for a quick peek will remove, and log, all materials that are readily identified as privileged. The problems arise with respect to materials that are privileged for reasons that do not readily appear on quick examination.

It was agreed that the (f)(3)(D) proposal should be revised to include "agreement of the parties" as an element. It was noted that cases dealing with these agreements seem to arise when parties to other litigation who did not join the protective agreement assert waiver.

It was suggested that the rule could be made broader if it did not refer to "inadvertent" production, but instead referred in general terms to party agreements enforced by court order. That would leave the parties free to devise and win court approval of innovative arrangements.

But it was asked whether a broad rule would encourage knowing, "advertent" production of privileged materials. The Subcommittee thought the rule should deal with inadvertent production.

More generally, it was suggested that the purpose of this proposal, and many like proposals, is to facilitate discovery when a producing party knows the materials may include matters covered by privilege but cannot easily identify them. Allowing preservation of the privilege by one means or another can reduce costs and expedite discovery by supporting less agonizingly thorough privilege screening. At the same time, it may seem inappropriate sermonizing to include in the rule text the words suggesting that the purpose of the agreement is to facilitate discovery.

The "inadvertence" question reappeared with the observation that the proposals are not aimed at deliberate "your eyes only" delivery of information. The difficulty of expression arises from the fact that the production is not inadvertent. The producing party knows it is producing the information. What it does not know is that some part of it is privileged. "Unintentional" does not seem to resolve the ambiguity. "Inadvertent privilege waiver" might help, but it also might seem to invoke the decisions that do permit recall of privileged information but only on condition that the producing party worked hard to avoid the production of material not known to be privileged. A

simple reference to agreements that "protect against privilege waiver," on the other hand, might go too far in allowing unnecessarily expansive agreements.

It was agreed that these problems should be addressed by revising the draft to read:

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

It was asked whether this language would include production knowing that the information is privileged. One answer was that it does — the parties may deliberately choose to agree on a protected exchange of privileged information to further settlement negotiations. Another question was whether this language would provide protection against arguments for waiver made by persons not parties to the agreement. The answer was that we do not know. Concern was expressed that a rule this broad would encourage slip-shod privilege review. But it was responded that the purpose is to enable the parties to avoid the cost and delay of thorough screening. "We want to go as far as we can."

The agreement requirement was further supported by observing that the parties will not agree to an agreement that allows clawback the day before trial. The combined requirement of party agreement and court approval will ensure that the arrangements will be sensible in the circumstances of the particular case. It was agreed that a court indeed has authority to approve such agreements.

It was observed that as proposed, the language does not directly forbid entry of an order without party consent. A producing party might request entry of an order to speed up production, despite resistance by the requesting party. The proposal does not take away any court authority that now exists. The reference to "agreement" is confined to the context of party discussion and proposals. The aim is to encourage party cooperation that keeps the case moving. In this context, "consent is the idea." It is good to have these problems addressed early, and the rule focuses party attention on these problems. They may not agree. Without agreement, a party may move for an order despite the lack of consent.

It was further observed that the draft approaches the questions of court authority and party agreement indirectly. In itself, it only provides that a discovery plan must state the parties' views and proposals on these questions. Earlier drafts directly authorized "quick peek" orders on agreement of the parties and with court approval. The (f)(3)(D) proposal does not in itself address the law of waiver.

The question returned: should a court be able to compel protection without party agreement on terms that preclude effective privilege screening? The fear is that a court might compel "quick peek" revelations over protest and without time to screen out even obviously privileged material: "produce in two weeks." The fact that the order says that privilege will be protected on later review does not adequately protect materials the party would never turn over under a party-planned "quick peek" agreement. And it must be remembered that we do not know whether these orders will protect against waiver arguments by nonparties; that is why we need party agreement.

A motion to delete from proposed Rule 26(f)(3)(D) any reference to party agreement failed, 5 yes and 8 no.

It was agreed that the Committee Note should say that this provision is modest. It does not address the court's authority to make orders absent party agreement. It simply focuses attention on mechanisms that may be adopted by agreement to speed discovery and reduce screening costs.

An observer suggested that "production" is not as useful a word for the rule as "disclosure." "Disclosure" would be used not in the sense of Rule 26(a) disclosure, but in the open sense of showing information. A quick peek would be described as disclosure, not formal discovery production.

The Committee voted to approve the proposal to add new language to Rule 26(f)(2) along the lines proposed in the agenda materials, but referring to "preservation of discoverable information."

The Committee further voted to approve the proposal to add a new Rule 26(f)(3)(C) as shown in the agenda materials.

The Committee also approved the revised version of Rule 26(f)(3)(D) set out above, with the corresponding changes in Form Rule 35 and Rule 16(b).

One comment was addressed to the draft Committee Note. Line 104 on page 9 of the agenda materials refers to party discussion "whether the information is readily accessible." Accessibility is a recurring subject of debate in discussions of rules about computer-based discovery. But it may be a good word in this neutral description of topics for discussion.

Rule 34(a): "Electronically Stored Information" as Document

The agenda materials, p. 16, lines 316-320, include proposed amendments of Rule 34(a)(1)(A) that include electronically stored information in the list of materials discoverable under Rule 34's "document" production provisions:

> **(1)** any designated electronically stored information or any designated documents, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium, from which information can be obtained either directly or after the responding party translates it into a reasonably usable form, * * *

Rule 34 seems to be the place for this recognition of computer-based information. The "electronically stored information" term is used throughout this package of proposed amendments, with Committee Note reminders that it has the same meaning when discovery is sought through depositions (most obviously Rule 30(b)(6) depositions), interrogatories, and requests to admit.

"Information" is a better word than "data" when referring to electronically stored things. The object of discovery is to acquire information.

"Images" are added to the list of discoverable items to ensure that all forms of information are reached. "[I]n any medium" is added in a similar effort to achieve a comprehensive catalog.

In addition, Rule 34 is amended throughout to provide for testing and sampling of documents and other information. The Style Project considered adding these words to reflect the need to test — or perhaps to sample — "document" information. Testing the authenticity of a document is a clear illustration. The Style Subcommittees concluded that this change was beyond the reach of the Style Project, but that it seemed desirable.

As (a)(1)(A) is drafted, it is not clear whether a request for "documents" would include electronically stored information. The draft does not define electronically stored information as a document, and indeed seems to separate it from documents.

The first question was whether embedded and metadata are included in "electronically stored information." This term does not exclude such "hidden" data — information stored in the computer, but not "visible on the screen" in routine use of the application software. To the contrary, embedded and metadata are included. The Subcommittee thought about other terms such as "recorded" or "retrievable," but settled on electronically stored information. If it is stored and can be retrieved, it is discoverable. The decision to make such information discoverable does not mean that it always must be produced. Discovery is limited by all present limits, and also by any new limits that may be adopted to focus specifically on electronically stored information.

It was suggested that "in any medium" is a "bad intensifier." But these words were defended as an important part of the project. Technology changes rapidly and unpredictably. We cannot know what will emerge. The point is to ensure that discovery is not defeated by unforeseen gaps in Rule 34 language. It was agreed that "in any medium" should remain in the rule.

Style changes were discussed. One would invert the order, so (a)(1)(A) would refer to "any designated documents or any electronically stored information." Or "designated" might even be moved into the preface: "to produce * * * the following designated items * * *." The important thing is to be clear that whatever form the information takes, the duty to produce is shaped by the requesting party's duty to designate.

Another style suggestion would restore em dashes to set off the examples: "any designated electronically stored information or any designated documents; — including * * * — from which information can be obtained * * *."

A broader style suggestion was that "document" should be defined to include electronically stored information. It must be clear that a request for "documents" embraces electronically stored information even when the request does not separately refer to electronically stored information. Many reported decisions now say that electronically stored information is a document; why should we not embrace those decisions? Although many judges have become familiar with computer-based discovery, many others still need to be educated in these topics. These observations were met with the concern that the rule should not stretch the definition of document "beyond any natural meaning." A data base, for example, is not much like a "document" in any conventional sense. It is simply a store of data that change continually. What emerges from it depends on what question is put to it. There are no formed "documents" in it. The conclusion was that "all we need is to be clear." The draft is clear. The Committee Note can say that the response to a request for "documents" must include electronically stored information.

Rule 34(b): Form of Production

The form of producing electronically stored information seems to be a frequent source of contention and difficulty. The proposed amendments of Rule 34(b) address these questions in part. The requesting party "may" request a form for production, and the responding party must produce or object. No standard is provided for resolving the objection. If the requesting party does not specify a form of production, the responding party may choose between defined options.

The provision for request and objection, with slight modifications from the form in the agenda materials, would read:

(b) Procedure.

(1) ***Form of the Request.*** The request:

(A) must describe with reasonable particularity each item or category of

items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form in which electronically stored information is to be produced.

(2) ***Responses and Objections.*** * * *

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including an objection to the requested form for producing electronically stored information, stating the reasons.

The first question was whether the requesting party should be required to state a desired form of production. That alternative was rejected by the Subcommittee because the requesting party may not know what is possible, and for that matter may be indifferent between the apparent alternatives. The Rule 26(f) proposals direct the parties to discuss the form of production; agreement often will follow.

The provision for situations in which the requesting party does not specify a form of production would be a new Rule 34(b)(2)(D):

(D) *Producing the documents or electronically stored information.* Unless the parties otherwise agree, or the court otherwise orders,

(i) A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to the categories in the request.

(ii) If a request for electronically stored information does not specify the form of production under Rule 34(b)(1)(B), a party must produce such information in a form in which the producing party ordinarily maintains it, or in an electronically searchable form. A party producing electronically stored information need only produce it in one form.

Discussion of these provisions began by noting that the reference to "electronically searchable form" was devised by the Subcommittee and may not be the most useful phrase. TIFF and PDF formats are not, or may not be, electronically searchable. It was pointed out that "electronically searchable form" suggests organization in a form searchable by word, concepts, or the like. TIFF images often are accompanied by a data base that is searchable and that leads to the documents. An alternative phrase might be something like "searchable using electronic or automated methods." Or it might be "information recoverable by electronic search methods." Or "electronically searchable form" would be neat. The idea is there, but the expression is tentative. It may prove useful to publish with alternative phrases. This suggestion was approved. The Committee Note can observe that the concept requires that the form be "reasonably" searchable. An observer suggested that the Note also should say that the searchable form need not include embedded or metadata.

The reference to the form in which the information is normally maintained seems to emphasize "native format" production, a sensitive subject. Suggestions have been made for a more flexible rule that would allow the responding party to choose any form it wants. One rejected alternative would have permitted the responding party to produce the information "indexed" to correspond to the categories of the request. This alternative was rejected because it might impose great burdens. Library scientists view "indexing" as word-searchable, perhaps not a problem, but electronic discovery professionals think of indexing as a list of documents already there. The proposal advanced here was a balance among options that should be available at low cost.

It was asked whether the rule should offer a third option — production of the information printed out. That practice is often followed now. A response was that printed production works in simple cases, but "is not fair in the complex cases." There is no reason to impose the costs of non-electronic searching on the requesting party. "A paper dump can be a huge expense for no reason." The rejoinder was that the rule allows the discovering party to request an electronic form. The limit of this alternative, however, is that the requesting party may not know what forms are available to the producing party. On the other hand, the requesting party can ask for paper production, or the parties can agree on it.

The lack of any direction for resolving an objection to the form of production was pointed out. What if the requesting party demands "native format" and the producing party objects? The answer is that the court will decide.

Rule 37(f): "Safe Harbor"

Parties that store vast amounts of information in electronic systems have begged for some form of safe harbor to protect against spoliation charges. Electronically stored information is routinely lost. Loss arises because systems designed for business purposes deliberately delete information on planned terms. Loss also arises as information that has been "deleted" is overwritten in the random and unpredictable operation of the system. Once the prospect of litigation appears, moreover, it is difficult to design a litigation hold that provides assured retention of discoverable information on terms that do not freeze all use of the system.

The agenda materials include two alternative forms of a new Rule 37(f) that would provide some limited protection by way of limiting the use of discovery sanctions for failure to produce electronically stored information that was destroyed despite reasonable steps to preserve it. It may be desirable to publish alternative proposals if it is found appropriate to publish any proposal on this topic.

The problem has been addressed through discovery sanctions because it has seemed difficult to craft a Civil Rule that imposes affirmative duties to preserve information.

One aspect of the drafting difficulty is that often the requested information is "not completely gone." Lengthy and expensive computer forensic efforts may be able to retrieve it — the question often is cost, not total inability to retrieve.

Whatever is done, it should be clear that any discovery rule does not address the imposition of sanctions for violating preservation duties imposed by statute or regulation.

The first alternative Rule 37(f) draft focuses on reasonable steps to preserve electronically stored information. Examples of reasonable behavior are given. The draft says, among other things, that a person acts reasonably if it preserves information maintained in the usual course of its regularly conducted activities if the information appears reasonably likely to be discoverable in

reasonably foreseeable litigation, and by routinely and in good faith operating its electronic information systems, unless it willfully or recklessly deletes or destroys the information. It also provides that a person who acts reasonably remains subject to sanctions if it violates a court order that requires preservation, and might provide that discovery sanctions are appropriate for violating a statute or regulation that requires preservation.

The second alternative is more streamlined, focusing directly on reasonable steps to preserve information that the person knew or should have known was reasonably likely to be discoverable in reasonably foreseeable litigation, on normal operation of the information system, and on absence of a court order — or perhaps a statute or regulation — requiring preservation. The focus is on the need to impose a "litigation hold," on ordinary operation of the system, and on court preservation orders. This alternative may not give as much protection to the producing party, in part because it does not seek to supplement the requirement of reasonable steps to preserve by looking for willful or reckless destruction.

One important drafting question arises from the extent of the sanction protection. Each alternative begins: "A court may not impose sanctions [under these rules] * * *." If "under these rules" is included, the way is left open to impose sanctions as a matter of inherent power and common-law authority. Spoliation instructions are the most obvious illustration — they commonly are explained in terms that do not draw from Rule 37. (Rule 37(c)(1), which does provide for spoliation instructions, does not reach the present problems.) If this limit remains, the safe harbor is not very comforting. On the other hand, at least the Private Securities Litigation Reform Act includes provisions directly aimed at preserving information for discovery, with "appropriate" sanctions for willful failure. See 15 U.S.C. § 78u-4(b)(3)(C). The Subcommittee does not wish to propose a rule that might supersede this statute or any other like it. Nor does it wish to propose a rule that would become a definition of what sanctions are "appropriate" within the statutory terms.

The concern that proposed Rule 37(f) intrudes on the area of spoliation rules was discussed further. The alternative drafts speak to preservation obligations before an action is even filed. Courts do impose sanctions for pre-filing destruction of evidence. But that does not of itself justify a rule that seems to create preservation duties before an action is filed. The Committee has been reminded repeatedly about the dangers of attempting to create an explicit preservation requirement. The reasons for addressing these problems, however, arise from the nature of electronic information storage systems. These systems routinely delete data. Business needs require such designs. The Subcommittee decided that we should not — perhaps cannot — attempt to create direct preservation rules. But there is a need for a safe harbor. It would be good to draft a rule, if it can be done, that offers protection to a party who behaves reasonably, recognizing that reasonable preservation obligations may arise at some point before an action is actually filed.

It was observed that if Rule 37(f) is limited to sanctions "under these rules," it may be a null set. The rules do not now provide sanctions directly for destroying discoverable information. There also is a question whether an Enabling Act rule can properly address conduct before an action is filed. Similar questions were raised during the work to develop Federal Rules of Attorney Conduct, and never fully resolved. Generally the Rules take hold with the commencement of an action and apply to events after that. The draft seems to address pre-complaint obligations. It may overlap with obligations imposed by rules of professional responsibility. There is developing spoliation law that addresses pre-filing conduct. But proposed 37(f) addresses discovery, not evidence. And without addressing pre-filing conduct, it would not do very much. It does not impose any affirmative obligation. All it does is to make it clear that a party who undertakes reasonable preservation steps "is better off."

It was observed that Rule 37(b) sanctions are limited to circumstances in which a party has violated a court order to provide discovery. Rule 37(f) seems to go beyond that, addressing — and negating — sanctions when there is no court order. But Rule 37(b) addresses the sequence of discovery request, objection or noncompliance, order to provide discovery, and disobedience. Rule 37(f) would address failure to comply with a preservation order.

An observer suggested that the drafts go too far when they speak of "reasonably foreseeable litigation." The focus should be on the reasonable foreseeability of the action in which discovery is sought. Many enterprises engage in activity that foreseeably will give rise to litigation in broad general terms that do not focus on any specific action — a firm researching a new drug product, for example, can foresee that if the product should one day be marketed there will be later litigation about the product. Even short of that, "reasonably foreseeable" may be too open-ended.

Another observer asked what there was in the rule that would prevent an enterprise from designing an information program that automatically destroys everything every few days? The response was that businesses design information systems for their business needs, and business needs require preservation of much information for long periods. A similar question asked whether adoption of some version of Rule 37(f) would cause enterprises to change their retention practices.

The focus of the proposals is on the propositions that a party cannot produce what it does not have, but that the obligation to cooperate in discovery entails an obligation to preserve. Courts have imposed spoliation sanctions on parties who have lost electronic information. If information is destroyed before the events giving rise to litigation have occurred, on the other hand, spoliation is not likely to be found.

It was asked whether the proposals really add anything to the law. They seem simply to provide guidelines. People frequently express fear of spoliation sanctions, but the cases do not seem to impose sanctions where the proposals would defeat sanctions. On the other hand, the Second Circuit Residential Funding case says that spoliation sanctions may be imposed for negligent operation of the usual information system. Perhaps the problem is not so much imposition of sanctions for negligent spoliation — although the cases are coming up — as it is one of widespread paranoia in government and business that the only way to avoid spoliation sanctions is to "keep everything." The scope of the "litigation hold" is a real concern. Several lawyers, particularly corporate staff counsel, want reassurance that it suffices to address a litigation hold to the sources that are likely to have discoverable information. Rather than create a mirror image of all of the information available throughout the organization, worldwide and on all of countless different (and often incompatible) information systems, they believe they should be protected if the hold preserves information in the sources likely to relevant to the particular litigation.

It was noted that a safe harbor of any sort is likely to operate in fact as a preservation rule. "There is a strong gravitational pull." Is the rule intended to command an end to routine destruction? Or, in the version that speaks of preserving information routinely maintained, is it intended to say that once you destroy the information it is no longer maintained? Should we focus instead on information that you do not regularly maintain? Alternative 2 does not have this word trap. The focus should be on the duty to intervene reasonably in the operation of the system.

A third alternative draft was handed out at the meeting. This draft focused directly on the duty to preserve by prohibiting sanctions if the party took reasonable steps to preserve information that was destroyed in the normal operation of its electronic information system. The focus on the duty to preserve was supported. But it was suggested that there is an ambiguity in "information": do you have to preserve a back-up tape, for example, when you do not know whether it has discoverable information? Is this question answered by the limit to "reasonable" steps? A discovery

request might be for the e-mail messages of an identified person. The responding party believed that they were preserved, not knowing that the person had deleted them, and recycle the back-up tape innocently. That could be reasonable behavior. Reasonable steps do not always preserve everything. Things slip through. That is the point of the safe harbor.

A preference was expressed for "alternative 2, in one form or another."

An observer suggested that the focus should be on reasonable steps to preserve, but that sanctions should be available only for willful or reckless destruction. In addition, it is too broad to speak of preserving information "reasonably likely to be discoverable in reasonably foreseeable litigation"; it should be: "when it knew or should have known that the information was reasonably likely to be discoverable in the action." It was responded that there may be situations in which information should be preserved because it is reasonably apparent that it will be discoverable. Negligent failure to preserve should not be within a safe harbor. On the other hand, sanctions may not be appropriate if trivial information is negligently lost. In further response, it was noted that "alternative 1" leaves a gap between reasonable preservation and willful or reckless destruction.

An illustration was suggested. A plaintiff claims employment discrimination. The plaintiff interacts at work with a small number of people. Once the claim is made, the employer can foresee litigation. It may be reasonable to preserve electronically stored information relevant to the people who interact with the plaintiff, without preserving all of the employer's electronically stored information. These are "reasonable steps." But what is reasonably likely to be discoverable? The full scope of Rule 26(b)(1)? The plaintiff is employed in the Chicago branch of a company with worldwide operations; focusing preservation on information in Chicago is different from focusing on information in the Shanghai branch, at least if the plaintiff has had no traffic with the Shanghai branch. As to the Chicago information, reasonable preservation may at times require that back-up tapes be preserved. And it was suggested that "house counsel can understand what is reasonably likely to be discoverable."

Discussion returned to the difficulty of focusing on when a party should have known that litigation would be brought. Perhaps this thought should be expressed by looking to a pending action or a specific action that is reasonably anticipated. But there is a complication — once information has been preserved for a foreseeable action, there may be a duty to search it to respond to discovery in a different action.

Turning to a broader view, it was said that "anything we do will disappoint a lot of people who want more guidance and more protection than we can give them. But this is a response to a discovery problem, and is within the proper province of the discovery rules. There is a lot of concern in the bar with 'gotcha,' with the disproportionate consequences of deleted information."

Support was expressed for alternative 2, but with the suggestion that there is a problem in referring to "the normal operation of the person's electronic information system." Many people do not have an electronic information "system." The response was that a "system" exists even for a person who has no document retention or destruction policy at all. The electronic system itself — the software programs that direct the hardware — routinely deletes information. "You do have a system — it is Windows, Linux, whatever." We need an expression that encompasses both the elements of the programs that are designed to delete information according to the user's particular policies and also the elements designed into the programs by the programmers.

It could be urged that once the rule requires reasonable steps to preserve it is redundant to refer to loss through normal operation of the system. But it was responded that the emphasis on normal operation gives direction and focus. If you know how your system operates, that bears on

what you need do for reasonable preservation. This provision should focus on the problem of automatic destruction that occurs without human intervention at the time of destruction.

Another question is whether the "no sanctions" rule should address a "failure to preserve" or a "failure to produce." Since the focus is on discovery sanctions, not creation of a specific preservation duty, the more natural focus is on failure to produce. (It was pointed out that it has been argued that a judge can impose sanctions for failure to produce something that did not exist at the time of the discovery request.)

A separate problem was raised in both Rule 37(f) alternatives. Should the rule include an exception so that it does not prohibit sanctions when a statute or regulation requires preservation of information that has been destroyed by automatic operation of an information system despite reasonable efforts to preserve the information? An exception of this sort may erode the value of the safe harbor. Failure to include the exception would not mean that the rule prohibits other authorities from imposing sanctions for violating the statute or regulation. Only discovery sanctions would be barred by making the statutory or regulation violation irrelevant.

It was urged that there is a duty to preserve any information that a statute or regulation requires to be preserved. "The duty exists; we should be able to enforce it through discovery sanctions. This is just like failure to obey a preservation order."

An observer suggested that the violation of a statute can figure into the determination whether reasonable steps were taken. Referring only to "routine" operation of the system seems to go to the state of the art.

The mode of referring to information-preservation statutes and regulations also is a problem. An astonishing welter of statutes and regulations, state and federal, require preservation of enormous amounts of information for purposes that have nothing to do with discovery. At least one statute, however, specifically directs preservation of information for discovery purposes. The Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(3)(C), directs preservation of relevant documents, data compilations, and tangible objects "as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure." The statute further states that an party aggrieved by a willful failure to comply "may apply to the court for an order awarding appropriate sanctions." Should we attempt to incorporate only the discovery-specific preservation statutes and regulations, or should all information-preservation statutes and regulations be referred to in the rule? Some of the draft language elevates all statutory duties to the same status as a specific discovery preservation order entered in the particular case.

Another question was raised by asking whether the rule should protect against loss of information by normal operation of the system, or instead should be limited to normal "good faith" operation. An observer suggested that "normal" is needed; the addition of "good faith" would be welcome. This issue returned later with the question whether "good faith" adds anything to the requirement that the destruction occur in routine operation of the system.

The Rule 37(f) discussion was brought to a point by asking whether a proposal should be published for comment. If yes, drafting decisions will remain to be made. The question was framed by a question whether anything like this is needed. Is there something about computer-based discovery that forces us to act? If the proposal essentially reflects existing case law, is it needed? If it goes beyond existing case law, is it appropriate? The response was that the Subcommittee has worked hard on this proposal. The topic is sufficiently important to warrant publication, so that the public comments can be taken into account in deciding whether to adopt any such rule. Publication

is appropriate without taking sides on the final determination whether to adopt any version of a "Rule 37(f)." In further response, it was noted that the current proposal pretty much tracks existing decisions, but there is no way to predict what future decisions will do. It also was pointed out that the problem of automatic destruction is not limited to the huge information systems of huge enterprises. It is a problem for the personal computer at home. "We want to say it's OK to put it on a CD and carry on with family use of the computer." The response in other circumstances might be quite different, including seizing the computer. The home computer is different from the box of letters or other papers at home — people do not understand how their computers routinely delete information. For that matter, surveys repeated over several years have shown that 60% of American businesses do not have routine document preservation procedures, and that staff counsel are not confident that their attempts to effect preservation will work. There is real benefit in reassuring parties that if they respond to litigation reasonably, they will be protected.

Two new alternative versions of Rule 37(f) were prepared overnight and were discussed on Friday morning. The general approach of both versions was the same. They focus on automatic operation of a "system," including a single computer as the "system," and on taking reasonable steps to preserve evidence. Neither alternative provides as much protection or direction as some people want. It would be possible to add still more explicit terms: "If a person takes such reasonable steps it may continue to operate its routine electronic information system." Many people at the Fordham conference suggested language similar to this. But it was asked whether this thought should be put in the rule. It seems a truism, and may prejudge specific situations.

It also was noted that each of the new alternatives looks to the "failure to produce," not "failure to preserve." At the same time, the first alternative also refers to a failure to preserve, and may be the better alternative for that reason.

The first question was whether either alternative really accomplishes anything. When each says that "a court may not impose sanctions if," it also says that if you act reasonably to preserve information and otherwise operate your information system in its routine manner, you are ok. The answer was that Rule 37(f) is a good place to tell people that they must have a litigation hold. This provides valuable guidance beyond anything that appears in the rules now. In addition, the reference to violating a court order "gives an alert to other parties, and supports a Committee Note that a party who wants a more specific preservation order may ask for it." The decision whether to enter a preservation order will be informed by considerations similar to those expressed in the rule, but also may be guided by other concerns.

The same concern was repeated: the rule should do more. In the proposed forms it only assures results that would occur anyway — sanctions are not imposed on people who act reasonably to preserve discoverable information. And the reply was the same — the drafts define as reasonable the routine operation of the information system. For that matter, the drafts suggest that sanctions may be appropriate for failure to exercise reasonable care.

A renewed attack was launched on the language that implies that reasonable care does not defeat sanctions if the destruction of information violates a "statute or regulation." The contrast to violating "an order in this action" is marked. A specific preservation order gives clear guidance. Violation of a statutory duty owed to someone not a party for purposes that have nothing to do with this litigation will lead to "gotcha" tactics. The structure emphasizes this. Safe-harbor protection is denied if information was deleted in violation of a mining regulation in one state that requires an employer to retain all employment records for ten years, even though deletion occurred automatically after two years, before there was any reason to anticipate the present litigation or for that matter before the events that gave rise to the present litigation. Violation of the duty to the state that

adopted the regulation should not control access to the safe harbor. The focus should be limited to a statute that requires preservation for purposes similar to the present action. An example would be an SEC regulation that requires preservation of information that is relevant in an action for securities fraud. Even that may be overbroad if it implies that the existence of the statute puts the world on notice that litigation is foreseeable.

So it was asked whether a party who violates an IRS regulation requiring that records be preserved should be outside the safe harbor even if the destroyed records are not those sought in discovery. The answer was that only destruction of information discoverable in the action should lose the protection.

In like vein, it was suggested that the effect of a statutory violation on safe-harbor protection is similar to the question whether a statute is intended to create a private remedy. This question is particularly pointed when the statute is not aimed at preserving information for discovery in civil litigation.

A related question was whether reasonable behavior should be protected even if a statute or regulation is violated. Suppose discoverable information is destroyed in the routine operation of an information system after a party has taken reasonable steps to preserve it: should the good harbor be available? One consequence may be an incentive to seek protective orders to provide increased protection against destruction.

It was protested that "you cannot give a safe harbor to a law breaker." The PSLRA requires preservation. A statute is as important as an order. But it may be appropriate to limit the reference to a statute or regulation that somehow is "relevant" to the particular litigation. One form would be to look to the statutory violation only if the lost information is relevant to the issues in the action. It should be remembered that denial of a safe harbor does not require that sanctions be imposed. The court still has discretion on the sanctions question, and may refuse to impose any sanction if the statutory violation does not seem important in the circumstances.

It was suggested that the reference to violation of an order in the action should be made more precise, referring to an order "to preserve information." And it was asked whether reasonable behavior may be a defense to violation of a preservation order. Suppose a preservation order is entered, the party takes reasonable steps to comply with the order, but the steps fail — the system continues routine destruction of order-protected information. The answer is that the routine destruction is not in the safe harbor. The reasonableness of the attempt to comply will figure in the decision whether to impose a sanction and the choice of sanction, but there is no safe-harbor protection.

The question of willful behavior returned. If a party cannot produce destroyed information, and the destruction was not willful, do we want to leave the door open for sanctions even as a matter of discretion? Do we want to allow sanctions whenever the destruction was negligent, as a condition for carrying on routine operation of the information system? Or should we limit sanctions to willful or reckless destruction?

Another question renewed the earlier "good faith" discussion. It was suggested that a rule can address a litigation hold only by requiring that it be reasonable. The lack of reasonable care in fashioning a litigation hold is negligence, and good-harbor protection should not be afforded for a negligent attempt. It is very difficult — and probably impossible — to provide simultaneously that a litigation hold affords safe-harbor protection only if it is framed with reasonable care, but also to provide protection if information was destroyed without willful or reckless behavior. An observer suggested that "good faith" should be addressed to the steps to preserve, as one aspect of reasonable

behavior. The resolution may be that the standard for safe-harbor protection is reasonable behavior. If the lack of reasonable care — negligence — ousts safe-harbor protection, state of mind is relevant to the decision whether to impose a sanction and the choice among possible sanctions. A merely negligent failure to preserve information that likely was unimportant may escape any sanction. Willful destruction of important information may meet the most severe sanctions.

Another recurring question asked whether the Enabling Act supports a rule that addresses preservation before an action is filed. It was suggested that to some extent Rule 11 addresses pre-filing conduct, but noted that Rule 11 regulates conduct directly aimed at filing an action. Operation of an information system before filing ordinarily is not directed to unfiled litigation.

The discussion concluded by finding a consensus that some version of Rule 37(f) should be recommended for publication. The Subcommittee will frame specific language that the full Committee will review by mail in time for submission to the June Standing Committee meeting.

Privilege Waiver: Rule 26(b)(5)(B)

In addition to the discovery-conference provisions proposed as Rule 26(f)(3)(D), the agenda materials include the broad suggestion that a joint project on privilege waiver might be undertaken with the Evidence Rules Committee. Independently of any joint project, there is a proposed Rule 26(b)(5)(B) for recapture of inadvertently produced privileged information:

> **(B)** *Privileged materials 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 information of its claim of privilege. After such notice, the requesting party must promptly return or destroy the specified information and any copies to the producing party, which must comply with Rule 26(b)(5)(A) with regard to the information and preserve the information pending a ruling by the court.

This proposal does not address the question whether production has waived a privilege. It merely provides a procedure to address the waiver question when a party turns over information that was not identified as privileged and later realizes that the information was privileged.

It was noted that the obligation to return or destroy is meaningless unless it implies an obligation not to use the information. Use is proper only after the requesting party obtains an order to produce, although it may be proper under the rule to rely on knowledge of the produced information in arguing that it is not privileged.

A related observation was that the rule could be read to say that the producing party does not lose a privilege until another party gets a ruling that the privilege was lost.

It was urged that the rule should go at least this far. Indeed, the rule should go farther unless the Evidence Rules Committee objects. Even if it does not go farther, the rule should say something about waiver — it should say that production is not a waiver. The Texas clawback rule has worked well for several years.

It was noted that the proposed rule could operate in conjunction with a "quick peek" agreement and order. Because a quick peek is provided knowingly, the rule properly refers to production without intending to waive and the Committee Note should not refer to inadvertent production.

It was asked whether the rule should refer to "person" rather than "party," so as to protect a nonparty who produces material and also to provide recapture from a nonparty who receives privileged information from a party. This issue was taken under advisement. Rule 45 may provide adequate protection for a nonparty. And it may be difficult to justify a rule that reaches a nonparty who receives information from a party apart from requiring the party to use best efforts to recapture the information.

The proposal does not affect the burden on the requesting party to persuade the court that the information is not privileged or that the privilege has been waived. So if the applicable rule is that any production is a waiver, regardless of intent or the care taken to protect privileged information, there is a waiver. The rule only recognizes the burden on the requesting party.

The Committee approved a recommendation that a Rule 26(b)(5)(B) be published for comment, subject to further style improvements by the Subcommittee and — if feasible — review by the full Committee.

The Committee also recommended further work on privilege waiver in tandem with the Evidence Rules Committee.

The Distinctive Burdens of E-Discovery: Rule 34(a) or 26(b)(2)

Many voices have urged, with increasing vehemence, that the burdens imposed by discovery of computer-based information are so distinctive as to require separate protective rules. The agenda materials include alternative proposals allocated to Rule 34(a) or to Rule 26(b)(2). The common question is whether the need for court control should be identified in a way that resembles, but is distinct from, the "two-tier" scope of discovery established by Rule 26(b)(1). Should we require a court order for production of computer-based information that otherwise would fall within the scope of party-managed discovery in Rule 26(b)(1)?

The first two alternatives would add a new Rule 34(a)(3). One would provide for discovery of information reasonably accessible to the responding party, with additional discovery of information not reasonably accessible on court order for good cause. The second would provide for discovery of information routinely maintained in the usual course of regular activities, with additional discovery of information not routinely accessed or maintained on court order for good cause.

The argument for locating this provision in Rule 34 is that the problem lies with Rule 34 "document" production. The advantage of focusing on what is routinely maintained is that it may be more difficult to determine whether information is reasonably accessible. There is a question, however, whether the reference to information not routinely accessed includes embedded and metadata. But reasonable accessibility may be a more functional approach. Either way, the idea is to identify a line separating what is automatically discoverable from what is discoverable only on order after showing good cause.

Similar variations are provided for Rule 26(b)(2). The first two are framed as a new factor (iv) in the part framed by the Style version as 26(b)(2)(B). The second two frame the same alternatives as a new 26(b)(2)(C).

The first view expressed was that the two-tier approach should be framed as part of Rule 34, and as the version that looks to routinely maintained information. "We need some presumptions" because "there is so much available." We should require some level of good cause to get to information that is expensive to retrieve. But we should not link the question to the proportionality

test of Rule 26(b)(2); that would shift the playing field too much. Nor is there any need to cross-refer, as the drafts to, to Rule 26(b)(2). We all know it is there. At the same time, it was recognized that "reasonably accessible" is the reason for having a two-tier system.

The rejoining view was that this protection belongs in Rule 26(b)(2) in some form. The burden of retrieving electronically stored information is not unique to Rule 34 production. An organization asked to provide deponents who can testify to information known or readily obtainable by the organization will be charged with an obligation to retrieve electronically stored information and drill its designated deponents on the information. Any party asked questions by interrogatory will be obliged to search its electronically stored information in preparing answers — and if we afford less protection for Rule 33 respondents, discovery requests will shift to interrogatories.

This view was accepted, leaving the question whether the protection should become a new item (iv) supplementing the three present 26(b)(2) items, or should be stated in a separate subparagraph (C). Location as a new subparagraph (C) may make it easier to understand, and will avoid any possible confusion arising from the statement in (b)(2)(B) that the court "must" limit discovery when item (i), (ii), or (iii) appears.

It was suggested that the focus should not be on how hard it is to get the information — "reasonably accessible" — but on where a person usually goes to look for things. "Most information is there."

The two-tier approach was opposed. Recognizing that there is a lot of electronically stored information, and that retrieval can be expensive, the overriding concern is that we should not shift the basic assumption of discovery. The system operates on the assumption that a party who has information should carry the burden of showing reasons why it should not have to produce the information. The system should not work so that a producing party can avoid this burden by simply saying "second tier." If the requesting party is forced to show that the information is reasonably accessible, or to show that the information is routinely maintained and routinely accessed, the expense and delay can be prohibitive. The motion will require "discovery on discovery," and expert inquiry and testimony. This will be the only way to show that information in fact is reasonably accessible. Small plaintiffs will be driven out of court. Adequate protective tools are available now through Rules 26(b)(2) and 26(c).

Support for the two-tier approach was expressed again in terms of the enormous burdens that may arise from discovery of electronically stored information. The problem is aggravated by the phenomenon that such information never — well, hardly ever — really goes away. Ordinarily it is there if sufficient expense is incurred to search it out. And the problem can be bilateral — motions are filed against plaintiffs for not producing as well as against defendants.

The opponent of two-tier discovery conceded all of these points, except for the problem of shifting the burden. The rule should require the responding party to carry the burden of showing that the information is not reasonably accessible, that further search is too costly. We know that soon all information will be stored electronically. That shift of information practices should not be used to shift the burden of justifying nonproduction.

Another advocate of the two-tier approach noted that the typical request "implicates a search that frequently entails weeks of activity and millions of dollars. There is a ground shift in what is out there." If the responding party must come forward every time there is a two-tier question, "the motion will be made all the time. The leverage game will be played this way." It is better to respond with what is reasonably accessible in the ordinary course of system operation. That will be enough 95% of the time.

This debate was distilled into the observation that the rule should be more precise about the allocation of the burden. The producing party will produce. Then the parties go to court. What happens there? The proposals would require the party resisting discovery to show why it need not produce. The court can decide on the depth of search, the sources searched, the time to be used, and perhaps cost sharing. Both sides need to argue the need to produce and the need for protection. "You have engaged the court. That is the important point." But the current mechanisms to get the court involved do not seem to be working as well as should be. Adoption of a new (b)(2) provision may be desirable for reasons similar to the reasons that led to the 2000 amendment that divided the (b)(1) scope of discovery between party-managed and court-managed discovery.

The opponent of two-tier discovery agreed that basically the proposal would be appropriate if it does not shift a new burden to the requesting party. But the background is that the proponents of the rule want to shift the burden.

It was suggested that one remedy might be to add a requirement that the court find the information is not reasonably accessible. The opponent agreed that this would help.

Then a more explicit suggestion was made that the producing party should have the burden of showing that the requested information is not reasonably accessible. If that showing is made, the requesting party would have the burden of showing good cause for production. The opponent agreed that "that is what happens today." There is a motion to compel or a motion for a protective order. The initial moving burden is the key.

In allocating the burden, it is important to remember that the responding party is in the best position to know and to show the burdens of search and access. If a substantial burden is shown, the requesting party is the one who should carry the burden of showing that the need for discovery outweighs the burden.

An illustration was offered. An action is brought claiming a nationwide conspiracy since 1994 to fix widget prices. The discovery demand is for "everything about widgets." The responding party "wants to be able to rely on my regular information system without looking into the attic. What happens when the requesting party asks me to look into the attic? Do I have to show the information is not reasonably accessible?" The two-tier approach is appropriate, but the responding party should be able to respond in the first instance by relying on its normal system.

It was suggested that the most common sequence of events will be that the requesting party will seek information about the capacities of the responding party's information system, perhaps by a Rule 30(b)(6) deposition. Then it will move to compel. The responding party will have to respond to the motion to compel by showing that the information is not reasonably accessible. The burden would be the same if the responding party took the initiative by moving for a protective order.

A different description led to substantially the same conclusion. The responding party will routinely state that some information is not reasonably accessible. The parties will confer. If they fail to agree, there will be a motion to compel, which requires a conference. If they still fail to agree, the motion will be pressed.

The opponent of the two-tier approach stated that the approach is acceptable if the rule makes clear that the responding party has the burden of showing that requested information is not reasonably accessible. Indeed, this approach is likely to be helpful in this form. It will help sort through what really is available, and how to get it efficiently.

It was suggested that the rule should focus directly on determining whether information is reasonably accessible, without adding the qualification that it be reasonably accessible "in the usual course of its regularly conducted activities." This question was left open for later resolution; the concern was that embedded and metadata may be reasonably accessible, and that focus only on reasonable availability might have the unintended effect of suggesting routine discovery of such data.

A motion was approved to go forward with a Rule 26(b)(2)(C), keyed to the reasonable accessibility of electronically stored information. The rule should explicitly impose on the responding party the burden of showing that information is not reasonably accessible. Once that showing is made, the requesting party still could obtain discovery for good cause. And the redundant cross-reference to Rule 26(b)(2)(B) would be deleted. The new draft will be circulated to the Committee before submission to the Standing Committee with the recommendation to publish for comment.

Interrogatory Response: Rule 33(d)

The Committee approved recommendation for publication of a Rule 33(d) amendment that would allow a party to respond to an interrogatory by making electronically stored information available to the requesting party. The Committee Note emphasizes the application to electronically stored information of the limits now in Rule 33(d). The burden of deriving or ascertaining the answer must be substantially the same for either party. The response must specify the records in a way that enables the requesting party to locate the information as readily as the responding party could locate it. And there must be a reasonable opportunity to examine the information, which may require the responding party to provide technical support, information on application software, access to its computer system, or other assistance.

Nonparty Discovery: Rule 45

The Committee approved recommendation for publication of Rule 45 amendments that make clear the availability of electronically stored information in nonparty discovery. These amendments also carry into Rule 45 the proposed Rule 34 amendment that ensures that documents may be tested and sampled as well as inspected and copied. In this dimension, Rule 45 should mirror Rule 34.

Civil Forfeiture Proceedings: New Supplemental Rule G

Judge Rosenthal introduced the proposal to adopt a new Supplemental Rule G. Rule G would govern civil forfeiture actions. It is placed in the Supplemental Rules because many forfeiture statutes adopt the Supplemental Rules. The draft serves several purposes. It draws together in one place the civil forfeiture provisions that now are scattered through the Supplemental Rules. It adds provisions that reflect enactment of the Civil Asset Forfeiture Reform Act in 2000. Other new provisions reflect developments in the decisional law, including decisions on constitutional matters.

Separation of Rule G from the remaining Supplemental Rules will enhance both forfeiture practice and general admiralty practice. Admiralty lawyers have been concerned that interpretation of common rules provisions may be shaped by responses to the needs of forfeiture proceedings, distorting the answers that should be given to meet the occasionally distinctive needs of admiralty proceedings.

Judge McKnight, chair of the Civil Forfeiture and Sealed Settlements Subcommittee, explained the proposal further. The draft presented for discussion has been hammered out over the course of a year through many hours of conference calls, a Subcommittee meeting, and multiple drafts. Indispensable assistance has been provided by the Department of Justice and the National

Association of Criminal Defense Lawyers. The representatives of the Department and NACDL have participated in the discussions at the highest level of professionalism. Their efforts have helped to produce a draft that can be recommended for publication.

Discussion followed the order of the Rule G subdivisions.

Rule G(1)

Subdivision (1) states the general relationship between Rule G, Supplemental Rules C and E, and the Civil Rules. Rule G governs any issue that it addresses. There are some issues that have been left to Rule C or Rule E because those rules provide clear and sound answers. And many issues are left to the Civil Rules. The Supplemental Rules do not provide a complete, self-contained system. As one example among many, amendment of pleadings is governed by Civil Rule 15.

Rule G(2)

Subdivision (2) governs the complaint. Paragraph (f) requires that the complaint "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." This standard is adopted from decisional law that has used these words to describe the particularized pleading required in a forfeiture action by Supplemental Rule E(2)(a). This pleading requirement in turn is integrated with Rule G(8)(b).

Rule G(3)

Subdivision (3) governs process directed against forfeiture property. For the first time, it requires that a court find probable cause before a warrant issues to arrest property that is not in the government's possession and is not subject to a judicial restraining order. This provision is one of several that confirm or establish advantages for potential claimants that present rules do not express.

Paragraph (c)(ii)(B) is likely to attract some controversy. Subparagraph (ii) imposes a general requirement that a warrant and any supplemental process be executed as soon as practicable. Item (B) authorizes the court to order a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause. The government in fact has been able to file forfeiture complaints under seal or to obtain an order staying execution. This course is taken when there is a need for prompt filing to satisfy time limits, but also a need to protect ongoing criminal investigations and investigators or informers. Potential claimants do not like sealing or stay orders, however, and fear that this implicit recognition of such orders may encourage courts to enter them. The Committee Note addresses this concern by stating that the rule does not reflect any independent ground for ordering a seal or stay.

Paragraph (c)(iv) says only that a warrant for property outside the United States may be transmitted to an appropriate authority for serving process where the property is located. It deliberately refrains from any attempt to dictate procedures to be followed in other countries. The United States cannot control, and may not be able to influence, these procedures.

Rule G(4)

Subdivision (4) governs notice. Paragraph (a) addresses the traditional method of giving notice by publication. Paragraph (b) is entirely new, directing that individual notice be directed to known potential claimants.

The basic requirement of (4)(a) is that the government publish notice within a reasonable time after filing the complaint. Exceptions are allowed if the property is worth less than $1,000 and individual (4)(b) notice has been sent to every person that can reasonably be identified as a potential

claimant, or if the court finds that the cost of publication exceeds the property's value and other means of notice would satisfy due process. The Committee Note observes that the publication cost to be considered in this equation is the cost of the least costly method.

As a substitute for traditional newspaper publication, (4)(a) allows publication on an official internet government forfeiture site. No such site exists now, but when the rule becomes effective this means of notice is likely to be far more effective than newspaper publication. Recognizing that some individuals lack access to the internet, it is far more common to find that potential claimants do not in fact read the newspaper where notice is published or do not look to the legal notices.

Paragraph (4)(a)(iv) states the standard for choosing among alternative authorized methods of publication. The government must select a means reasonably calculated to notify potential claimants. This standard was retained through several drafts. It was changed in a late draft to require choice of a means "reasonably calculated to be most effective to notify potential claimants." This change was undone soon after it was made. Due process is satisfied by selection of a traditional and customary means that is not less likely to reach potential claimants than other traditional and customary means. The government has a strong interest in choosing the most effective method so as to reduce tardy appearances by claimants who argue that a better means of publication should have been chosen, and does seek to publish by the most effective means. A rule that emphasizes the need to seek the most effective means, however, is likely to encourage litigation over such claims as that the government should have chosen one newspaper rather than another, publication in the district where the action was filed rather than the district where the property was seized, and so on.

For newspaper publication in the United States, the rule gives a choice between three districts — where the action is filed, where the property was seized, or where property that was not seized is located. Choice among these alternatives will depend on the circumstances of the specific case. The alternatives available as to property outside the United States are different, reflecting in part the concern that some countries may forbid circulation of legal notices relating to United States proceedings.

Direct notice to known potential claimants is provided by subdivision (4)(b). This practice is new to the rules, but reflects due process concerns that notice by publication should be supplemented by direct individual notice when is feasible.

The (4)(b)(ii) provisions for the content of the individual notice include a statement of the time for filing a claim and the time for filing an answer. These provisions depart in some ways from the times for claim and answer set out in CAFRA, 18 U.S.C. § 983(a)(4)(A) and (B). The Committee Note explains that the rule provisions can be reconciled with the statutory provisions, and are designed to better implement the statutory purposes.

The means of sending individual notice are described in subdivision (4)(b)(iii). The basic requirement is stated in (b)(iii)(A): notice must be sent by means reasonably calculated to reach the potential claimant. The Committee Note provides examples. The central dispute is whether the rule instead should require service of process under Civil Rule 4. The rule resolves this dispute in favor of a functional approach. This approach does not rely on the belief that notice by publication is likely to reach all potential claimants in most forfeiture proceedings. Although publication is the traditional means of notice for in rem proceedings, there is little reason to suppose that it is particularly effective. Steps taken to seize the defendant property, however, are quite likely to bring notice home to most potential claimants. There is no tradition requiring formal service, and a functional approach seems sufficient. As with choosing the means of publication, the government has an interest in choosing a means of notice that is effective.

Later subparagraphs address the means of notice in specific settings. The first, (4)(b)(iii)(B), allows notice to the attorney representing a potential claimant with respect to the seizure of the property or in related proceedings. The Committee Note observes that this means should be used only when it reasonably appears to be the most reliable means. The requirement that the attorney be representing the potential claimant in a matter related to the forfeiture seeks to limit such notice to circumstances that make it reasonable to rely on the attorney to transmit notice to the claimant.

Substantial debates surrounded the next subparagraph, (b)(iii)(C). This provision requires that notice sent to a potential claimant who is incarcerated be sent to the place of incarceration. The problems that surround such service are explored from the due process perspective in Dusenbery v. U.S., 534 U.S. 161 (2002). The government should be responsible for identifying the correct prison. But it cannot be responsible for the practices each prison adopts for internal distribution of legal mail. Potential claimants may be incarcerated in state prisons, local jails, and even lock-ups. There are 20,000 forfeitures a year. In 80% of them, at least one potential claimant is incarcerated. Incarcerated claimants "have every incentive to deny receiving notice." The government can produce prisoner-signed mail log books or similar proofs for persons in federal prisons, but often cannot for those in other prisons. It cannot be held responsible for policing the mail distribution policies of state agencies, as the Seventh Circuit has recently recognized. Even drafting the rule to require mail with a return receipt would be a mistake. The receipt would be signed by a prison official, providing no information whether the notice in fact reached the potential claimant. For that matter, in some circumstances notice may be accomplished by other means — personal service occasionally is used when the claimant appears at a hearing in a related proceeding. NACDL believes that the rule should require that the notice actually get to the prisoner, by means that require the prisoner to sign for it. The Dusenbery decision only establishes the minimum due process requirements, and by a bare majority at that. "We should do better. There are a lot of cases like this."

Discussion of notice to incarcerated claimants began by asking whether sending notice to counsel bypasses these problems; the answer is that (iii)(B) is intended to provide that notice to counsel suffices. The NACDL observer urged that at a minimum, the rule should require notice both to counsel and to the potential claimant, but it was responded that this would be a burden, and a reminder that for some time NACDL opposed any opportunity to rely on notice for counsel.

The discussion continued by asking whether an affidavit of service should be required. The government recognizes that an affidavit of mailing would make sense on moving for default. But it was argued that failure of any claimant to appear in an in rem forfeiture proceeding does not afford the same assurance that is provided by failure of a personally served defendant to appear in an in personam action. The lack of a claimant is a more important signal that notice may not have been effected. This observation led to the question whether the Committee Note should say something about "default." It was observed that the government does not have to move for default if no claim is made in an administrative proceeding, but recognized that Rule G applies only to judicial proceedings. It seems better not to venture beyond the observations already made in the draft Note.

The problem of notice to an incarcerated person was summarized by suggesting that the draft provides the least unsatisfactory answer to a terribly difficult problem that has no good answer. Rule G cannot fix the problem of establishing reliable means of notice to people in state prisons.

Rule G(5)

Subdivision (5) governs claim and answer. The time for filing a claim is set by the individual G(4)(b) notice if notice was sent to the claimant. If direct notice was not sent but notice was published, the draft sets the claim deadline as 30 days after final publication of notice. The draft will

need further work in one respect. If notice is published on an official internet site, there may be no "final publication." The options to be considered include 30 days after the thirtieth consecutive day of internet publication, or perhaps 60 days after the first of 30 consecutive days of internet publication.

The (5)(b) provision sets the time to answer or to file a motion under Rule 12 within 20 days after filing the claim. As noted with Rule 4(b)(ii)(C), this provision modifies to some extent the provisions of 18 U.S.C. § 983(a)(4)(B). The government has urged that the time to file an answer should not be suspended by filing a Rule 12 motion, arguing that it needs information from the answer to help frame any motion to strike the claim for lack of standing. But under (5)(a)(i)(B) the claim itself must state the claimant's interest in the property, and the Rule 12 motion and litigation of the motion should reveal any additional information needed. This prospect is advanced by the special interrogatories provided in subdivision (6).

Rule G(6)

Subdivision (6) reflects, but narrows, the special interrogatory provisions of Supplemental Rule C(6)(c). The plaintiff in an admiralty action may serve interrogatories with the complaint; answers are due with the answer. Such extensive interrogatories are not needed in forfeiture proceedings; subdivision (6) is a clean illustration of the circumstances that distinguish the needs of admiralty practice from the needs of forfeiture practice. The special interrogatories authorized by (6) are limited to the claimant's identity and relationship to the property. The purpose is to facilitate early framing of the question whether the claimant has claim standing. The special interrogatories are described as "under Rule 33" to ensure that they count in applying the presumptive numerical limits of Rule 33. It has been protested that the time allowed by the draft to serve these interrogatories — up to 20 days after a claimant's motion to dismiss — is too long. So too it is protested that the government does not need the allowed 20 days after the interrogatories are answered to respond to the motion to dismiss. But these times seem reasonable in relation to the ordinary pace of litigation and the competing demands that often face United States Attorneys.

Rule G(7)

Subdivision (7) is drawn from, but also departs from, provisions for preserving and disposing of property in Supplemental Rule E(9) and (10).

Subdivision (7)(a) addresses preservation of property. As presented, it spoke to property not in the government's actual possession and also to property subject to precomplaint restraint. Discussion began by observing that the examples in the Committee Note included lis pendens as an example of precomplaint restraint; it was observed that a lis pendens notice is not filed until the complaint is filed, and asked why it should be included. After agreeing that lis pendens notices should not be used as examples, discussion turned to the broader question whether there is any need to address property subject to precomplaint restraint. It was agreed that there is no need; these words will be deleted.

Paragraph (b) addresses sale of property. One of the grounds for sale listed in subparagraph (i)(A) is "diminution in value." The government is concerned that it be able to realize maximum value for property that may depreciate while the forfeiture proceeding remains pending. The rule does not require sale, but recognizes discretion — for example, the court can refuse to order sale, despite declining value, if the claimant can show an emotional attachment to a 1994 automobile. There must be good cause to order sale for diminishing value, as implied by (i)(D). A motion was made to delete "diminution in value." A claimant may have strong interests in market timing — when is the best time to sell shares of stock that fluctuate in value? — or emotional and family

attachments to a home. The motion passed by vote of 8 for, 4 against. The Committee Note will be amended to state that diminution in value may establish "other good cause" for sale.

Paragraph (b)(i)(C) provides for sale of property subject to a mortgage or taxes on which the owner is in default. This provision has proved difficult; the difficulties are reflected in the draft Committee Note. It was suggested that the Note would be improved by deleting the sentence stating: "In any event it is not always fair to require a claimant to continue payment commitments made in the expectation of ongoing use of the property." This sentence seems gratuitous advice. Beyond that, it was agreed that the rule provision should remain. There are circumstances in which sale seems appropriate to protect a mortgagee or tax authorities, or to facilitate disposition of property subject to frivolous claims.

Rule G(8)

Subdivision (8) governs motions.

Paragraph (a) deals with a motion to suppress use of the property as evidence. It says that "a party with standing to contest the lawfulness of the seizure under the Fourth Amendment may move to suppress use of the property as evidence." The reference to standing is meant to avoid confusion between standing to make a claim in the forfeiture proceeding and the separate concept of standing to contest admissibility. The government also is concerned that if the rule does not refer to the Fourth Amendment, arguments will be made that the rule creates an exclusionary rule broader than the Fourth Amendment; an example might be an argument that the property must be suppressed as evidence because the warrant was not served as promptly as Rule G(3) requires. But it was asked whether the rule can and should deny standing to make a Fifth Amendment suppression argument, or an argument based on a statutory violation that requires suppression. Although the government recognizes that Fifth Amendment violations and some statutory violations have been held to require suppression, it believes that these theories have not yet been recognized in forfeiture proceedings. But it was responded that the rule should not presume to exclude these grounds for suppression. It was agreed that "under the Fourth Amendment" should be deleted, so that a motion to suppress can be made by "a party with standing to contest the lawfulness of the seizure." The Committee Note will say that the rule does not create a basis for standing that does not otherwise exist.

Paragraph (b) deals with a motion to dismiss the complaint. Subparagraph (ii) states that a complaint may not be dismissed on the ground that the government did not have adequate evidence for forfeiture when the complaint was filed. Earlier drafts tracked the language of 18 U.S.C. § 983(a)(3)(D): "No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." The government views this subparagraph as an essential part of an interwoven compromise set of provisions. There is a problem in the categories of forfeiture proceedings excluded from § 983 by § 983(i)(2) — such matters as "legacy customs cases," IRS forfeitures, the International Emergency Economic Powers Act, and a few others. The Ninth Circuit, and one or two others, have adopted a rule that in these actions exempted from § 983, "pre-CAFRA law" applies. The government must have probable cause when the complaint is filed; if not, the action must be dismissed even though the government can establish probable cause at the time of dismissal. The possible collision between Rule G(8)(b)(ii) and this approach in some courts to CAFRA-exempt cases might be avoided by prefacing (ii): "In an action governed by 18 U.S.C. § 983(a)(3)(D), a complaint may not be dismissed * * *."

It was asked whether Civil Rule 11 is violated if the government initiates a civil forfeiture provision without probable cause. The answer is reflected in G(2)(f), part of this integrated package.

(2)(f) requires that the complaint state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. The dispute among the circuits for pre-CAFRA cases was resolved by § 983(a)(3)(D). The statutory concept is carried forward in the rule.

The NACDL observer stated that the Third and Eighth Circuits have adopted the Ninth Circuit view for non-CAFRA cases. The Third Circuit has adhered to this view in a post-2000 decision. Other courts go the other way or have identified the question without answering it. 19 U.S.C. § 1615 and the Fourth Amendment require the Ninth Circuit view — there must be probable cause at the time of seizure, and so there also must be probable cause at the time of filing a forfeiture action. 18 U.S.C. § 983(c)(2) parallels § 983(a)(3)(D) — it is true that the government does not have to have sufficient evidence to establish forfeitability at the time of filing, but it must have probable cause.

The government views this as a fundamental point. CAFRA resolves the argument in the government's favor, not in favor of claimants. If the complaint pleads facts as required by Rule G(2)(f) there is no need to establish probable cause. "A complaint does not seize the res. G(3) requires that the government show probable cause for a warrant to seize the res."

It was observed that this debate raises issues not familiar in the civil procedure arena. We are speaking of the sufficiency of the complaint, and the argument seems to be based on a motion to suppress evidence packaged as a motion to dismiss. The legislative history is said to refer to summary judgment, reflecting a concern about the use of summary-judgment motions to contest probable cause at the time of filing.

It was asked what harm could flow from a rule that simply mimics the statute? But, for that matter, what use does such a rule serve? The government believes that even a rule that simply tracks the language of the statute and that applies only to proceedings independently governed by the statute will do some good.

The Committee approved a motion to revise (b)(ii) to incorporate the exact language of § 983(a)(3)(D).

A second motion was made to delete the final sentence of (b)(ii): "The adequacy of the complaint is governed by the requirements of subdivision (2)." The government opposed the motion, stating that this sentence is necessary to ensure that subdivision (2) has its intended force. A Committee member agreed: "this is a truism, but it may as well remain." The opposite view was expressed — nothing in (8)(b)(ii) changes subdivision (2), so we do not need the final sentence. The only effect it might have is to support a government argument that subdivision (2) shows there is no need to establish probable cause at the time of filing the complaint. This argument renewed the discussion of 19 U.S.C. § 1615 and the pre-CAFRA probable cause debates. That debate can continue in cases not governed by § 983(a)(3)(D), but Rule 8(b)(ii) should not leave the door open for argument that the debate is affected by the rule. In almost all cases, a complaint that satisfies G(2)(f) can be drafted only if there is probable cause. The motion to strike the last sentence failed, 5 yes and 7 no. the Committee Note will say that the Rule takes no position on any question outside § 983(a)(3)(D).

With style changes, Rule G(8)(b)(ii) will read:

> **(ii)** In an action governed by 18 U.S.C. § 983(a)(3)(D), the complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the

property. The sufficiency of the complaint is governed by subdivision (2).

Paragraph (d) addresses petitions to release property pending trial. Earlier drafts sought to defeat any resort to Criminal Rule 41(g) to accomplish release outside Rule G, and to defeat any petition for release in an action exempted from CAFRA by § 983(i). Research undertaken for the Subcommittee indicated that there may be some room to rely on Rule 41(g) in special circumstances, and that in some circumstances there may be room for an argument that due process requires a post-deprivation hearing. The Subcommittee determined that it would be inappropriate to attempt to resolve by rule the issues that remain open in these areas. A later draft that sought to avoid taking any position was challenged, however, on the ground that a position was implied in the attempt to take no position. The Subcommittee concluded that these provisions, once presented as subparagraphs (iii) and (iv), should be deleted.

A motion was approved to recommend publication of Rule G and conforming changes in Supplemental Rules A, C, and E, subject to Subcommittee resolution of drafting issues identified in footnotes presented with the agenda materials.

Style Subcommittee A

Judge Russell and members of Style Subcommittee A reported on Style Rules 38 through 53, minus Rule 45. Rule 45 was styled in conjunction with the discovery rules. Discussion was framed by Style 487, including the discussion footnotes.

Rule 38. The revisions shown in text and approved in notes 1 through 3 were approved.

A possible change in subdivision (d) was discussed but not adopted. The change would have revised the style draft as follows: "A party waives a jury trial unless its demand is properly served and filed. A proper demand ~~that complies with this rule~~ may be withdrawn only if the parties consent." Although "properly demanded" is used in Style Rule 39(b), concern was expressed that in Rule 38(d) "proper" might implicate the determination whether there is a right to jury trial.

Rule 39. The Style Subcommittee accepted the suggestion that Rule 39(b) be written: "Issues on which a jury trial is not properly demanded ~~under Rule 38~~ are to be tried * * *."

Rule 40. note 1 asks whether the Style Rule should address notice requirements. It was decided to leave the Style text as it is, retaining note 1 to point out the issues for the Standing Committee. The Style-Substance Track will include a proposal to revise Rule 40 in ways that will moot this issue.

Rule 41. The Committee agreed that it is appropriate to add references to Rules 23.1(c) and 23.2 to Style Rule 41(a)(1)(A) for the reasons expressed in the Committee Note.

Words were removed from 41(a)(1)(A)(i) as an unnecessary intensifier: "a notice of dismissal ~~at any time~~ before the adverse party serves * * *."

The change from "instance" to "request" identified at note 2 was approved.

The second sentence of 41(a)(2) was changed to read: "If a defendant has pleaded ~~served~~ a counterclaim before being served with the plaintiff's motion to dismiss, the action ~~must not~~ may be dismissed ~~against~~ over the defendant's objection ~~unless~~ only if the counterclaim can remain pending for independent adjudication."

The change recommended in note 4 was adopted: "may move to dismiss the ~~an~~ action or any claim against it."

A suggestion was made to divide 41(a)(2) into subparagraphs, in a fashion similar to 41(a)(1). Professor Kimble responded that one-sentence divisions generally are not favored. There has been an unfortunate tendency in recent rules to divide too far. The question is purely a matter of style, to be resolved by the Style Subcommittee.

It was asked whether the final words of 41(b) could be changed from "operates as" to "is" an adjudication on the merits. The change was rejected. The effect of the reference to an adjudication on the merits is confusing and confused in the decisions. For example, the rule says that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits. But it is well established that a dismissal for want of jurisdiction establishes issue preclusion on the jurisdiction question that was decided. "Operates as" at least has the virtue of suggesting that something may have the effect of an adjudication on the merits even when it is not.

It was agreed that the text at note 5 should remain as presented — "may stay the proceedings until the plaintiff has complied."

Rule 42. No issues arose.

Rule 43. No issues arose.

Rule 44. The change back from "authenticates" in earlier style drafts to "evidences," as explained in note 1, was approved. "Proved" in 44(a)(2)(C)(ii) will be changed to "evidenced" as suggested in note 4: "allow the record to be ~~proved~~ evidenced by * * *."

"Otherwise" will remain in 44(a)(1) and (2) as flagged by notes 2 and 3.

Brief discussion determined once again that the cross-reference at the end of 44(b) is properly to Style 44(a)(2)(C)(ii). The present rule allows admission of a written statement that there is no record or entry in a foreign record if the statement complies with the requirements for "a summary." The requirements for a summary are described in Style (a)(2)(C)(ii).

Rule 44.1. The Style draft provides for notice of an issue of foreign law "by a pleading or other written notice." It was suggested that "notice * * * by notice" is awkward. It was agreed to substitute "writing": "by a pleading or other ~~written notice~~ writing."

Rule 46. It was noted that the choice between "a party who" and "a party that" is a global issue.

Rule 47. Present Rule 47 provides that the parties or their attorneys may supplement the court's examination of prospective jurors "by such further inquiry as [the court] deems proper." Style 47(a) refers to "additional questions." This expression may imply that the court has to review and approve specific questions. It was urged that "further inquiry" should be incorporated into the style draft. One likely resolution: "must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper."

Rule 48. No issues arose.

Rule 49. It was agreed to delete "several" from Style (a)(1)(B): "submitting written forms of the ~~several~~ special findings * * *."

Present Rule 49(a) calls for instructions necessary "to enable the jury to make its findings." Style 49(a)(2) directs the court to "instruct the jury so it can make its findings." Committee members agreed that "enable the jury" has a different sense. The Committee made a "strong recommendation" that "to enable" be restored. Whatever choice is made, the same term should be used in Style 49(b)(1): "must instruct the jury ~~as needed for it~~ to enable it to render a general verdict * * *."

Deletion of "such" from (a)(3) as recommended at note 3 was approved.

Deletion of "appropriate" from (b)(1) as recommended at note 1, p. 19, was approved.

Style 49(b)(3)(A) tracks present 49(b) in addressing the situation in which answers to interrogatories are consistent among themselves but one or more is inconsistent with the general verdict. Present 49(b) says the court may enter judgment "in accordance with" the answers. Style 49(b)(3)(A) says the court may enter judgment "according to the answers." It was asked whether this should be judgment "on the answers," the expression used in Style (b)(2) for entering judgment "on the verdict and answers" when they are consistent. "According to the answers" was defended on the ground that the interrogatories may not be complete — Rule 49(b) does not require that interrogatories address every issue necessary to decision. No change will be made.

Rule 50. It was agreed to restore "during," so Style 50(a) will begin: "If a party has been fully heard on an issue during a jury trial * * *."

The Committee approved addition to Rule 50(d) of the statement that the appellate court may direct entry of judgment on reversing denial of judgment as a matter of law. This addition fits within the limits of the Style Project because this authority has been recognized by the Supreme Court.

Rule 51. Present and Style Rule 51(b)(3) say that the court "may instruct the jury at any time after the trial begins and before the jury is discharged." Loren Kieve suggested that "after the trial begins and" be deleted. Discussion of this suggestion pointed out that trial begins when the jury is sworn, or so it may seem. It is clear in criminal prosecutions that jeopardy attaches when the jury is sworn. Perhaps it is not so clear whether for some purposes a civil trial begins before a jury is sworn. The purpose of adding this language to the completely revised Rule 51, which took effect only last December 1, was to encourage trial judges to consider initial and interim instructions in complex cases. "Pre-instructions" can be important. The Committee decided that this question is a matter of style, not substance; an advisory motion to delete "after the trial begins and" failed, 5 yes and 6 no.

Style 51(a)(1) refers only to "jury instructions," rather than instructions "on the law" as in present Rule 51. Deletion of "on the law" was defended with the observation that jury instructions cover many matters other than the substantive law that governs the merits of the decision. These matters still are matters of "law," but perhaps it is better to delete "on the law" as Style Rule 51 does. The Style Subcommittee concluded that this deletion would not create any confusion as to the judge's authority to comment on the evidence. Although treatises often discuss comments on the evidence in conjunction with Rule 51, that is a matter of organizational convenience reflecting the fact that neither the Civil Rules nor the Evidence Rules refer to this common-law tradition.

Style 51(c)(2)(B) says that an objection is timely if "a party, after not being informed of an instruction or action on a request * * * objects promptly * * *." It was suggested that this is awkward. It would be better to say "A party that was not informed * * * objects promptly * * *." Although this suggestion was seconded, the Committee concluded that the issue is one of style.

Style Rule 51(d)(2) says the court may consider a plain error "regardless of whether the error has been preserved as required." The Committee agreed that "regardless of whether" changes the substance of present Rule 51(d)(2). Plain-error review is reserved for cases in which the error has not been preserved as required. If the error has been preserved as required, the limits of plain-error review do not apply. Rule 51(d)(2) will be restored to the present form: "A court may consider a plain error in the instructions affecting substantial rights ~~regardless of whether the error has~~ that has not been preserved as required by (d)(1)." The Style Subcommittee may choose to revise this to "A

court may consider a plain error in the instructions that has not been preserved as required by (d)(1) if the error affects substantial rights."

Rule 52. Style Rule 52(a)(4) presents a global style question. Present Rule 52(a) says that a master's findings are "considered as the findings of the court" to the extent that the court adopts them. Style 52(a)(4) says they are "considered the court's findings." The choice between "deemed" and "considered" may turn on the extent of fiction involved. "Deemed" would be used when something is a pure fiction. "Considered" would be used when there is some element of reality about treating one thing as some other thing that it is not. Under new Rule 53(g), a master's findings are reviewed de novo unless the court approves an agreement among the parties to review only for clear error or to accept the findings as final. Thus a master's findings may in fact be superseded by court findings; a master's findings adopted on de novo review are in fact the court's findings. Review for clear error adopts the findings as if the court's findings, so they may be considered the court's findings even though they are not. Adoption without any review still could be found to embrace the findings in some sense. All of this is for resolution according to the global convention ultimately adopted.

Style 52(a)(6) carries forward the provision that a judge's findings are reviewed for clear error "whether based on oral or documentary evidence." The Committee recalled that this provision was deliberately added to emphasize that the clear-error rule applies, albeit in different fashion, even when the appellate court has before it the very same paper basis for decision that the trial court relied upon. But a trial-court decision may be based on evidence that is neither oral nor documentary. There may be a view of premises, and often tangible things are considered. The Committee concluded that the clear-error rule applies now to such decisions, so that the Style Project can change Rule 52(a)(6) to read: "Findings of fact, whether based on oral or ~~documentary~~ other evidence, must not be set aside unless clearly erroneous * * *."

As a matter for future reference, not present consideration in the Style Project, it was asked whether Rule 52(a), as carried forward in 52(a)(3), creates an undesirable implication that it may be appropriate to make findings of fact in deciding a motion for summary judgment. This question may fit in with an eventual reconsideration of Rule 56 — one perennial suggestion is that Rule 56 should require a statement of the facts that are found beyond genuine issue and of the reasons why they warrant summary judgment.

The Committee Note points out several elements of the Style changes. Style 52(a)(3) expands the statement that findings are not necessary in deciding motions to reflect the fact that rules other than Rule 52(c) require findings on motions. Style 52(a)(5) makes explicit the conclusion that a party may object to findings on a decision to grant or refuse an interlocutory injunction even though the party did not request findings, or did not object to the findings or take similar measures. Finally, the former reference in Rule 52(c) to judgment "as a matter of law" has been deleted to avoid any confusion with the standards that govern judgment as a matter of law in a jury trial. A Rule 52(c) judgment on partial findings is the de novo factfinding responsibility of the trial judge. The Committee approved these statements in the Note.

Rule 53. The changes flagged by note 2 on page 29 and note 1 on page 31 were approved. The change from "stipulate" in present 51(g)(3) to "agree" in Style 51(g)(3) involves a global issue to be resolved globally.

Style Substance. Style Subcommittee A reported on reactions to some of the Style-Substance proposals that involve rules within Subcommittee A's purview. The proposal to delete present and Style Rule 4(k)(1)(C) was approved, subject to reconsideration if Professor Rowe's research should

show any reason to reconsider. The reference to a "United States" statute in the Committee Note will be changed to "federal statute."

The proposal to move beyond telephones alone in Rule 16(c)(1) was approved: "the court may require that a party or its representative be present or reasonably available by ~~telephone~~ other means to consider possible settlement."

The relationship between Rule 36(b) and Rule 16 has been uncertainly expressed in both the present rule and the Style rule. It is proper to make this change: "~~Subject to Rule 16(d) and (e), t~~The court may permit withdrawal or amendment of an admission that has not been incorporated in a pretrial order if ~~it~~ doing so would promote the presentation of the merits of the action and if * * *."

Discussion of Style Rule 40 showed the reasons why it is desirable to revise the first sentence to read: "Each court must provide by rule for scheduling trials ~~without request or on a party's request after notice to the other parties~~. * * *"

Style Subcommittee B

Judge Kelly presented the report for Style Subcommittee B for Rules 54 through 63, including parallel recommendations on the Style-Substance Track.

Rule 54. The Committee approved the change in Style Rule 54(d)(2)(D) flagged by note 1: "the court may refer issues concerning ~~relating to~~ the value of services * * *."

Professor Marcus was assigned to research the relationship between Rule 54(d)(2)(C) and new Rule 23(h). New Rule 23(h) (1) provides that a motion for an award of attorney fees in an action certified as a class action must be made by motion under Rule 54(d)(2), "subject to the provisions of this subdivision." Rule 23(h)(1) has timing provisions different from Rule 54(d)(2), reflecting the different circumstances of class actions. Professor Marcus's research concluded that there is an inconsistency between present Rule 54(d)(2)(C) and present Rule 23(h)(1) that was overlooked when Rule 23 was revised. The new provisions of Rule 23(h)(1) prevail, making it proper to fix the dissonance in the Style Project by deleting the reference to class members from Rule 54(d)(2)(C).

Professor Marcus also pointed up another conflict between present Rule 54(d)(2)(C) and Rule 23(h). Rule 54(d)(2)(C) allows "a party" to make adversary submissions on an attorney-fee motion. Rule 23(h)(2) allows only a class member or a party from whom payment is sought to object to the motion. This provision was deliberately adopted to bar objections by other parties — a nonsettling defendant, for example, would not be allowed to object to an award of attorney fees against a settling defendant. Here too, the newer Rule 23(h)(2) governs. This consequence of adopting Rule 23(h)(2) should be reflected in the Style Project. Both changes can be reflected in Style 54(d)(2)(C): "Subject to Rule 23(h), ~~O~~on request of a party ~~or class member~~, the court must give an opportunity for adversary submissions on the motion * * *." The Committee Note will state that "The adoption in 2003 of Rule 23(h) limits the application of Rule 54(d)(2)(C) to class actions. This effect is reflected by adding the reference to Rule 23(h)."

The Committee approved the Committee Note explanation of the Rule 54(b) change that deletes the requirement that there be "an express direction for the entry of judgment." The continuing requirement that there be an express determination that there is no just reason for delay, coupled with actual entry of judgment, satisfies the rule's purposes.

Rule 55. Present Rule 55(a) provides that the clerk shall enter a default when a party "has failed to plead or otherwise defend as provided by these rules." Style Rule 55(a) deletes "as these rules

provide." The Committee approved the deletion as proper within the Style Project. The cases show that the clerk may not enter default when a party has done something that counts as defending, even though it is not in a manner provided by the rules.

Rule 56. Discussion of Style Rule 56(c) overlapped a suggestion made for the Style-Substance Track. Present Rule 56(c) directs that a summary-judgment motion "be served at least 10 days before the time fixed for the hearing." Style Rule 56(c) changes this to "at least 10 days before the hearing day." The Style-Substance Track suggestion would change this to "at least 10 days before it is submitted for decision."

Support was expressed for referring to the time the motion is submitted for decision. That addresses the functional need. Summary-judgment motions often are decided without a formal "hearing." It was pointed out that the Fifth Circuit, responding to Texas state practice that required an actual hearing, has ruled that the motion can be heard at any time after 10 days.

A different approach was suggested, looking to the functional problem by allowing 10 days to respond to the motion.

Support also was expressed for "at least 10 days before the hearing."

But it was pointed out that most districts have local rules establishing time limits for summary-judgment proceedings. The Style Project should not do anything that would interfere with those local rules. If anything is changed, the rule also should be changed to expressly authorize the local rules that now exist.

It was further suggested that the time provisions in present Rule 56 "are a mess. They need fixing far beyond anything that can be accomplished in the Style Project." The subject will prove controversial.

The present rule found support — why not continue to say "the time fixed for the hearing"? It was protested that ordinarily no time is fixed for the hearing. Another Committee member observed, however, that this corresponds to the "return date," a common aspect of practice in some courts. And an observer responded that this language is good because it supports the practice of providing an actual hearing, not a mere submission for decision. "'Heard' means something. Why change to submission?"

Concern was expressed about leaving the rule as it is. The rule is "unconnected to the real world." Submission for decision seems proper, or else a direct focus on the time to submit opposing affidavits. That might be expressed by adding "during which time the opposing party may serve opposing affidavits."

It was asked whether the court can shorten the 10-day period. The answer appears to be that although interim relief can be granted to meet emergent circumstances, the time for considering summary judgment cannot be accelerated absent agreement or waiver.

It was concluded that Style Rule 56(c) should carry forward the present rule, with a small change of expression: "at least 10 days before the day ~~fixed~~ set for the hearing." This topic will be removed from the Style-Substance Track.

In Style Rule 56(d)(2), it was agreed that the expression should be "interlocutory summary judgment may be entered on ~~the issue of~~ liability alone * * *."

In Style Rule 56(e)(1), the Style Subcommittee had decided to retain "affirmatively" — affidavits must "affirmatively show that the affiant is competent to testify * * *." But after

discussion it was concluded with the Style Subcommittee's concurrence that "affirmatively" can be deleted as unnecessary. It suffices to say that the affidavit must show that the affiant is competent to testify.

Another change at the end of Style Rule 56(e)(1) was accepted: an affidavit may be supplemented or opposed by "~~further~~ additional affidavits."

"[P]romptly" was deleted from Style Rule 56(g): the court must ~~promptly~~ order the submitting party to pay * * *."

The Committee approved the Committee Note explanation of the Style decision to change "shall" in present Rules 56(c), (d), and (e) to "should" in the places that say the court "shall" grant summary judgment. "Must" would be inaccurate in light of the well-established doctrine that there is discretion to deny summary judgment even though the summary-judgment papers show there is no genuine issue of material fact. The Committee also approved the Note observations that courts should seldom exercise this discretion.

Rule 57: The Committee approved this change in the Style draft: "A party may demand a jury trial ~~may be demanded~~ under Rules 38 and 39."

Rule 58: Present Rule 58(b) separates paragraphs (1) and (2) with "and." The Committee agreed with the Style Subcommittee that this should be changed to "or." These two paragraphs set out alternatives.

Rule 59: No issues arose.

Rule 60: A global issue was noted for this change in Style Rule 60(b)(1): the court may relieve a party or ~~a party's~~ its legal representative * * *." This is part of the choice whether to refer to a party as "who" or "it, that."

Present Rule 60(b) states that all Rule 60(b) motions "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment * * *." It is clearly settled that the "reasonable time" requirement may require that a motion be made in less than one year. The one-year limit is a maximum that closes off any opportunity to argue that it is reasonable to move after more than one year, but does not ensure that any time up to one year is reasonable. Style Rule 60(c)(1) says "A motion under (b) must be made within a reasonable time — and, for reasons (1), (2), and (3) within a year — after entry of the judgment * * *." Doubt was expressed whether this version clearly communicates the present meaning. No change was made, but room was left for the Style Subcommittee to change to "for reasons (1), (2), and (3) ~~within~~ no more than a year * * *."

The final sentence of present Rule 60(b) begins: "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished * * *." Style Rule 60(d) deletes all of this sentence. The draft Committee Note refers to the phenomenon that although Rule 60(b) purports to abolish these writs, they have not disappeared completely. Occasionally a federal court relies on federal practice principles to address particularly distressing circumstances through one of these writs. See Ejelonu v. INS, 355 F.3d 539, 544-548 (6th Cir. 2004). And lawyers familiar with state-court uses of these writs may attempt to carry the state practice over to federal court. Pro se litigants, moreover, frequently pick up on references to these writs and apply for them. The suggestion that the abolition should be restored was met by the protest that it would be a shame to continue forever with this backward-looking fixation on practices long buried. But it was responded that it is in fact forward-looking to anticipate continued resort to these writs and to provide a clear abolition in the rule rather than rely on a Committee Note that will be

overlooked or deliberately ignored. A motion to restore the abolition was adopted, 10 yes and 1 no. The Style Subcommittee will decide whether the abolition should be placed in Style Rule 60(d) or should become an independent subdivision (e).

Rule 61. No issues arose.

Rule 62. Present Rule 62(c) says that the court may suspend, modify, restore, or grant an injunction during the pendency of an appeal "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Style Rule 62(c) renders this as "on terms for bond or other terms that ~~the court considers proper to~~ secure the adverse party's rights." This rendition was questioned on the ground that it implies that the terms must in fact secure the adverse party's rights. It is clearly settled that injunction bonds need not provide adequate security. Indeed, it is settled that a court may conclude that no bond should be required although there is a significant risk of substantial injury. The seeming style change may in fact change present meaning. It was responded that although present practice is in fact as described, present practice is a misreading of the present rule's language. The rejoinder was that the Style Project then should carry forward with language that supports the present misreading. The discussion concluded without making any recommendation.

Style Rule 62(c)(2) has been progressively brought closer and closer to the language of the present rule. The current proposal is: "(2) by the assent of all its judges, as evidenced by their signatures." The difficulty has been that the present rule seems to say that all three members of a three-judge court must agree before the court can act on issues relating to an injunction pending appeal. There are real questions whether that is a wise rule, and whether in any event an Enabling Act rule can purport to circumscribe the authority of a two-judge majority of a three-judge court. The Committee agreed to accept the proposed language.

Rule 63. After substantial discussion, Subcommittee B agreed to the Style Subcommittee's proposal to change the description of a judge's unavailability to proceed with a case. Present Rule 63 addresses a judge who "is unable to proceed." Style Rule 63 refers to a judge who "cannot" proceed. But the caption of Style Rule 63 continues to refer to a judge's "inability" to proceed. The dissonance between the change in the rule text and the failure to change the caption was challenged. But the Style draft was defended on the ground that continued use of "inability" in the caption shows that "inability to proceed" means the same thing as "cannot proceed." The question why the language of the rule had been changed was raised. The Committee recommended to the Style Subcommittee that the language of the rule be changed back to conform to the present rule: "If the judge who commenced a hearing ~~cannot~~ is unable to proceed, * * *."

Style-Substance. In addition to Rule 56(c), Style Subcommittee B addressed the proposal to amend Rule 24(a)(2) on the Style-Substance track. This proposal reflects a widespread belief that the threshold for intervening under Rule 24(a)(2) should be the same as the criterion for joining a party under Rule 19(a)(1)(B). Rule 19 describes a nonparty who claims an interest relating to the subject of the action. Rule 24(a)(2) describes a nonparty who claims an interest relating to "the property or transaction that is" the subject of the action. Deleting these words from Rule 24(a)(2) would make it conform to Rule 19. But the cases do in fact rely on this language in present Rule 24(a)(2). Deleting it seems a subject too serious to be added to the list of "clearly right" changes suitable for the Style-Substance track. The Committee agreed to remove this proposal from the Style-Substance Track.

Style Subcommittee B had no concerns about any of the other Style-Substance Track proposals for rules that have been its responsibility in the Style Process.

Rule 50(b): Foundation for Post-Verdict Motion

From the beginning in 1938, Rule 50 has permitted a post-verdict motion for judgment notwithstanding the verdict only if the moving party had moved for a directed verdict at the close of all the evidence. This requirement was carried forward when the terminology was changed to "judgment as a matter of law." The cases continue to agree that a post-verdict motion generally cannot be supported by a motion made during trial but before the close of all the evidence. At the same time, the substantial number of reported appellate opinions that continue to wrestle with this requirement show that lawyers all too often forget to renew earlier trial motions at the close of all the evidence. Some of the opinions permit modest relaxations of the requirement, inviting still further appeals attempting to resurrect failures to comply punctiliously with the requirement.

The Rules 15 and 50 Subcommittee proposed to amend Rule 50(b) to allow a post-verdict motion for judgment as a matter of law to be supported by any motion for judgment as a matter of law made during trial under Rule 50(a). This proposal rests on the conclusion that a motion made during trial serves the functional needs that have been urged to support the close-of-all-the-evidence requirement, and at the same time avoids unnecessary procedural forfeitures. A motion made during trial alerts the opposing party to the claimed inadequacy of the evidence and affords a clear opportunity to supplement the evidence. The trial motion also alerts the court to the opportunity to simplify the proceedings by granting judgment as a matter of law on all or part of the case before submission to the jury. Because these important functional needs are satisfied, the Seventh Amendment also is satisfied.

As a matter of style, it was explained that it seems better to refer expressly to a motion for judgment as a matter of law made "under subdivision (a)." Both present Rule 56 and Style Rule 56 refer to granting summary judgment when the moving party is entitled to "judgment as a matter of law." The Subcommittee considered and rejected the possibility that a post-verdict motion might be supported by arguments made to support a pretrial motion for summary judgment. A post-verdict motion under Rule 50(b) should be clearly limited to grounds urged at trial.

The Committee recommended this amendment for publication. There was not time to discuss the Committee Note, which may be shortened before the rule is presented for publication.

The Subcommittee also presented without recommendation another proposal to amend Rule 50(b). Original Rule 50(b) set the time limit for seeking a judgment n.o.v. as 10 days after the jury was discharged if a verdict was not returned, but was later amended to set the time to renew a motion for directed verdict as 10 days after the entry of judgment. This change conformed Rule 50(b) time limits to the time limits set in Rules 52 and 59. But it seems to allow an extraordinarily long time to move if the jury fails to return a verdict. It would be foolish to permit a motion after a second trial to rely on the inadequacy of the record at the first trial. After a second trial the sufficiency of the evidence should be measured by the record at the second trial. For that matter, it would be disruptive to permit renewal of a motion made during the first trial on the eve of the second trial. When the jury has failed to agree, it seems sensible to restore the time limit to 10 days after the jury is discharged. Any motion after that would be a motion for summary judgment before the second trial necessitated by the first jury's failure to agree. The moving party could rely on the first trial record to support the Rule 56 moving burden; if the trial record shows that the opposing party does not have sufficient evidence, summary judgment will be granted unless the moving party is able to supplement the trial record with sufficient evidence to create a jury issue.

This proposal has lingered for several years on the Committee agenda. The Subcommittee could not make time to consider it, but presented it without recommendation in the thought that it is better to consider at one time any likely Rule 50(b) amendments.

One consequence of the lack of Subcommittee deliberation immediately appeared. The draft prepared for Subcommittee consideration expressed the separate time limit as follows: "or if a complete verdict was not returned by filing a motion no later than 10 days after the jury was discharged." Rereading this language, however, suggested a possible problem: when a jury returns a partial verdict, the time limit should apply only to those issues on which the jury has failed to agree. Matters resolved by the verdict should be governed by the general provision geared to entry of judgment. One suggestion was that the rule should read: "or — if the motion addresses a jury issue not decided by the [a?] verdict — no later than 10 days after the jury was discharged." The Subcommittee will consider this language further.

The Committee approved a recommendation to publish this second Rule 50(b) amendment for comment in a form to be resolved by the Subcommittee.

As a matter of style, it was suggested that the final sentence of Rule 50(b) be revised: "Alternatively, the movant may ~~alternatively~~ request a new trial or join a motion for a new trial under Rule 59 * * *." This suggestion was resisted. It seems to describe the new trial motion as an alternative to the renewed motion for judgment as a matter of law. The emphasis instead should be on the new trial as alternative relief — the movant's first request is for judgment as a matter of law, with a new trial as a less desirable alternative.

Rule 15

The Rules 15 and 50 Subcommittee has concluded that the Committee agenda is too fully occupied by more pressing matters to support present consideration of proposals to amend Rule 15. Although some of the proposals seem simple, they raise may difficult issues that cannot be resolved without extensive deliberation. The Committee agreed that the Rule 15 proposals should be carried on the agenda for consideration in the future.

E-Government Act

Judge Fitzwater chairs the Standing Committee E-Government Act Subcommittee. He introduced the questions raised by the E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899, 2913, 44 U.S.C. 101 note. Section 205 requires any document that is filed electronically to be made available online. Paper documents may be converted to electronic form; if converted, they too must be made available online. Section 205(c)(2), however, provides that a document shall not be made available online if it is "not otherwise available to the public, such as documents filed under seal." Section 205(c)(3) requires the Supreme Court to prescribe Enabling Act Rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability * * * of documents filed electronically." Section 205(c)(3)(A)(iv), finally, provides that any Enabling Act rule that provides for redaction of information shall provide that a party who wishes to file an otherwise proper document containing such information may file an unredacted document under seal. The unredacted and sealed document "at the discretion of the court and subject to any applicable rules issued [under the Enabling Act] shall be either in lieu of, or in addition[,sic] to, a redacted copy in the public file."

The Judicial Conference Court Administration and Case Management Committee has worked hard to develop initial responses to the E-Government Act. Their recommendations have been made the basis for the initial recommendations of the E-Government Act Subcommittee. Professor Capra,

Reporter for the Evidence Rules Committee, has been designated lead reporter for this project. He has prepared a template rule to be considered by each of the advisory committees. The Standing Committee hopes that the advisory committees will consider the template both to determine whether the template might be improved in ways that apply to all the sets of rules and also to determine whether special needs dictate departures from the template for a specific set of rules. Professor Schiltz has prepared a refined version of the template, and the materials submitted to the Civil Rules Committee reflect still further variations. The advisory committee reporters will confer with the E-Government Act Subcommittee in conjunction with the June Standing Committee meeting.

One illustration of the ways in which specific concerns may arise under a particular rules set arose in conjunction with this meeting. When Department of Justice lawyers reviewed the agenda materials, they suggested that the template rule makes no sense for civil forfeiture proceedings. Civil forfeiture procedure requires public notice of many things that the government would be required to redact from court filings. It seems clear that significant work will need to be done to study and resolve this concern.

The advisory committees also will have a second responsibility. Each set of rules must be reviewed to determine whether revisions should be made in addition to adoption of a general E-Government Act rule. The materials submitted for this meeting include not only a proposed "Rule 5.2" based on modifications of the general template but also a long list of Civil Rules that might be considered for possible revision.

Discussion began with an observation that the problems considered at a recent meeting of Chief District Judges show that it will be important to move as rapidly as possible toward a new rule.

It also was noted that the rather ambiguous statutory provision for routine filing under seal is a real problem. An amendment has been proposed to Congress, and there are hopes that it will be approved at this session. The prospect that the statute establishes a general right to file under seal is troubling on at least two scores. The practical burden on court clerks will be staggering. And the tradition of public access, sought to be carried forward into an era of electronic filing, could be substantially reduced.

The burdens of complying with even simple redaction requirements may be far greater than appears on casual contemplation. Discovery materials, for example, are to be filed only when used in the proceeding or ordered by the court. But does that mean that at that time they must be redacted to expunge home addresses, the names of minors, all but the last four digits of financial account numbers, and so on? Lawyers already are reacting to these concerns by reframing the questions put at deposition and so on. But care must be taken to ensure that nothing has slipped in execution.

It had been hoped that the several advisory committees would be able to take action on E-Government Act Rules proposals during the fall 2004 meetings. As continued study continues to suggest new problems, however, it appears that it may be necessary to consider these rules both in the fall and again during the spring 2005 meetings. Proposals advanced for publication at the June 2005 Standing Committee meeting will be timely for publication in August 2005, the likely publication date even if proposals were advanced for the January 2005 Standing Committee meeting. Work will continue.

Federal Judicial Center Study: Sealed Settlement Agreements

Tim Reagan presented the final Federal Judicial Center Report on sealed settlement agreements filed in federal courts. The study surveyed 288,846 civil cases in 52 districts. It found 1,272 filed and sealed settlement agreements. In 97% of those cases, the complaint was not sealed,

leaving open public access to information about the subject of the action. Study of the few actions in which both complaint and settlement were sealed suggested that only a very few cases involved matters likely to be of general public interest.

The summary report in the agenda materials is backed up by a lengthy report and study of the individual sealed settlement cases. A survey of local district rules and state statutes also is provided.

The Committee received the Report with thanks and praise. The Subcommittee on Filed, Sealed Settlement Agreements will study the report further and recommend whether rules changes should be made to reflect the information in the report.

Next Meeting

The next Committee Meeting was set for October 28 and 29 in Charleston, South Carolina.

Respectfully submitted,

Edward H. Cooper
Reporter

Sealed Settlement Agreements in Federal District Court

Tim Reagan, Shannon Wheatman, Marie Leary, Natacha Blain, Steve Gensler, George Cort, Dean Miletich[1]
Federal Judicial Center

The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to conduct research on sealed settlement agreements filed in federal district court. Although the practice of *confidential* settlement agreements is common, the question is how often and under what circumstances are such agreements *filed* under seal?

Many civil cases settle before trial and defendants commonly seek confidentiality agreements concerning the terms of settlement. Usually such agreements are not filed. A high proportion of civil cases settle,[2] but a sealed settlement agreement is filed in less than one half of one percent of civil cases. In 97% of these cases, the complaint is not sealed.

The Law of Sealing

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications Inc.*, 435 U.S. 589 (1978) (footnote omitted). "It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* at 598.

Accountability is a principal reason for public access. *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be sub-

[1] We are grateful to our colleagues Pat Lombard, Angelia Levy, David Guth, Donna Pitts-Taylor, Vashty Gobinpersad, and Estelita Huidobro for their assistance with this project. We are grateful to Russell Wheeler, Jim Eaglin, Syl Sobel, Tom Willging, Molly Treadway Johnson, and Ken Withers for advice on this report. We are especially grateful to the clerks of court, other court staff, and archive personnel who provided us with information and helped us acquire access to court files.

[2] An analysis of disposition codes for civil terminations from 1997 through 2001 showed 22% were dismissed as settled and 2% were terminated on consent judgment. Another 10% were voluntary dismissals, and some of these probably were settled. An additional 20% are coded as "other" dismissals.

ject to public scrutiny."); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) ("the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret"); *id.* at 929 ("The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to."); *Union Oil Co. of California v. Leavell*, 220 F.3d 562 (7th Cir. 2000) ("The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

Courts of appeals have determined that the common law presumption of access applies to documents filed with the court, although it does not apply to documents exchanged in discovery, *Federal Trade Commission v. Standard Financial Management Corp.*, 830 F.2d 404, 408 (1st Cir. 1987); *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995), or to settlement agreements not filed, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781-83 (3d Cir. 1994). Also, the presumption of public access is stronger for documents filed in conjunction with substantive action by the court than for documents filed as part of discovery disputes. *Anderson v. Cyrovac Inc.*, 805 F.2d 1, 11 (1st Cir. 1986); *Leucadia Inc. v. Applied Extrusion Technologies Inc.*, 998 F.2d 157, 165 (3d Cir. 1993); *Foltz v. State Farm Mutual Automobile Insurance Co.*, 331 F.3d 1122, 1135-36 (9th Cir. 2003); *Chicago Tribute Co. v. Bridgestone/firestone Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).

Some cases have stated explicitly that if a settlement agreement is filed with the court for the court's approval or interpretation, then denying the public access to the agreement requires special circumstances. *Bank of America National Trust & Savings Association*, 800 F.2d 339, 345 (3d Cir. 1986) ("Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records."); *Herrnreiter v. Chicago Housing Authority*, 281 F.3d 634 (7th Cir. 2002) ("[Defendant's] desire to keep the amount of its payment quiet (perhaps to avoid looking like an easy mark, and thus drawing more suits) is not nearly on a par with national security and trade secret information. Now that the agreement itself has become a subject of litigation, it must be opened to the public just like other information (such as wages paid to an employee, or the price for an architect's services) that becomes the subject of litigation."); *Brown v. Advantage Engineering Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("It is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought

before a court for resolution, it is no longer solely the parties' case, but also the public's case. Absent a showing of extraordinary circumstances . . . , the court file must remain accessible to the public.").

Many appellate opinions have stressed the importance of the court's stating specific reasons for sealing a filed document. *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) ("Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient."); *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 182 (4th Cir. 1988) ("the district court must provide a clear statement, supported by specific findings, of its reasons for sealing any records or documents, as well as its reasons for rejecting measures less drastic than sealing them"); *Hagestad v. Tragesser*, 49 F.3d 1430, 1435 (9th Cir. 1995) ("because the district court failed to articulate any reason in support of its sealing order, meaningful appellate review is impossible").

Only two federal district courts have local rules pertaining specifically to sealed settlement agreements. The District of South Carolina proscribes them, D.S.C. L.R. 5.03(C), and the Eastern District of Michigan limits how long they may remain sealed, E.D. Mich. L.R. 5.4. Forty-nine districts (52%) have local rules pertaining to sealed documents generally. Fourteen districts (15%) have rules covering only administrative mechanics (e.g., how sealed documents are marked),[3] 32 districts (34%) have rules covering how long a document may remain sealed (after which it is returned to the parties, destroyed, or unsealed),[4] and 12 districts (13%) have good cause rules.[5] These rules are compiled in Appendix B.

---

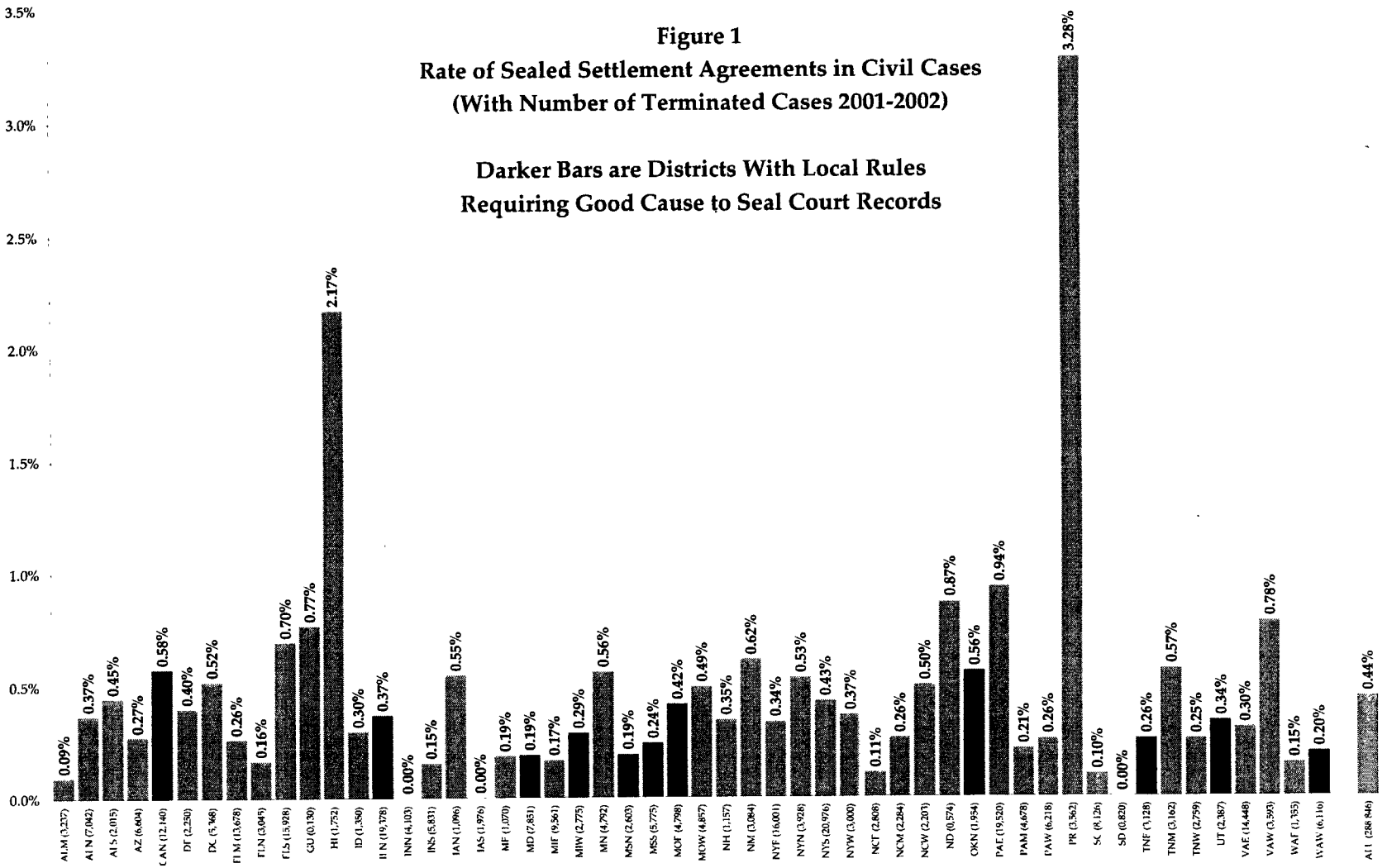
[3] California Central, California Eastern, Colorado, Delaware, District of Columbia, Georgia Southern, Indiana Southern, Montana, New Hampshire, New York Northern, Oklahoma Western, Rhode Island, Vermont, Wisconsin Eastern.

[4] Arizona, California Northern, California Southern, Connecticut, Florida Southern, Idaho, Illinois Northern, Iowa Northern and Southern, Kansas, Maryland, Michigan Eastern, Michigan Western, Minnesota, Mississippi Northern and Southern, Missouri Eastern, New York Eastern, North Carolina Eastern, North Carolina Middle, North Carolina Western, North Dakota, Ohio Northern, Ohio Southern, Oregon, Pennsylvania Middle, Tennessee Eastern, Texas Eastern, Texas Northern, Utah, Virginia Western, Washington Western.

[5] California Northern, Illinois Northern, Maryland, Michigan Western, Mississippi Northern and Southern, Missouri Eastern, New York Western, Oklahoma Northern, Tennessee Eastern, Utah, Washington Western. Note that the good cause rule for the Western District of New York is new (May 1, 2003).

Figure 1
Rate of Sealed Settlement Agreements in Civil Cases
(With Number of Terminated Cases 2001-2002)

Darker Bars are Districts With Local Rules
Requiring Good Cause to Seal Court Records



Findings

We examined 288,846 civil cases that were filed in a sample of 52 districts. We found 1,272 cases with sealed settlement agreements (0.44%). That is one in approximately 227 cases.

The sealed settlement rate for individual districts ranges from considerably less than the national rate to considerably more than that rate. Figure 1 shows sealed settlement rates for individual districts. Three of the districts we studied (6%) had no sealed settlement agreements among cases terminated in 2001 and 2002 – Indiana Northern, Iowa Southern, and South Dakota. Three districts (6%) had sealed settlement rates more than twice the national rate – Pennsylvania Eastern (0.94%), Hawaii (2.2%), and Puerto Rico (3.3%).[6]

We studied all 11 districts whose local rules require good cause to seal a document. The rate of sealed settlement agreements in those districts was 0.37%. The rate of sealed settlement agreements in the other districts was somewhat higher – 0.45% – but the difference was not statistically significant.[7]

Sealed settlement agreements appear in cases of many different types. Table 1 shows nature of suit frequencies. More than half of the cases with sealed settlement agreements are either personal injury cases (30%) or employment cases (26%). Another fifth are either civil rights cases (10%) or contract cases (11%). Intellectual property cases account for 11% of civil cases with sealed settlement agreements, but the rate of sealed settlement agreements in such cases is relatively high (1.54%). Cases identified as Fair Labor Standards Act cases have an even higher rate of sealed settlement agreements (2.58%), almost six times the overall average. Because the court must approve settlement agreements in such cases, they are frequently filed. They often are filed under seal to preserve confidentiality.

Sealed settlement agreements appear to be filed typically to facilitate their enforcement. If they are filed with the court, the same judge who

---

[6] The high rate for Pennsylvania Eastern is due largely to a single multidistrict litigation case in that district; 79% of the cases with sealed settlement agreements that we found in that district were in this multidistrict litigation. The sealed settlement agreement rate in Hawaii is relatively frequent in part because the sealing of the record of successful settlement conferences is relatively high there; approximately two-thirds of the cases we identified as containing sealed settlement agreements in that district were so identified for this reason. The high rate of sealed settlement agreements in Puerto Rico appears to reflect a relatively more common practice of filing and sealing such agreements in that district.

[7] $p = 0.63$.

heard the case can enforce the agreement without a new action being filed, and the court can enforce the agreement with contempt powers. Often the agreement is filed so that the court can approve it. Among cases with sealed settlement agreements, approximately one-quarter (22%) were actions typically requiring court approval of settlement agreements – 13% were cases involving minors or other persons requiring special protection, 7% were actions under the Fair Labor Standards Act, and 6% were class actions.[8]

Table 1. Types of Cases With Sealed Settlement Agreements

Nature of Suit	Number of Cases	Proportion Among Cases With Sealed Settlement Agreements	Sealed Settlement Rate
Personal Injury	378	30%	0.82%
Personal Property	28	2%	0.64%
Real Property	7	1%	0.07%
ERISA	26	2%	0.20%
Fair Labor Standards Act	88	7%	2.58%
Other Employment/Labor	223	18%	0.75%
Other Civil Rights	125	10%	0.55%
RICO	9	1%	1.06%
Securities	11	1%	0.76%
Antitrust	10	1%	0.59%
Trademark	48	4%	1.19%
Patent	62	5%	2.17%
Copyright	29	2%	1.25%
Contract	145	11%	0.33%
Other	83	7%	0.08%
Total	**1,272**	**100%**	**0.44%**

Sometimes the settlement agreement is not filed until one party believes it has been breached, and then it is filed as a sealed exhibit to a mo-

[8] The three individual percentages add up to more than the overall percentage, because some cases had more than one reason for court approval of settlements. A few cases with Fair Labor Standards Act claims had other nature of suit codes.

tion to enforce it. In approximately 11% of the cases with sealed settlement agreements, this was how the agreement came to be filed. In a few additional cases, there was a motion to enforce after the agreement was filed.

Occasionally the settlement agreement is not a sealed document filed with the court but a part of a sealed or partially sealed proceeding or transcript. This is true for 13% of the cases we found with sealed settlement agreements.

In 97% of the cases with sealed settlement agreements the *complaint* is *not sealed.* Almost the only time we encountered a sealed complaint was in cases where the entire record was sealed. (Sometimes the docket sheet was sealed;[9] sometimes although the case file was sealed, the docket sheet was

[9] We encountered 23 cases with sealed docket sheets: *Cahaba Pressure-Treated Forest Products v. OM Group* (AL-N 7:97-cv-01917 filed 07/25/1997) (fraud action dismissed as settled), *Thomasson Lumber Co. v. Cahaba Pressure-Treated Forest Products* (AL-N 7:98-cv-00043 filed 01/08/1998) (contract action dismissed as settled), *Pennsylvania National Mutual Casualty Insurance Co. v. Cahaba Pressure-Treated Forest Products* (AL-N 2:98-cv-01261 filed 05/19/1998) (insurance action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (CA-N 4:00-cv-02945 filed 08/14/2000) (Statutory action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (CA-N 3:01-cv-01156 filed 03/21/2001) (statutory action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (CA-N 3:01-cv-02928 filed 07/27/2001) (contract action dismissed as settled), *Nick Chorak Mowing v. United States* (DC 1:99-cv-00587 filed 03/08/1999) (contract action dismissed as settled), *Engel v. Equifax Inc.* (DC 1:01-cv-00882 filed 04/17/2001) (statutory action dismissed as settled), *United States v. Board of Regents* (FL-N 4:93-cv-40226 filed 06/25/1993) (statutory action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (FL-S 0:01-cv-01845 filed 05/04/2001) (commerce action resolved by consent judgment), *Casimiro v. Allstate* (HI 1:99-cv-00527 filed 07/22/1999) (insurance action dismissed as settled), *Kessler v. American Postal* (MD 8:98-cv-03547 filed 10/21/1998) (statutory action dismissed as settled), *United States v. Frederick Memorial* (MD 1:01-cv-02923 filed 10/02/2001) (statutory action dismissed as settled), *Compaq Computer Corp. v. SGII Inc.* (MI-W 1:02-cv-00028 filed 01/16/2002) (trademark action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MN 0:98-cv-02428 filed 11/10/1998) (fraud action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MN 0:99-cv-00292 filed 02/18/1999) (fraud action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MN 0:02-cv-00369 filed 02/12/2002) (fraud action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MN 0:02-cv-04270 filed 11/07/2002) (contract action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MS-S 1:95-cv-00161 filed 03/23/1995) (statutory action dismissed as settled), *Compass Marine v. Lambert Fenchurch* (MS-S 1:99-cv-00252 filed 04/05/1999) (fraud action dismissed as settled), *Arviso v. Mission Manor Health* (NM 6:02-cv-01072 filed 08/27/2002) (statutory action dismissed as settled), *United States v. Genesee Valley Card* (NY-W 6:97-cv-06502 filed 11/12/1997) (statutory action dismissed as settled), *United States v. 2986 Tallman Road* (NY-W 6:01-cv-06155 filed 03/23/2001) (drug-related seizure of property case resolved by consent judgment).

not.[10]) In one additional case, all documents in the case file were sealed, including the complaint and the settlement conference report, *except* for the agreed judgment, which specified the terms of settlement.[11]

We did not evaluate whether the sealing of documents complied with circuit law and local rules, but we did observe that the public record almost never included specific findings justifying sealing.

Some of the cases with sealed settlement agreements are likely to be of greater public interest than others. Table 2 lists some types of cases that might be of special public interest and states what proportion of sealed settlements in our study are in cases of each type. Approximately two-fifths of the cases have at least one of the features in Table 2 that might make them of special public interest.

Appendix C contains case descriptions showing what the public record reveals about each case. Because the complaints are almost never sealed, the public record almost always identifies the defendants and reveals what the defendants are alleged to have done.

---

[10] We encountered 15 cases with sealed case files but unsealed docket sheets: a product liability action brought by a minor, *Farr v. Newell Rubbermaid Inc.* (AL-N 5:00-cv-00997 filed 04/18/2000); an employment action against the University of Michigan where private medical information was an issue, *Baker v. Bollinger* (MI-E 4:00-cv-40239 filed 06/26/2000); a civil rights action by a minor against a county, *M.K. v. Pinnacle Programs Inc.* (MN 0:98-cv-02440 filed 11/13/1998); a wrongful death action against a city and a railroad, *Schlicht v. Dakota Minnesota & Eastern R.R. Corp.* (MN 0:98-cv-02059 filed 12/28/1999); a job discrimination action brought on behalf of children, *Rowe v. Boys and Girls Club of America* (MN 0:01-cv-202269 filed 12/10/2001); two consolidated foreclosure actions pertaining to gambling boat mortgages, *Credit Suisse First Boston Mortgage Capital LLC v. Doris* (MS-N 4:99-cv-00283 filed 11/22/1999), consolidated with *Credit Suisse First Boston Mortgage Capital Inc. v. Bayou Caddy's Jubilee Casino* (MS-N 4:99-cv-00284 filed 11/22/1999); a qui tam action under the False Claims Act against a hospital, *United States ex rel. Padda v. Jefferson Memorial Hospital* (MO-E 4:00-cv-00177 filed 02/03/2000); a RICO case by one unnamed plaintiff against three unnamed defendants, *Sealed Plaintiff v. Sealed Defendant* (NY-E 9:00-cv-04693 filed 08/11/2000); another product liability case with a minor plaintiff, *Keyes v. Deere & Co.* (PA-E 2:98-cv-00602 filed 02/06/1998); an insurance case involving a workers' compensation claim, *Slater v. Liberty Mutual Insurance Co.* (PA-E 2:98-cv-01711 filed 03/31/1998); a copyright case, *Valitek Inc. v. Hewlett-Packard Co.* (PA-E 2:99-cv-03024 filed 06/15/1999); an insurance case against a church, *Jesus Christ of the Apostolic Faith* (PA-E 2:00-cv-03320 filed 06/29/2000); a patent case, *Graham Packaging Co. v. Mooney* (PA-M 1:00-cv-02027 filed 11/20/2000); and a third product liability case with a minor plaintiff, *Angelo v. General Motors Corp.* (PA-W 2:00-cv-00871 filed 05/04/2000).

[11] This was a civil rights action for failure to prevent disclosure of plaintiff's medical condition, *Doe v. City of Tulsa* (OK-N 4:00-cv-00896 filed 10/18/2000). We counted this as a case with a sealed settlement agreement, because although the agreed judgment was not sealed, other documents containing terms of settlement were sealed.

Table 2. Types of Cases That Might Be Of Special Public Interest

Type of Case	Cases	
Environmental	10	(1%)
Product Liability (includes cases with other Nature of Suit codes)[12]	258	(20%)
Professional Malpractice	40	(3%)
Public Party Defendant	153	(12%)
Very Serious Injury (death or serious permanent disability)	334	(26%)
Sexual Abuse	31	(2%)
Any Reason	**504**	**(40%)**

We had access to important terms of settlement in 18% of the cases with sealed settlement agreements. Occasionally this was because we had access to sealed documents. Sometimes sealed documents became unsealed. Sometimes documents that are not sealed disclose some or all terms of the settlement agreement. Analysis of information available in this way confirms that settlement agreements, sealed or otherwise, generally contain four essential elements: (1) a denial of liability, (2) a release of liability, (3) the amount of settlement, and (4) a requirement of confidentiality. In unfair competition cases, especially cases involving patents, the terms of settlement typically bind the parties to certain actions in addition to or instead of the payment of a settlement amount. In general, however, the only thing kept secret by the sealing of a settlement agreement is the amount of settlement.

Conclusion

Sealed settlement agreements are rare in federal court. They occur in less than one-half of one percent of civil cases. In 97% of these cases, the complaint is not sealed, so the public has access to information about the alleged wrongdoers and wrongdoings. Although the public record seldom contains specific findings justifying the sealing of settlement agreements,

[12] More than half of these cases arise from a 1998 airplane crash near Peggy's Cove, Nova Scotia (144 cases in the Eastern District of Pennsylvania); the 1996 crash of TWA flight 800 taking off from Kennedy airport also accounted for a substantial fraction of these cases (31 cases in the Southern District of New York).

generally the only thing kept secret by the sealing is the amount of settlement.

Appendix A
Method

Districts

We looked for sealed settlement agreements in the 11 districts with local rules requiring good cause to seal a document and a 50% random sample of the other districts.[13]

We originally designed our method so that we might include all districts in the study, but we have studied the districts in a modified random order, so that if we concluded the research without studying all districts, we would have studied a random sample. Because state court practices influence federal practice, we decided to study districts in the same state together, and we decided the same researcher should study them. So we listed the states (plus the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) in random order and began studying the districts in that order.[14]

We modified random selection in the following ways. We began our research with districts in North Carolina, which is home to the subcommittee's chair (the Honorable Brent McKnight, formerly magistrate judge for the Western District of North Carolina and now district judge there), so that his additional knowledge about cases in his district would serve as a check on our work. We also put at the top of the list states with districts having local rules specifically concerning sealed settlement agreements. The Eastern District of Michigan has a rule calling for the unsealing of settlement agreements after two years. E.D. Mich. L.R. 6.4. The District of South Carolina has a new rule proscribing the sealing of settlement agreements. D.S.C. L.R. 5.03(C). We also put Florida at the top of the list, because of the state's groundbreaking Sunshine in Litigation law, Fla. Stat. § 69.081.

We decided the first 47 districts in the list would provide a sample of sufficient size, taking into account an estimate that it would take approximately a year and a half to study that many districts. We determined that our time frame would permit us to supplement the random sample with the five otherwise unselected districts with local rules requiring good cause to seal a document. That way our study would include all 11 dis-

[13] The Western District of New York adopted a good cause rule after the cases in this study were terminated.

[14] The Northern Mariana Islands is not included, because its docket sheets are not available electronically.

tricts with good cause rules,[15] permitting a rough comparison between those districts and a sample of other districts, especially with respect to sealed settlement rates.[16]

To test whether results from our modified random sample are likely to be different from an unmodified random sample, we computed the overall rate of sealed settlement agreements using a procedure somewhat different from just comparing the number of sealed settlements we found to the number of cases we examined. There are nine districts that were selected first, before we starting selecting districts at random – districts in Florida, Michigan, North Carolina, and South Carolina. We computed an average by weighting each of these districts as 1. There are 85 other districts. Not considering the five districts that were selected only because they have good cause rules (California Northern, Illinois Northern, Maryland, Oklahoma Northern, and Utah), we selected 38 at random. So we weighted these districts 85/38 = 2.24 in computing an average. Using this weighting scheme, we computed a sealed settlement rate of 0.46%, which is almost identical to the unweighted rate of 0.44%. For this reason, we decided to analyze our data as if our sample were truly random.

Termination Cohort

We decided to look at cases terminated over a two-year period – calendar years 2001 and 2002. Because we include all calendar months, there are unlikely to be any hidden seasonal biases. Looking at two years of terminations ensures that our data will not be based only on an idiosyncratic year.

Finding Sealed Settlement Agreements

Our search for sealed settlement agreements was a process of step-by-step elimination – upon closer and closer review – of cases that do not have sealed settlement agreements.

---

[15] California Northern, N.D. Cal. Civ. L.R. 79-5; Illinois Northern, N.D. Ill. L.R. 26.2; Maryland, D. Md. L.R. 105.11; Michigan Western, W.D. Mich. L. Civ. R. 10.6; Mississippi Northern and Southern, N. & S. D. Miss. L.R. 83.6; Missouri Eastern, E.D. Mo. L.R. 83-13.05(A); Oklahoma Northern, N.D. Okla. L.R. 79.1(D); Tennessee Eastern, E.D. Tenn. L.R. 26.2; Utah, D. Utah L. Civ. R. 5-2; and Washington Western, W.D. Wash. L. Civ. R. 5. The Western District of New York adopted a good cause rule after the cases in this study were terminated, *see* W.D.N.Y. L.R. 5.4(a) (adopted May 1, 2003).

[16] Three of these additional districts – California Northern, Illinois Northern, and Oklahoma Northern – are in multidistrict states. We did not study the other districts in those states.

We rejected the idea of looking only at cases with disposition codes of "settled" or "consent judgment" in data reported to the Administrative Office – that would have eliminated 37% of the cases we ultimately found.[17] Even if we also looked at cases with disposition codes of "voluntary dismissal" and "other dismissal," we would have eliminated 20% of the cases we ultimately found.[18]

We attempted to download all 288,846 docket sheets for cases terminated in 2001 or 2002 in the study districts. We found 138 of the docket sheets (0.05%) to be sealed. We searched each unsealed docket sheet for the word "seal."[19] This search found "seal," "sealed," "unseal," etc., including "Seal," "Seale," etc. in a party name. Docket *entries* (and headers) with the word "seal" in them were extracted and assembled into a text file. If a docket *sheet* had the word "seal" in it, then we also searched for the word "settle" (which found "settle," "settled," "settlement," etc.), extracted docket *entries* with the word "settle" in them, and assembled them into the same text file as the docket entries with the word "seal" in them. Naturally, some docket entries had both the word "seal" and the word "settle" in them. In this way we examined docket entries from 15,026 cases.

We considered, but rejected, looking only at cases where a docket entry with the word "seal" had a date within two weeks, for example, of either the termination date or a docket entry with the word "settle." Had we done this, we would have missed 8% of the cases we ultimately found.[20]

If "seal" and "settle" docket entries from the same case suggested that the case might or did have a sealed settlement agreement, then we read the entire docket sheet for that case. Sometimes, for example, a docket entry merely says "sealed document," and review of other docket entries is necessary to determine what the sealed document might be.[21]

---

[17] 60% of the cases we found were coded 13 = "dismissed: settled" and 4% were coded 5 = "judgment on consent."

[18] 8% of the cases we found were coded 12 = "dismissed: voluntarily" and 9% were coded 14 = "dismissed: other."

[19] Because the Northern District of Illinois has a procedure for restricting public access to documents without actually sealing them – although they may also be sealed – for that district we also searched for the word "restrict."

[20] In one case the word "seal" is 627 days from both termination and the word "settle" (*Franco v. Saks & Co.*, NY-S 1:00-cv-05522 filed 07/26/2000).

[21] For this project, researchers who examine docket sheets and court documents all have law degrees – either a J.D. or an M.L.S. (master of legal studies, which typically requires approximately one year of law school). Tim Reagan reviewed documents from districts in California, Guam, Iowa, Michigan, Missouri, New Hampshire, North Caro-

This review of 2,262 docket sheets eliminated cases with sealed documents filed only at the beginning of qui tam actions or attached only to discovery motions, motions for summary judgment, and motions in limine.

When we reviewed a complete docket sheet, we determined two things. First, we determined whether the case might or did include a sealed settlement agreement. If so, then we identified which documents in the case file to review to learn what the case is about and to learn as much as possible about the sealed settlement agreement. We reviewed actual documents filed in 1,415 cases.[22] Generally we reviewed complaints, cross- and counterclaims, court opinions, and documents pertaining, or possibly pertaining, to the settlement.

We were not able to determine with very good precision whether cases with sealed docket sheets contained sealed settlement agreements, so we regarded cases with sealed docket sheets that were terminated by consent judgment or settlement as containing sealed settlement agreements and cases terminated otherwise as not containing sealed settlement agreements.[23]

In this way we identified 1,272 cases among cases terminated over a two-year period in 52 districts that appear to have sealed settlement agreements.[24] Table A summarizes the number of cases reviewed in each district. Descriptions of these cases are in Appendix C.

---

lina, Puerto Rico, South Carolina, and Virginia; Shannon Wheatman reviewed documents from districts in Florida, Hawaii, Indiana, Maine, Maryland, North Dakota, Pennsylvania, Puerto Rico, Virginia, and Washington; Marie Leary reviewed documents from districts in Alabama, Arizona, Delaware, Idaho, New York, and South Dakota; Natacha Blain reviewed documents from districts in Illinois, Minnesota, Mississippi, New Mexico, Oklahoma, Tennessee, and Utah; Steve Gensler reviewed documents from the District of Columbia.

[22] For one case in the Northern District of Illinois, most of the case file is lost, so our decision as to the presence of a sealed settlement agreement was based on review of the docket sheet and a one-page stipulated dismissal. An additional two case files in the Southern District of New York are lost, so our decisions as to the presence of sealed settlement agreements were based on review of the docket sheets alone.

[23] We were given access to 17 of these sealed docket sheets and our decision as to the presence of a sealed settlement agreement was based on a review of the docket sheets rather than the less precise rule of thumb.

[24] This includes 23 cases (2%) with sealed docket sheets terminated either by consent judgment or settlement, according to data reported to the Administrative Office.

Table A. Case Counts.

District	Cases Terminated in 2001 or 2002	Sealed Docket Sheets	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
Alabama Middle	3,237	0	80	4	3	3
Alabama Northern	7,042	3	745	26	24	26
Alabama Southern	2,015	1	78	22	9	9
Arizona	6,604	18	347	32	21	18
California Northern**	12,140	11	635	146	82	70
Delaware	2,250	0	213	13	9	9
District of Columbia	5,368	5	469	39	35	28
Florida Middle	13,678	17	529	103	43	36
Florida Northern	3,045	2	160	11	5	5
Florida Southern	15,928	16	669	260	128	111
Guam	130	0	7	3	1	1
Hawaii	1,752	2	458	42	40	38
Idaho	1,350	6	440	10	5	4
Illinois Northern**	19,378	0	649	99	80	72
Indiana Northern	4,103	1	216	11	7	0
Indiana Southern	5,831	0	200	60	13	9
Iowa Northern	1,096	0	42	15	6	6
Iowa Southern	1,976	0	69	9	0	0
Maine	1,070	0	141	10	2	2
Maryland**	7,851	8	232	20	15	15
Michigan Eastern	9,561	0	351	52	19	16
Michigan Western*	2,775	2	181	13	7	8
Minnesota	4,792	13	300	31	27	27
Mississippi Northern*	2,603	0	54	22	5	5
Mississippi Southern*	5,775	11	211	38	18	14
Missouri Eastern*	4,798	0	342	53	22	20
Missouri Western	4,857	0	167	35	27	24
New Hampshire	1,157	2	83	10	4	4
New Mexico	3,084	3	86	23	19	19
New York Eastern	16,001	0	495	88	59	54
New York Northern	3,928	0	192	27	22	21
New York Southern	20,976	0	948	130	93	90
New York Western	3,000	12	106	20	12	11
North Carolina Eastern	2,808	0	143	12	4	3
North Carolina Middle	2,284	0	63	10	7	6
North Carolina Western	2,203	2	101	27	14	11
North Dakota	574	0	126	8	6	5

Table A. Case Counts.

District	Cases Terminated in 2001 or 2002	Sealed Docket Sheets	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
Oklahoma Northern**	1,954	0	176	35	15	11
Pennsylvania Eastern	19,520	0	655	208	192	183
Pennsylvania Middle	4,678	0	520	25	12	10
Pennsylvania Western	6,218	0	306	44	20	16
Puerto Rico	3,562	0	223	159	120	117
South Carolina	8,126	0	311	25	8	8
South Dakota	820	0	40	6	0	0
Tennessee Eastern*	3,128	0	249	15	11	8
Tennessee Middle	3,162	0	581	39	24	18
Tennessee Western	2,759	0	222	37	16	7
Utah*	2,387	3	179	11	8	8
Virginia Eastern	14,448	0	330	57	47	44
Virginia Western	3,593	0	112	41	31	28
Washington Eastern	1,355	0	70	3	2	2
Washington Western*	6,116	0	741	23	16	12
Total Number of Cases	**288,846**	**138**	**15,043**	**2,262**	**1,415**	**1,272**

* District with a local rule requiring good cause for sealing and part of the 50% random sample.
** District with a local rule requiring good cause for sealing and *not* part of the 50% random sample.

Attorney Reports on the Impact of *Amchem* and *Ortiz* on Choice of a Federal or State Forum in Class Action Litigation

A Report to the Advisory Committee on Civil Rules Regarding a Case-based Survey of Attorneys

Executive Summary

Thomas E. Willging
Shannon R. Wheatman

April 2004

Federal Judicial Center

This study was undertaken at the request of the Judicial Conference's Advisory Committee on Civil Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Advisory Committee on Civil Rules or of the Federal Judicial Center.

The full report, including a Methods Appendix and copies of the questionnaires, is available at http://www.fjc.gov under "Publications."

The Project Team included George Cort, Vashty Gobinpersad, Tyeika Hartsfield, Andrea Henson-Armstrong, Maria Estelita Huidobro, Dean Miletich, Robert Niemic, and Robert Timothy Reagan.

Contents

Background

In 2001, the Advisory Committee on Civil Rules ("the Committee") asked the Federal Judicial Center to conduct empirical research in an attempt to gain information that might assist the Committee's examination of whether Federal Rule of Civil Procedure 23 should be amended to provide a different certification standard for classes certified for settlement rather than for trial and litigation. After researching class action filing rates,[1] the Center designed and conducted a survey of attorneys who had represented clients in recently terminated class action litigation.

In both state and federal courts, many class actions have been resolved by certification for settlement. In class action litigation that is characterized by multiple filings in state and federal forums, such as mass tort cases, the ability to certify cases for multistate or nationwide settlement is viewed as important to achieving a broad resolution of the litigation. In 1996, the Committee published for public comment a proposed amendment to Rule 23 that would have permitted certification of a settlement class action "even though the requirements of subdivision (b)(3) might not be met for purposes of trial."[2] The Committee deferred consideration of the proposed amendment after the Supreme Court granted certiorari in *Amchem Products, Inc. v. Windsor*[3] and later in *Ortiz v. Fibreboard Corp.*[4] In those cases, the Court held that under Rule 23 a court could not certify a class for settlement unless the class met all of the Rule 23(a) criteria and one of the Rule 23(b) criteria, with the exception of trial manageability for

1. In September 2002, the Center presented to the Committee the results of a related study, also requested by the Committee, of the effect of the *Amchem* and *Ortiz* decisions on the filing of class actions in federal courts. *See* Bob Niemic & Tom Willging, Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules (2002) (available at http://www.fjc.gov). That study reported that the rate of filing of class actions in federal court had increased after *Amchem* and *Ortiz*. That study does not—and could not—directly answer the question whether those two decisions have had an impact on the settlement of class actions in federal court or whether there is any relationship between the Court decisions and attorney–client decisions on where to file cases. For example, those two cases may have influenced attorneys' decisions in a limited number of specific types of cases; also, the number of federal class action filings might have increased at a slower rate than state class action filings.

2. Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559 (1996); *see also id.* at 563–64 (Proposed Committee Note).

3. 521 U.S. 591 (1997). In *Amchem*, the Supreme Court affirmed a Third Circuit decision that vacated the order of the district court certifying a class of individuals with asbestos injury claims against a number of defendants and approving a Rule 23(b)(3) opt-out settlement. The district court had combined in one class action claimants with present asbestos injuries and future claimants (absent and unknown) who had been exposed to an asbestos product but who had not to date discovered an asbestos-related injury. The Court held that the district court's ruling had allowed settlement of a "sprawling" class action that failed to provide future claimants the adequate representation required by Rule 23(a)(4).

4. 527 U.S. 815 (1999). In *Ortiz*, the Court reversed a Fifth Circuit decision that had affirmed an asbestos settlement with similar features to those the Court criticized in *Amchem*. The settlement in *Ortiz*, however, focused on a single manufacturer of products containing asbestos and used a mandatory "limited fund" settlement class certified under Rule 23(b)(1)(B).

a (b)(3) class. The rulings restricted the ability of federal courts to certify settlement class actions.

In *Amchem*, the Court noted the Committee's pending "settlement class" proposal and stated that, although parts of the Court's ruling were rooted in due process concerns about notice, the holding on certification standards was limited to Rule 23 "as it is currently framed."[5] Since the Supreme Court decisions, the Committee has continued to receive proposals to amend Rule 23 to relax the certification standard for settlement classes—proposals that emphasize the importance of such class actions to achieving the broad resolution of repetitive litigation.[6] The Committee has also continued to receive advice that the problems of such a rule amendment would outweigh any benefits that facilitating settlements might provide.[7]

As part of its examination of proposals to amend Rule 23 to provide a separate settlement class certification standard, the Committee asked the Center to assist by providing empirical information, if possible, as to the effect of *Amchem* and *Ortiz* on class action litigation in federal courts. The Center, in consultation with the Committee, designed a survey of attorneys in class actions recently terminated in federal courts. Questionnaires were designed to provide data on whether the Supreme Court decisions restricting certification of settlement classes in federal courts under existing Rule 23 influenced attorneys to file and litigate such actions in state courts. The survey also sought information on the extent to which limits on certification of settlement classes affected the number of overlapping or duplicative class actions pending simultaneously in state and federal courts.

This report is based on analyses of responses to questionnaires (copies of which can be found in the Questionnaire Appendix accompanying the full report) returned by 728 attorneys, 312 (43%) representing plaintiffs and 416 (57%) representing defendants in 621 class actions (see the Methods Appendix accompanying the full report). These class actions were either filed in federal court or removed to federal court between 1994 and 2001 and terminated between July 1, 1999, and December 31, 2002. In 107 of the 621 cases, we received responses from attorneys for both sides.[8] The response rate was 39% of 1,851 attorneys. Attorneys were asked to report infor-

---

5. *Amchem*, 521 U.S. at 619.

6. *See, e.g.*, Francis McGovern, *Settlement of Mass Torts in a Federal System*, 36 Wake Forest L. Rev. 871, 878 (2001) (stating that "*Amchem* and *Ortiz* have changed the practical landscape for the global resolution of personal injury mass tort litigation by making class action settlements more expensive and, in certain circumstances, improbable"). According to Professor McGovern, a change in Rule 23 to facilitate settlement class actions for all types of cases is one way to address the problem. *Id.* at 882 (asserting that "[t]here will be efforts to facilitate class action settlements by relaxing the 23(a) prerequisites and, at the same time, strengthening 23(e) scrutiny").

7. For discussion of some of the arguments against global class action settlements and settlement class rules in the pre-*Amchem* legal environment, see generally, *Symposium, Mass Tortes: Serving Up Just Desserts*, 80 Cornell L. Rev. 811 (1995).

8. All responses were used for analyses based on attorney reports (Parts 1 and 3). For analyses done at the case level (Parts 2, 4, and 5), if two responses referred to the same case, each response was given a weight of 0.5.

mation about a specific case in which they had represented a party (the "named case"). We selected the named cases from the database used for the Center's earlier report to the Committee on class action filing activity.

The report identifies factors that attorneys reported—with the benefit of hindsight—as related to their decisions about where to file or whether to remove a class action, and it presents data concerning attorney perceptions of the relative importance of those factors. Questions called for numerous attorney judgments about whether individual factors might have influenced that attorney's total assessment of differences between state and federal courts in handling class action litigation.

Unless specified as not statistically significant, all differences discussed in this report were statistically significant. By statistically significant we mean significant at the .05 level or better (i.e., the probability that the differences occurred by chance is at most 5%).

Executive Summary

Overall conclusions regarding *Amchem* and *Ortiz* factors

The Committee's primary question was whether existing Rule 23, as interpreted and applied in the *Amchem* and *Ortiz* line of cases to restrict class certification for settlement class actions, induced attorneys to file and litigate class actions in state rather than federal court. This study supports the following empirical conclusions based on attorney reports regarding specified cases:

- neither *Amchem* and *Ortiz* nor federal class certification rules were reported to have directly affected the vast majority of plaintiff attorneys' choice of forum;
- defendant attorneys reported their perceptions that federal courts' strict application of class certification rules was one factor that affected their decision to *remove* cases *to* federal courts, which would not be likely to avoid any effects of *Amchem* and *Ortiz*;
- in less than 10% of the cases, *Amchem* and *Ortiz* factors may have been related to attorneys' choice of forum and to how courts managed class actions;
- despite attorneys' perceptions that federal judges were less receptive than state judges to motions to certify class actions, federal and state judges were almost equally likely to certify class actions and to certify those cases for litigation and trial or for settlement;
- federal and state judges were equally likely to approve class settlements;
- federal judges were more likely than state judges to deny class certification, while state judges were more likely than federal judges to not rule on certification;
- the reported size of certified classes tended to be larger in state courts, but no direct link to *Amchem* and *Ortiz* was found and we could not directly test speculation that *Amchem* and *Ortiz* may have driven the larger classes into state court where they could be settled more easily;
- the rate at which proposed class actions were reported to have been certified appears to have declined when compared to a Federal Judicial Center pre-*Amchem* and *Ortiz* study of class actions in four federal districts;
- based on the same study, the percentage of certified class actions that were reported to have been certified for settlement appears to have increased after *Amchem* and *Ortiz*; and
- the percentage of class recoveries reported to have been allocated to attorney fees appears to have been about the same as in the previous Center study.

Summary of findings

1. Attorney reports of the effects of *Amchem* and *Ortiz* on choice of forum

(a) Plaintiff attorney reports of reasons for filing the named case in federal or state court

We presented plaintiff attorneys a range of questions and statements to find out why they filed the named case in state or federal court. Three factors were strongly related to their decisions about where to file: widely shared attorney perceptions that state or federal judges were predisposed to rule on certain claims in line with the interests of the attorney's client; attorney reports of the source of law (state or federal) for the claims; and attorney reports of "state facts," a composite measure we created, using the average of the percent of class members who resided in the state and the percent of claims-related transactions or events that attorneys reported having occurred within the state.[9]

Attorneys' decisions regarding where to file were associated with other factors, but not as strongly as with those above. The strongest group of additional factors encompassed the substantive law and the discovery rules governing the case. Those factors were also related to attorney perceptions of judicial predisposition. Plaintiff attorneys did not report that either class certification rules in general or the *Amchem* and *Ortiz* holdings in particular had any direct impact on their choice of a state or federal forum.

We also found that the filing of a class action in state or federal court was strongly associated with the location of a competing or overlapping class action.

(b) Comparison of plaintiff and defendant attorney reports of reasons for choosing to file the named case in, or remove it to, federal court

We presented a similar set of statements to defendant attorneys so they could indicate why they removed the named case, and we compared their responses to those of plaintiff attorneys who also chose a federal forum. Defendant attorneys more often than plaintiff attorneys cited their expectations that federal courts would apply class certification rules strictly and that substantive law, discovery rules, and expert evidence rules would favor their side. Aside from the importance defendant attorneys attributed to stringent class certification rules in general, *Amchem* and *Ortiz* factors limiting federal courts' ability to certify a class for settlement did not appear to have played a role in either side's decision to select a federal forum. In general, a defendant attorney was far more likely than a plaintiff attorney to refer to the attorney's personal preferences or to client preferences as a basis for a decision to select a federal forum.

---

9. The portion of the "state facts" variable that deals with the location of claims-related transactions or events depends on the ability of a responding attorney to distinguish between events (such as the purchase of a product) that may have occurred both within the state of filing and in a number of other states. For further discussion of the "state facts" variable see the full text of this report at *infra* notes 19–20.

(c) Attorney reports of the effects of Amchem and Ortiz on the named case and in general

We also posed direct questions to attorneys about any effects *Amchem* and *Ortiz* may have had on their decisions about where to file or litigate the named cases and on class action litigation in general, including case management. Attorneys' responses suggest that, at most, the two decisions may have had a relationship to the attorneys' choice of forum and to case management in a small percentage of the named cases. Overall, as discussed in Parts 1(a) and (b), attorneys' statements as to why they filed cases in state or federal courts did not independently generate a conclusion that the *Amchem* and *Ortiz* decisions played an important role. Viewed in the aggregate—that is, in the context of the many factors that might have been associated with choice of forum—attorneys reported perceptions that *Amchem* and *Ortiz* factors had an impact on a small proportion of cases.

Nonetheless, attorney responses to the direct *Amchem* and *Ortiz* questions provide some support for the conclusion that the cases have had some relationship with class action certification and settlement. Our findings in that regard appear to be limited to a small proportion of the cases covered in the survey, less than 10% of which generated reports of some link with the two decisions.

Attorneys' opinions about the impact of *Amchem* and *Ortiz* indicate that they expected the two cases to have had more of an impact than their collective reports show they had in the named cases. Forty-three percent (43%) said that *Amchem* and *Ortiz* had made it more difficult in general to certify, settle, and/or maintain class actions in federal and state courts; another 5% thought the two cases had such an impact, but only in mass tort cases.

(d) Plaintiff and defendant attorney reports about any relationship between client characteristics and filing and removal decisions

We also asked plaintiff and defendant attorneys about characteristics that might have described their clients (such as place of residence, type of business, gender, race, and ethnicity) and whether, at the time of filing or removing an action, they perceived any litigation advantage or disadvantage arising out of any of those characteristics. None of the differences appeared to be related to choice of a federal or state forum. We found few important differences in reports of advantages or disadvantages based on party characteristics. The majority of attorneys reported that they perceived no advantage or disadvantage in most of their clients' characteristics.

Comparing perceptions of plaintiff attorneys who filed in state courts with those who filed in federal courts, the only salient client characteristics were connected to the defendant's type of business and the proposed class representative's local residence and reputation. The class representative's local residence appeared to be the factor with the strongest association with a plaintiff's decision to file a class action in a state court.

Comparing perceptions of plaintiff attorneys with those of defendant attorneys (regardless of the choice of forum), the only client characteristic that elicited a major-

ity response was that plaintiff attorneys tended to see the proposed class representative's local residence as an advantage. Other client characteristics (e.g., defendant's corporate status or type of business) produced different responses from plaintiff and defendant attorneys.

2. Competing or overlapping class actions filed in other courts

A clear majority of attorneys reported the existence of other lawsuits dealing with the same subject matter as the named case in other state or federal courts. Those attorneys also indicated that about three-fourths of the other lawsuits were resolved in the same manner as the named case. Among the remaining cases, we found that when the named case was dismissed on the merits, voluntarily dismissed, or terminated by summary judgment (and not resolved as a class action), the related cases were more likely to have had a different outcome. Those data suggest that rulings on the merits of individual claims did not prevent further litigation in other courts in related cases.

3. Plaintiff and defendant attorney perceptions of state and federal judges' predispositions toward plaintiff and defendant interests

(a) Attorney perceptions of judicial predispositions

Attorneys on both sides of the litigation reported their expectations about judicial predispositions at the time they filed or removed the named case. Those impressions were often related to lawyers' judgments about the favorability of that court's rules and the substantive law applicable to their clients' claims and defenses, and to attorneys' impressions of judicial receptivity to claims like those of the clients.

About half of the plaintiff attorneys who filed cases in state courts expressed an impression that state judges were more likely than federal judges to rule in favor of interests like those of their clients. About one in four plaintiff attorneys who filed in federal court, though, expressed an expectation that federal judges were more likely than state judges to rule in favor of their clients' interests, and about 40% of plaintiff attorneys filing in federal court reported that they perceived no difference between state and federal judges in that regard.

Three out of four defendant attorneys who removed cases to federal courts reported the impression that federal judges were more likely than state judges to rule in favor of interests like those of their clients. About 20% of attorneys perceived no difference between the two sets of judges.

(b) Substantive law, procedural rules, and judicial receptivity as sources of perceived judicial predispositions

Plaintiff attorneys were more likely to perceive judicial predispositions in favor of their clients' interests when they also reported that state substantive law and state discovery, evidence, and class action certification rules favored their clients' interests. Those plaintiff attorneys were also more likely than other plaintiff attorneys to report

that state court judges were more receptive than federal judges to motions to certify a class and more receptive to their clients' claims on the merits.

In reporting their impressions of judicial predispositions, defendant attorneys presented almost, but not exactly, a mirror image of plaintiff attorneys. Defendant attorneys who removed cases to federal courts were more likely to perceive federal predispositions in favor of their clients' interests when they also reported that federal discovery, expert evidence, and general evidentiary rules favored their clients' interests. Those defendant attorneys were also more likely than other defendant attorneys to report that federal judges were less receptive than state judges to motions to certify a class and more receptive to their clients' positions on the merits. Defendant attorneys who perceived federal judicial predispositions, however, were no more likely than other defendant attorneys to report that federal substantive law was favorable to their clients' interests.

In the next two sections we explore how those perceptions in individual named cases matched up with the aggregate of judicial rulings, procedural outcomes, and monetary recoveries and settlements in two groups of named cases: first, those removed from federal courts and, in the final section, all of the named cases.

4. Comparison of rulings by state and federal courts in removed cases

In Part 1(a) we reported that attorney perceptions of judicial predispositions toward interests like those of the attorneys' clients represented one of the strongest factors affecting choice of forum. Do these attorney perceptions about judicial predispositions have any basis in the reality of judicial rulings in the named cases viewed as a whole?

We found little relationship between the attorneys' perceptions and federal and state judicial rulings in the named cases. Federal district judges remanded to state court almost half of the cases that defendants removed to federal court, providing an opportunity to compare rulings in the two sets of courts.[10] We found federal and state judges about equally likely to certify cases as class actions (which happened in 22% of the remanded cases and 20% of the cases retained in federal courts). Moreover, federal and state judges were about equally likely to certify classes for trial and litigation or for settlement: Half of the certifications in each set of courts were for trial and litigation and half were for settlement.

In the attorney reports about the named cases, federal judges were more likely than state judges to issue rulings denying class certification, while state judges were more likely than federal judges to take no action regarding class certification. Neither the action or inaction of courts regarding class certification was associated with whether a case produced a monetary recovery or settlement. A ruling denying class

10. Note that our comparison of the two sets of cases proceeds on the assumption (untestable in the context of this survey) that district judges' decisions to remand were based on the presence or absence of federal subject-matter jurisdiction and were not affected one way or the other by the certifiability of the case as a class action or by the underlying merits of the claims presented.

certification usually was accompanied by explicit resolution of the individual claims of the proposed class representatives, whether the resolution was by settlement, summary judgment, or trial. The absence of a ruling on class certification was more often accompanied by voluntary dismissal of the claims.

In the named cases, we found no statistically significant differences in rulings on dispositive procedural motions in cases remanded to state courts and in cases retained in the federal courts. In certified class actions, state and federal courts were equally likely to approve a classwide settlement. In one or two instances in federal or state court the settlement had been revised before court approval; no class settlement was rejected in total.

We also found, in removed cases, a relationship (again, not necessarily a causal relationship) between attorneys' perceptions of judicial predispositions and whether the parties' class settlements included a money recovery—and, if so, how much. Attorney fees also varied in the same direction as the predisposition perceived by attorneys; that is, fees were higher when plaintiffs perceived a predisposition in their favor than when they did not perceive such a predisposition.

Despite the similarities in rulings, monetary recoveries—almost always in the form of settlements fashioned by the parties—differed in the two court systems. In removed cases that were remanded to state courts, the amount of classwide monetary recoveries and settlements was substantially larger than monetary recoveries and settlements in cases retained in federal court. The median recovery in state court was $850,000 and in federal court was $300,000. Those differences, however, appeared to be a product of the larger size of classes resolved in state courts (typically, 5,000 class members compared to 1,000 in federal courts). The typical recovery per class member turned out to be higher in federal court: $517 in federal court compared to $350 in cases remanded to state courts.

We also found a relationship between class size and attorney perception of predispositions. Attorneys were somewhat more likely to perceive federal court predispositions to favor client interests in cases with a smaller class size and to perceive favorable state court predispositions toward such interests in cases with a larger class size. These differences seem marginal, however, and applicable to a small number of cases.

5. Procedural outcomes and monetary recoveries and settlements in named cases (removed and not removed)

Looking at the total sample of all closed cases (including cases filed as original federal class actions, not just the removed cases discussed in Part 4), we found that in the majority of cases (57%) the court took no action on class certification. Courts certified 24% of the cases as class actions and denied certification in 19% of them. Of the certified cases, 58% were certified for settlement and 42% were certified for trial or litigation.

The Center's 1996 research for the Committee, focusing on class actions terminated in 1992–1994 in four federal district courts, and based on examination of court files, not attorney recollections, reported a class certification rate of 37%. The percent-

age of those cases certified for settlement was 39%. While the study methods were different, comparing data from the current study and the 1992–1994 study indicates that the rate of class certification as a whole most likely has not increased and appears to have declined (from 37% to 24%) in the period after *Amchem* and *Ortiz*. These two studies also indicate that the percentage of class actions certified for settlement appears to have increased (from 39% to 58%).

In the study at hand, in both state and federal courts, certified class actions generally terminated with settlements and monetary recoveries. Almost all certified class actions settled. In contrast, most cases that were never certified terminated by dismissal, summary judgment, voluntary dismissal, or settlement of class representatives' claims.

In state and federal courts combined, about one in four of the named cases included a monetary recovery or settlement for the class. The typical (i.e., median) recovery was $800,000. Twenty-five percent of the recoveries and settlements exceeded $5.2 million, and 25% were $50,000 or less.

Various commentators and judges have criticized the use of coupons—especially nontransferable coupons without any market value—to settle class actions. In the study, 29 of 315 cases (9%) with a recovery included some type of coupon in the recovery; 3 of those cases (1%) involved nontransferable coupons.

Attorney fees typically were about 29% of the class recovery, which was about the same percentage as in the prior FJC study of class actions. Twenty-five percent of the cases involved fees of 36% or more, which was also similar to what we found previously.

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

TO: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Ed Carnes, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 18, 2004**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on May 6-7, 2004 in Monterey, California and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix G.

This Report addresses a number of action items: approval of published Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 for transmission to the Judicial Conference and approval for publication and comment on proposed amendments to Rules 5, 32.1, 40, 41, and 58.

II. Action Items—Summary and Recommendations.

The Advisory Committee on the Criminal Rules met on May 6 and 7, 2004, in Monterey, California, and took action on a number of proposed amendments. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 12.2 Notice of Insanity Defense; Mental Examination; Sanction for Failure to Disclose.

- Rules 29, 33, 34 and 45. Proposed Amendments Re Rulings by Court on Motions to Extend Time for Filing Motions Under Those Rules.
- Rule 32, Sentencing; Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release. Proposed Amendment Concerning Defendant's Right of Allocution.
- Rule 59; Proposed New Rule Concerning Rulings by Magistrate Judges.

As noted in the following discussion, the Advisory Committee proposes that those amendments be approved by the Committee and forwarded to the Judicial Conference.

Second, the Committee considered and recommended amendments to the following Rules:

- Rule 5, Initial Appearance; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.
- Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.
- Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearings.

The Committee recommends that these rules be published for public comment.

Finally, the Advisory Committee has several information items to bring to the attention of the Standing Committee.

II. Action Items— Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 2003 meeting, the Standing Committee approved the publication of proposed amendments to Rule 12.2, 29, 32, 32.1, 33, 34, 45, and New Rule 58. The comment period for the proposed amendments was closed on February 15, 2004. The Advisory Committee received written comments from several persons and organizations commenting on all or some of the proposed amendments to the rules. The Committee has made several minor changes to rules and recommends that all of the proposed

amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM—Rule 12.2; Proposed Amendment Regarding Sanction for Failure to Produce Results of Examination.

The amendment to Rule 12.2 is intended to fill a perceived gap. Although the rule contains a sanctions provision for failing to comply with most of the requirements of the rule, there is no provision stating possible sanctions if the defendant does not comply with Rule 12.2(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination. The Committee received four comments on the published amendment. One of the commentators, the Federal Bar Association, believes that the rule goes too far from a practical perspective and would prefer that it be left to the court in each case to decide an appropriate remedy, e.g., by providing the government with an ample opportunity to test the defendant.

Following consideration of the comments, the Committee unanimously approved the amendment, as published. A copy of the rule is at Appendix A.

Recommendation—The Advisory Committee recommends that the amendments to Rule 12.2 be approved and forwarded to the Judicial Conference.

2. ACTION ITEM—Rules 29, 33, 34 and 45; Proposed Amendments Regarding Time for Ruling on Motions Under Those Rules.

In June 2003, the Standing Committee approved for publication amendments to Rules 29, 33, 34, and 45 that would address the timing of rulings on motions filed under Rules 29, 33, and 34 and make a conforming amendment to Rule 45. In Rules 29, 33, and 34 the court is required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so deprives the court of the jurisdiction to consider an underlying motion that is filed after the seven-day period. Accordingly, if a defendant moves for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that extension motion within the same seven-day period. If for some reason the court does not act on the motion for extension within the seven days, the court lacks jurisdiction to act on the underlying substantive motion. The amendments are designed to remedy that problem.

The Advisory Committee received four written comments, which supported the change, and made a minor clarifying change to the Committee Note. A copy of the rules is at Appendix B.

Recommendation—The Advisory Committee recommends that the amendments to Rules 29, 33, 34, and 45 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 32; Proposed Amendment Regarding Allocution by Victims of Felonies.

In June 2003, the Standing Committee approved publication of a proposed amendment to Rule 32, which would expand victim allocution to victims of non-sexual abuse and non-violent felonies. The Advisory Committee received four written comments from members of the public and also some suggested style changes from the Style Subcommittee. The public comments were mixed. Three supported the change with some reservations about implementing the rule. One commentator opposed the change. After the comment period closed, the Committee learned that Congress was in the process of considering the Victims' Right Act, which would implement a number of significant changes in federal criminal practice relating to victims of crime.

At its May 2004 meeting, the Advisory Committee considered the written comments, and the text of the pending Victims' Right Act. The Committee determined that the most appropriate course of action at this point would be to proceed with the proposed amendment to Rule 32, with the recommendation that if the Victims' Right Act is enacted, the proposed amendment be withdrawn. In that case, the Advisory Committee envisions that not only Rule 32, but other rules as well, would be examined with a view toward making changes that conform to the Act. The Committee approved the rule by a vote of 9 to 2. A copy of the rule is at Appendix C.

Recommendation—The Advisory Committee recommends that the amendment to Rule 32 be approved and forwarded to the Judicial Conference, with the understanding that if the Victims' Right Act is enacted, that the proposed amendment be withdrawn.

4. Action Item—Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments Concerning Defendant's Right of Allocution.

The amendment to Rule 32.1 would provide a person facing revocation or modification of probation or supervised release with a right of allocution. The amendment followed a suggestion in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), where the court observed that there is no explicit provision in Rule 32.1 giving the defendant a right to allocution. The Standing Committee approved publication of the proposed amendment in June 2003; the comment period ended on February 16, 2004. The Advisory Committee received only two written comments on the amendment; both supported the change. The Committee approved the amendment, as published, by a unanimous vote.

A copy of the rule and Committee Note are at Appendix D.

Recommendation—The Committee recommends that the amendment to Rule 32.1 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM—New Rule 59; Proposed Rule Concerning Rulings by Magistrate Judges.

Proposed new Rule 59, which would parallel Civil Rule 72, is a response to a suggestion made by the Ninth Circuit Court of Appeals in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001). The new rule addresses procedures for appealing decisions by magistrate judges. In June 2003, the Committee approved publication of the proposed new rule for public comment. The Criminal Rules Committee received three comments on the rule.

Based upon those recommendations, and several suggestions from the Style Subcommittee, the Advisory Committee made a number of minor clarifying changes to both the Rule and the Committee Note, and approved the new rule by a vote of 10 to 1. A copy of the rule and Committee Note are at Appendix E.

Recommendation—The Committee recommends that new Rule 59 be approved and forwarded to the Judicial Conference.

III. Action Items—Recommendation to Publish Amendments to Rules

The Advisory Committee has considered amendments to a number of rules and recommends that they be published for public comment. The rules are as follows:

A. Action Item—Rule 5, Initial Appearance; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

At its Fall 2003 meeting, the Committee considered possible amendments to a number of rules that would provide for electronic transmission of various documents to magistrate judges or the court. A subcommittee, chaired by Judge Anthony Battaglia, studied those rules and proposed amendments that would permit such transmissions. Rule 5, Initial Appearance, is one of those rules. In particular, the proposed amendment to Rule 5 would permit the government to use "reliable electronic means" to transmit the warrant to the magistrate judge. The accompanying Committee Note suggests several factors that a court may consider in determining whether a particular electronic media is reliable. The Committee unanimously approved the amendment. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 5 be published for public comment.

B. Action Item—Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

As noted above, the Committee considered possible amendments to several Criminal Rules in order to permit the parties to submit materials to the magistrate judge or the court by electronic means. The Committee believed that the parties should be permitted to do so in Rule 32.1 proceedings, i.e., proceedings involving revocation or modification of probation or supervised release. Again, the Committee Note addresses the issue of what might constitute "reliable electronic means." The Committee approved the amendment by a unanimous vote. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be published for public comment.

C. Action Item—Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

Based upon a suggestion from Magistrate Judge Robert Collings, the Committee has considered a conflict in Rules 32.1 and 40 concerning the ability of the court to consider bail in out-of-district cases. Although Rule 32.1(a)(6) permits a court to consider bail in out-of-district proceedings regarding revocation of release, Rule 40 does not. The Committee unanimously agreed to amend Rule 40 to conform to Rule 32.1. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 40 be published for public comment.

D. Action Item—Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

In conducting a survey of magistrate judges concerning use of electronic transmissions in pretrial proceedings, the Committee determined that there was an interest in expanding the use of facsimiles or other electronic means in obtaining or issuing search warrants. The Committee unanimously agreed with an amendment to Rule

41(e) that would permit electronic transmission of the warrant itself. The current rule permits the court to dictate the contents of warrant to the officer for transcription and the execution. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment.

E. Action Item—Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearings.

Magistrate Judge Nowak e-mailed the Committee to inform it that there was a possible inconsistency between Rules 5, 5.1, and 58, concerning the right of a defendant to a preliminary hearing. The Committee agreed and unanimously proposes that Rule 58(b)(2)(G) be amended by deleting any specific reference to the question of when a defendant is entitled to a preliminary hearing, and instead direct the reader to Rule 5.1, which specifically addresses preliminary hearings. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 58 be published for public comment.

IV. Information Items

A. Information Item—Congressional Consideration of Amendments to Rule 46.

Congress has continued to consider possible amendments to Rule 46 in response to proposals from bail bondsmen, who have urged Congress to amend that rule to prevent judges from revoking surety bonds for violation of any condition other than for failure to appear in court. The chair of the Criminal Rules Committee, Judge Carnes, and his predecessor, Judge Davis, have testified on the matter and presented arguments and statistical data supporting the current version of the rule. At this date, the issue continues to be considered by various Congressional committees.

B. Information Item—Congressional Amendments to Rule 6

As the restyled Criminal Rules were going into effect in December 2002, Congress further amended Rule 6 to permit the government to share grand jury information with foreign governments in terrorism cases. But the amendment was based on the former version of the rule, and therefore the legislation could not be executed. The Congressional amendment has been apparently considered to be a nullity because the

amending language was based upon the older version of Rule 6. The Committee has learned that the Department of Justice has prepared conforming language to remedy the conflict in the language, and that the problem may be remedied during the current legislative session. The Advisory Committee does not anticipate taking any additional action.

C. Information Item— Consideration of an Amendment to Rule 29, Concerning Deferral of Rulings on Motions for Judgment of Acquittal.

For the last several meetings, the Advisory Committee has considered a proposal from the Department of Justice to amend Rule 29 to require that all motions for a judgment of acquittal be deferred until after the jury has returned a verdict. Currently the rule permits the court to defer its ruling. The Department's proposal was driven in large part by the view that the court's ruling on a Rule 29 motion creates an anomaly because it is the only ruling not appealable, as a result of the double jeopardy clause. The Department has identified cases in which granting the motion was clearly incorrect. The Department's proposal to require that ruling be deferred until after verdict would, in its view, protect the defendant from double jeopardy and at the same time permit the government to appeal.

At its Fall 2003 meeting, the Committee identified two main areas where the amendment could prove particularly problematic— in those cases where there were multiple defendants or multiple counts and in those cases where the jury is unable to reach a verdict. The Department agreed to attempt to draft an amendment addressing those concerns, and was able to do so, only with regard to the hung jury scenario. In an attempt to reach a middle ground, Judge Levi proposed amendments to Rule 29 that would have permitted the defendant to receive a pre-verdict ruling on the motion, subject to a waiver of double jeopardy claims.

At its May 2004 meeting, the Committee discussed at length the underlying and competing policy concerns and the proposed amendments to Rule 29. Ultimately, the Committee voted 9 to 2 to leave Rule 29 as it is with the court having the discretion to rule on a motion for judgment of acquittal either before or after verdict.

Attachments:

Appendix A. Rule 12.2.
Appendix B. Rules 29, 33, 34 and 45.
Appendix C. Rule 32.
Appendix D. Rule 32.1.
Appendix E. New Rule 59.

Appendix F. Proposed Amendments to Rules 5, 32.1, 40, 41, and 58 for publication.

Appendix G. Minutes of April 2004 Meeting.

APPENDIX A

RULE 12.2. NOTICE OF AN INSANITY DEFENSE; MENTAL EXAMINATION

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.2. Notice of Insanity Defense; Mental Examination

* * * * *

(d) Failure to Comply.

(1) ***Failure to Give Notice or to Submit to Examination.*** ~~If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the~~ The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the

* New material is underlined; matter to be omitted is lined through.

defendant's guilt or the issue of punishment in a capital case~~.~~ if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(2) ***Failure to Disclose.*** The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

* * * * *

COMMITTEE NOTE

The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d). Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to relate only to the evidence related to the matters addressed in the report, which the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)—which can substantially affect the entire hearing—the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the results and reports that were not disclosed, as required in Rule 12.2(c)(3).

The rule assumes that the sanction of exclusion will result only where there has been a complete failure to disclose the report. If the report is disclosed, albeit in an untimely fashion, other relief may be appropriate, for example, granting a continuance to the government to review the report.

SUMMARY OF COMMENTS ON RULE 12.2

The Committee received four comments on the proposed amendment. Three of the commentators supported the change. The fourth, the Federal Bar Association, believes that the amendment is unnecessary.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Horsley generally supports the proposed amendments to all of the published rules, without any specific reference to Rule 12.2.

Federal Magistrate Judges Association (CR-03-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Magistrate Judges Association supports the amendment and notes that the change "appropriately entrusts to the court to fashion an appropriate sanction."

Criminal Section (03-CR-007)
Federal Bar Association
(Kevin J. Cloherty, Chair)
February 23, 2004

The Federal Bar Association believes that the proposed amendment goes too far, from a practical perspective. The Association notes that if defense counsel does not provide notice and the evidence is excluded, an appeal will follow on grounds of ineffective assistance of counsel. Instead of this amendment, the Association suggests that the government be given "ample opportunity" to test the defendant and prepare a rebuttal.

Changes Made After Publication and Comment—RULE 12.2

The Committee made no additional changes to Rule 12.2, following publication.

APPENDIX B

RULES 29, 33, 34 & 45.

- **Copy of Rules**
- **Committee Notes**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later~~, or within any other time the court sets during the 7-day period~~.

* * * * *

COMMITTEE NOTE

Rule 29(c) has been amended to remove the requirement that the court must act within seven days after a guilty verdict or after the court discharges the jury, if it sets another time for filing a motion for a judgment of acquittal. This amendment parallels similar changes to Rules 33 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 29(c) requires the defendant to move for a judgment of acquittal within seven days of the guilty verdict, or after the court discharges the jury, whichever occurs later, or some other time set by the court in an order issued within that same seven-day period. Similar provisions exist in Rules 33 and 34.

Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a judgment of acquittal under Rule 29 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time.

Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty~~, or within such further time as the court sets during the 7-day period~~.

COMMITTEE NOTE

Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rules 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 33(b)(2) requires the defendant to move for a new trial within seven days after the verdict or the finding of guilty verdict, or within some other time set by the court in an order issued during that same seven-day period. Similar provisions exist in Rules 29 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an

extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the

underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere~~, or within such further time as the court sets during the 7 day period~~.

COMMITTEE NOTE

Rule 34(b) has been amended to remove the requirement that the court must act within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere if it sets another time for filing a motion to arrest a judgment. The amendment parallels similar amendments to Rules 29 and 33. Further, a conforming amendment has been made to Rule 45(b).

Currently, Rule 34(b) requires the defendant to move to arrest judgment within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within some other time set by the court in an order issued by the court within that same seven-day period. Similar provisions exist in Rules 29 and 33. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the

seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, the court loses jurisdiction to act on the underlying substantive motion, if it is not filed within the seven days. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion to arrest judgment under Rule 34 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may

nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 45. Computing and Extending Time

* * * * * *

(b) Extending Time.

(1) *In General.* When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) ~~*Exceptions*~~. *Exception* The court may not extend the time to take any action under Rule ~~Rules 29, 33, 34 and~~ 35, except as stated in ~~those rules~~ that rule.

* * * * *

COMMITTEE NOTE

Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.

Currently, Rules 29(c)(1), 33(b)(1), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Rule 45(b)(2) currently specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.

Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

SUMMARY OF COMMENTS ON RULES 29, 33, 34, and 45

The Committee received four comments on the proposed amendments; three commentators supported the change and the fourth noted a grammatical error in the Committee Note to Rule 34.

Professor Peter Lushing (03-CR-001)
Benjamin N. Cardozo School of Law
New York, NY
Oct. 14, 2003

Professor Lushing noted that in the Committee Note for Rule 34 the word "acquittal" seems to be misplaced.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Horsley generally approved of the proposed rules package, but did not offer any specific comments on these particular rules.

Committee on United States Courts (03-CR-005)
State Bar of Michigan
(Joseph G. Scoville, Chair)
Lansing, Michigan
February 2, 2004

The United States Courts Committee of the State Bar of Michigan suggests that any changes to Civil Rule 6 concerning time requirements for filings should also be reflected in Criminal Rule 45. The Committee apparently offers no specific comments on the current proposed change to Rule 45.

Federal Magistrate Judges Association (CR-03-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Magistrate Judges Association supports the proposed amendments to Rules 29, 33, 34, and 45.

Changes Made After Publication and Comment—Rules 29, 33, 34, & 45

The Committee made no substantive changes to Rules 29, 33, 34, and 45 following publication.

APPENDIX C

RULE 32. SENTENCING AND JUDGMENT

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

Rule 32. Sentencing and Judgment

* * * * *

(i) Sentencing.

* * * * *

(4) Opportunity to Speak

* * * * *

(B) *By a Victim of a Crime of Violence or Sexual Abuse*. Before imposing sentence, the court must address any victim of any crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *By a Victim of a Felony Other Than a Crime of Violence or Sexual Abuse.* Before imposing sentence, the court must address any victim of a felony, not involving violence or sexual abuse, who is present at sentencing and must permit the victim to speak or submit any information about the sentence. If the felony involved multiple victims, the court may limit the number of victims who will address the court.

~~(C)~~ (D) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

* * * * *

COMMITTEE NOTE

In a series of amendments, Rule 32 has been modified to provide allocution for victims of violent crimes, and more recently for victims of sexual offenses. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, 108 Stat. 1796 (amending Rule 32 to provide for victim allocution in crimes of violence). In 2002, Rule 32 was amended to extend the right of victim allocution to victims of sexual abuse. *See* Rule 32(a)(1)(B). The amendment to Rule 32(i)(4) expands the right of victim-allocution to all felony cases.

The role of victim allocution has become part of the accepted landscape in federal sentencing. *See generally* J. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001). And although the actual practice varies, some courts currently permit statements from victims of crimes that do not involve violence or sexual abuse. Typical examples include statements from victims of fraud and other economic crimes. Victims of non-violent felonies may have pertinent information that could affect application of a particular sentencing guideline. At the same time, however, there are potential problems with victim allocution, particularly in cases involving a large

number of victims. *See* Barnard, *supra*, at 65-78 (noting arguments against victim allocution).

Rule 32(i)(4)(C) is a new provision that extends the right of allocution to victims of felonies that do not involve either sexual abuse or violence. The amendment attempts to strike a reasonable balance between the interest of victims in being heard and the ability of the court to efficiently move its sentencing docket. Although the rule requires the court to hear from victims if any are present and wish to speak, it gives the court some discretion about the manner in which victims are to be heard. In a particular case, the court may permit, or require some or all of the victims to present their information in the form of written statements. The rule explicitly states that if there are multiple victims, the court may properly limit the number of persons who will be permitted to address the court during sentencing.

The amendment does not include any provision requiring a court to permit a representative to speak on behalf of a victim, as the court must do for victims of sexual abuse or violence. The Committee believed that the policy reasons for permitting a victim to speak through a representative in a case involving sexual abuse or violence do not exist in most other types of cases. Nonetheless, there is nothing in the rule that would prohibit the court from permitting a third person to represent the views of one or more victims of a felony not involving violence or sexual assault.

SUMMARY OF COMMENTS ON RULE 32

The Committee received four comments from members of the public and also some suggested changes from the Style Subcommittee of the Standing Committee. Three of the commentators support the amendment; one opposes it. The Style Subcommittee questioned why the term "Felony Offense" is used in the title of Section (C), rather than just the word "Felony." The Committee made that change.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Horsley supports the package of amendments published in 2003, but offers no specific comments about the proposed change to Rule 32.

Hon. Robert Holmes Bell (03-CR-003)
W.D. Michigan
Grand Rapids, Michigan
October 29, 2003

Judge Robert Holmes Bell, Chief District Judge of the Western District of Michigan, opposes the amendment to the extent it requires the court to hear victim testimony. He notes that victims do not provide anything new because the Presentence Report is supposed to present the victim's perspective about the crime. He adds that the definition of victim is so vague that many people demand to be heard. He concludes by suggesting that the entire section (B) should be rewritten to give the court the discretion to hear from the victims.

Committee on Federal Courts (03-CR-004)
State Bar of California
(Robert J. Schulze, Chair)
San Francisco, California
Feb. 14, 2004

The State Bar of California, Committee on Federal Courts, supports the amendment to Rule 32.

Federal Magistrate Judges Association (03-CR-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Magistrate Judges Association supports the proposed change but identifies two concerns. First, the amendment does not explicitly state who is a "victim." For example, the Association questions who the victims would be in a conspiracy to distribute drugs. Second, the amendment may unduly restrict the discretion of the court. Although the rule uses the term "must," the Committee Note seems to signal some discretion to the court. The Association offers the following as additional language:

> "In particular cases, the court, may, in its discretion, determine who are the victims of an offense, impose reasonable limits on the number of victims or classes of victims who may present information, and determine whether the information presented should be presented orally, in writing, or by some other means."

Changes Made After Publication and Comment—RULE 32

The Committee made no substantive changes to Rule 32 following publication.

APPENDIX D

RULE 32.1. REVOKING OR MODIFYING PROBATION OR SUPERVISED RELEASE

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(b) Revocation.

* * * * *

(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; ~~and~~

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel ~~.~~ ; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

(1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel ~~.~~ and an opportunity to make a statement and present any information in mitigation.

* * * * *

COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a

person upon revocation of supervised release. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at revocation hearings, Rule 32.1(b)(2) and extends it as well to modification hearings where the court may decide to modify the terms or conditions of the defendant's probation, Rule 32.1(c)(1). In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

SUMMARY OF COMMENTS ON RULE 32.1

The Committee received only two written comments on the proposed amendment to Rule 32.1. Both of them supported the amendment.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Jack Horsley commented favorably on the package of published amendments. He did not, however, comment on the specific amendment to Rule 32.1

Federal Magistrate Judges Association (03-CR-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Federal Magistrate Judges Association supports the amendment, noting that it "wisely fills a gap in the rule noted in case law."

Changes Made After Publication and Comment—RULE 32.1

The Committee made no changes to Rule 32.1 following publication.

APPENDIX E

NEW RULE 59. MATTERS BEFORE A MAGISTRATE JUDGE

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within 10 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

(1) Referral to Magistrate Judge. A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

***(2)* Objections to Findings and Recommendations.** Within 10 days after being served with a copy of the recommended disposition, or at some other time the

court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) De Novo Review of Recommendations. The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions.

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of magistrate judge's decisions resulted from *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is stated on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is contrary to law or is clearly erroneous, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. § 636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions. In *Thomas v. Arn*, 474 U.S. 140, 155 (1985), the Supreme Court approved the adoption of waiver rules on matters for which a magistrate judge had made a decision or recommendation. The Committee believes that the waiver provisions will enhance the ability of a district court to review a magistrate judge's decision or recommendation by requiring a party to promptly file an objection to that part of the decision or recommendation at issue. Further, the Supreme Court has held that a de novo review of a magistrate judge's decision or recommendation is required to satisfy Article III concerns only where there is an objection. *Peretz v. United States*, 501 U.S. 293 (1991).

Despite the waiver provisions, the district judge retains the authority to review any magistrate judge's decision or recommendation by a magistrate judge whether or not objections are timely filed. This discretionary review is in accord with the Supreme Court's decision in *Thomas v. Arn, supra,* at 154. *See also Matthews v. Weber*, 423 U.S. 261, 270-271 (1976).

Although the rule distinguishes between "dispositive" and "nondispositive" matters, it does not attempt to define or otherwise catalog motions that may fall within either category. Instead, that task is left to the case law.

SUMMARY OF COMMENTS ON RULE 59

The Committee received three comments on the proposed rule. All three support the rule. The Style Subcommittee also offered some suggested style changes to the Rule; most of those suggestions were incorporated into the rule.

Mr. Jack E. Horsley (03-CR-002)
Matoon, Illinois
Oct. 17, 2003

Mr. Jack Horsley commented favorably on the package of rule amendments but offered no specific comments on Rule 59.

Committee on Federal Courts (03-CR-004)
State Bar of California
(Robert J. Schulze, Chair)
San Francisco, California
Feb. 14, 2004

The Committee on Federal Courts of the California State Bar supports the proposed new rule.

Federal Magistrate Judges Association (03-CR-006)
(Judge Louisa S. Porter, Chair)
San Diego, California
February 9, 2004

The Magistrate Judges Association offered a number of suggested changes to the rule:

- The Association believes that in order to avoid confusion, the Committee should consider addressing the question of whether the terms "dispositive" and "nondispositive" should be given the same meaning in both Rule 59 and Civil Rule 72. It suggests that the words, "matter not dispositive of a charge or defense of a party," is preferable and would be similar to the language in Rule 72.

- It notes some ambiguity in the rule regarding the time for filing objections. It suggests that the language be changed to reflect the differences in those instances where the ruling is made orally on the record and where the ruling is written.

- The Association suggests that Rule 72 be changed to include the language in Rule 59, concerning the failure to object.

- It states that the provision in the rule that would permit the judge to alter the time for filing objections is problematic and recommends that the 10-day time limit in Rule 72 be added to Rule 59 or that if an extension is requested, that it must be made within the 10-day period.

- The Association suggests that it would be helpful to expand the Committee Note to address the differences in the scope of Rules 59 and 72, regarding referral of matters to magistrate judges. It notes that the "broad scope for Rule 59(a)" may lead to further amendments to Rule 72.

- Finally, the Association states that the rule does not address the effect of a report and recommendation in the absence of an objection. It suggests addition of a new Rule 54(b)(4) that would state that where no objection is filed that the report and recommendation is not self-executing and has no effect until the district court enters an order or judgment.

Changes Made After Publication and Comment

The Committee adopted almost all of the style suggestions by the Style Subcommittee, and several of the suggestions by the Federal Magistrate Judges' Association. In particular the Committee adopted a variation of the language suggested by the Association concerning matters disposing of a "charge or defense." The Committee also addressed the issue in Rule 59(a) of clarifying the starting point for the 10 days in which to file objections by changing the word "made" in line 9 to read "stated." In Rule 59(b)(1) the Committee rearranged the order of the sample motions that would be considered "dispositive." Finally, the Committee included a paragraph at the end of the Committee Note, addressing the decision not to further specify in the rule, or the Note, what matters might be dispositive or nondispositive.

APPENDIX F

PROPOSED AMENDMENTS TO RULES FOR PUBLICATION AND COMMENT

- **Proposed Amendment to Rule 5 & Committee Note**
- **Proposed Amendment to Rule 32.1 & Committee Note**
- **Proposed Amendment to Rule 40 & Committee Note**
- **Proposed Amendment to Rule 41 & Committee Note**
- **Proposed Amendment to Rule 58 & Committee Note**

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(3) ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1~~ or Rule 58(b)(2)(G)~~;

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant ~~, a facsimile of either,~~ or ~~other appropriate~~ a reliable electronic form of either; and

* * * * *

COMMITTEE NOTE

The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee

believed that the broader term "electronic form" includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether

security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(5) ***Appearance in a District Lacking Jurisdiction.*** If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

* * * * *

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or copies of those

certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

* * * * *

COMMITTEE NOTE

Rule 32.1(a)(5)(B)(i) has been amended to permit the magistrate judge to accept a judgment, warrant, and warrant application by facsimile or by reliable electronic means. Currently, the rule requires the government to produce certified copies of those documents. This amendment parallels similar changes to Rules 5 and 41.

The amendment reflects a number of significant improvements in technology. First, receiving documents by facsimile has become very commonplace and many courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short,

in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. The Committee envisions that the term "electronic" would include use of facsimile transmissions.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may wish to consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

~~**(a) In General.** If a person is arrested under a warrant issued in another district for failing to appear—as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena—the person must be taken without unnecessary delay before a magistrate judge in the district of arrest.~~

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear, as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by subpoena; or

(ii) violating conditions of release set in another district.

* * * * *

COMMITTEE NOTE

Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See, e.g.*, *United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believed that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

Rule 41. Search and Seizure

* * * * *

(d) Obtaining a Warrant.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Means.***

(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

* * * * *

(e) Issuing the Warrant.

* * * * *

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* If the applicant reads the contents of the proposed duplicate original warrant, the ~~The~~ magistrate judge must enter ~~the~~ those contents ~~of the proposed duplicate original warrant~~ into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) *Modification~~s~~.* The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly. ~~In that case, the judge must also modify the original warrant.~~

(D) Signing the ~~Original Warrant and the Duplicate Original~~ Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

* * * * *

COMMITTEE NOTE

Rule 41(e) has been amended to permit the magistrate judges to use reliable electronic means to issue warrants. Currently, the rule makes no provision for using such media. The amendment parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i).

The amendment recognizes the significant improvements in technology. First, more counsel, courts, and magistrate judges now routinely use facsimile transmissions of documents. And many courts and magistrate judges are now equipped to receive filings by

electronic means. Indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings may be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using facsimiles and electronic media to transmit a warrant can be both reliable and efficient use of judicial resources.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of "electronic means."

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those transmissions are reliable. The rule treats all electronic transmissions in a similar fashion. Whatever the mode, the means used must be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may

consider whether there are reliable means of preserving the document for later use.

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) Initial Appearance. At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the~~ any right to a preliminary hearing under Rule 5.1, and the general circumstances, if

any, under which the defendant may secure pretrial release.

* * * * *

COMMITTEE NOTE

Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance on a misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases were the defendant is held in custody, thus creating a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is incomplete in its description of the circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. § 3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.

APPENDIX G

MINUTES OF MAY 2004 MEETING

[DRAFT] MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

May 6-7, 2004
Monterey, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Monterey, California on May 6 and 7, 2004. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, May 6, 2004. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Ms. Deborah J. Rhodes, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. David Levi, chair of the Standing Committee, Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Jonathan Wroblewski of the Department of Justice; Ms. Laural Hooper of the Federal Judicial Center; and Mr. George Leone, Chief, Appeals Division, United States Attorney's Office, D.N.J.

Judge Carnes welcomed Ms. Deborah Rhodes as the new member representing the Department of Justice.

II. APPROVAL OF MINUTES

Judge Trager moved that the minutes of the Committee's meeting in Gleneden Beach, Oregon in October 2003, be approved. The motion was seconded by Judge Battaglia and, following corrections to the Minutes, carried by a unanimous vote.

III. STATUS OF PROPOSED AMENDMENTS TO RULES PENDING BEFORE THE SUPREME COURT

Mr. Rabiej informed the Committee that the package of amendments submitted to, and approved by the Judicial Conference in September 2003 (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35) had been approved by the Supreme Court and were being transmitted to Congress.

IV. PROPOSED AMENDMENTS PUBLISHED FOR COMMENT AND PENDING FURTHER ACTION

A. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Sanction for Defense Failure To Disclose Information.

The Reporter stated that only four commentators had expressed views on the proposed amendment to Rule 12.2(d)—which is intended to fill a gap created in the 2002 amendments to the rule and include a sanction provision if the defendant fails to disclose any expert reports, as required under Rule 12.2(c)(3). First, he stated, Mr. Jack Horsley generally supports the proposed amendments to all of the rules, without any specific reference to Rule 12.2. Second, the Magistrate Judges Association supports the amendment and notes that the change "appropriately entrusts to the court to fashion an appropriate sanction." Third, he noted that the Federal Bar Association had expressed the view that the proposed amendment goes to far and that if defense counsel does not provide notice and the evidence is excluded, an appeal will follow on grounds of ineffective assistance of counsel. Instead of this amendment, the Association suggested that the government be given "ample opportunity" to test the defendant and prepare a rebuttal. Finally, the Reporter stated that the Standing Committee's Style Subcommittee has offered brief comments on rule.

Following brief discussion, Judge Bucklew moved that the Committee approve the amendment to Rule 12.2 and forward it to the Standing Committee with a recommendation to forward it to the Judicial Conference. Judge Friedman seconded the motion, which carried by unanimous vote.

B. Rules 29, 33 and 34; Proposed Amendments Re Rulings By Court On Motions to Extend Time for Filing Motions Under Those Rules.

The Reporter stated the Committee had received comments on the proposed amendments to Rules 29, 33, and 34; those amendments are intended to remove the language from the current rules that impose a 7-day requirement on the court for setting a time for filing motions under those rules. A conforming change has been proposed for Rule 45. He noted that first, Professor Lushing noted a grammatical error in the Committee Note for Rule 34. Second, another commentator, Mr. Horsley, generally approved of the proposed rules package, but did not offer any specific comments on these particular rules. Third, the United States Courts Committee of the State Bar of Michigan suggested that any changes to Civil Rule 6 concerning time requirements for filings should also be reflected in Criminal Rule 45. The Committee apparently offers no specific comments on the current proposed change to Rule 45. And finally, the Reporter stated that the Magistrate Judges Association supports the proposed amendments to Rules 29, 33, 34, and 45.

During the brief discussion on the proposed amendments, Judge Levi noted that the Committee might wish to revisit Rule 45 following proposed amendments to Civil Rule 6. Judge Friedman moved that the Committee approve the proposed amendments and forward them to the Standing Committee with a recommendation to forward them to the Judicial Conference. Mr. Campbell seconded the motion, which carried by a unanimous vote.

C. Rule 32, Sentencing; Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.

Professor Schlueter reported that four commentators had offered views on the proposed amendment to Rule 32; that amendment would extend the right of allocution to all victims in non-violent, non-sexual abuse felony cases. He noted that Mr. Jack Horsley supported the package of amendments published in 2003, but offered no specific comments about the proposed change to Rule 32. Professor Schlueter added that Judge Robert Holmes Bell, Chief District Judge of the Western District of Michigan, opposed the amendment to the extent it requires the court to hear victim testimony. In his view, victims do not provide anything new because the Presentence Report is supposed to present the victim's perspective about the crime. Judge Bell also noted that that the definition of victim is so vague that many people demand to be heard and suggested that that the entire section (B) should be rewritten to give the court the discretion to hear from

the victims. Third, Professor Schlueter continued, the State Bar of California, Committee on Federal Courts, supports the amendment to Rule 32. Fourth, the Magistrate Judges Association supports the proposed change but identified two concerns. First, the Association noted that the amendment does not explicitly state who is a "victim." Second, the amendment may unduly restrict the discretion of the court. Although the rule uses the term "must," the Association commented that the Committee Note seems to signal some discretion to the court. The Association offers the following as additional language:

> "In particular cases, the court, may, in its discretion, determine who are the victims of an offense, impose reasonable limits on the number of victims or classes of victims who may present information, and determine whether the information presented should be presented orally, in writing, or by some other means."

Finally, Professor Schlueter, noted that the Style Subcommittee had questioned why the term "Felony Offense" is used in the title of Section (C), rather than just the word "Felony." Following discussion, the Committee agreed with the Subcommittee's recommendation and changed the wording.

Professor Schlueter noted that the House of Representatives had passed an Act requiring a wide-range of rights to victims of crime and that the same measure was being considered by the Senate. He recommended that in light of the pending legislation and the fact that other rules would likely be affected, that the Committee might wish to consider deferring consideration of the proposed amendment. During the brief discussion of the pending legislation and it possible effects on criminal trials, Judge Trager noted that he favored going forward with the proposed amendment. In his view, if Congress actually enacted the Victims Right bill, there would be time to pull the proposal from the process. He moved that the Committee approve the amendment to Rule 32 and forward it to the Standing Committee with the understanding that in the event Congress enacted the legislation, that Committee could withdraw the proposal. Mr. Fiske seconded the motion, which carried by a vote of 10-2.

D. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments to Rule Concerning Defendant's Right of Allocution.

The Reporter indicated that the Committee had received only two written comments on the proposed amendment to Rule 32.1. The amendment, he explained, would provide allocution rights for a person who faces revocation or modification of probation or supervised release. He noted that first, Mr. Jack Horsley commented favorably on the package of published amendments but did not, however, comment on the specific amendment to Rule 32.1. Secondly, he stated that the Federal Magistrate Judges

Association supported the amendment. Following brief discussion, Judge Bucklew moved that the Committee approve the amendment and forward it to the Standing Committee. Judge Bartle seconded the motion, which carried by a unanimous vote.

E. Rule 59; Proposed New Rule Concerning Rulings By Magistrate Judges.

Professor Schlueter reported that the Committee had received three written comments on the proposed new Rule 59, which is intended to parallel Civil Rule 72. First, he stated, Mr. Jack Horsley had commented favorably on the package or rule amendments but had offered no specific comments on Rule 59. Second, the Magistrate Judges Association had offered a number of suggested changes to the rule:

First, he reported, the Association believed that in order to avoid confusion, the Committee should consider addressing the question of whether the terms "dispositive" and "nondispositive" should be given the same meaning in both Rule 59 and Civil Rule 72. It suggested that the words, "matter not dispositive of a charge or defense of a party," is preferable and would be similar to the language in Rule 72. Following brief discussion, Judge Trager moved that the rule be amended to reflect that suggestion. Judge Bartle seconded the motion, which carried by a vote of 10 to 1.

Next, Professor Schlueter reported that the Association had noted some ambiguity in the rule regarding the time for filing objections. It had suggested that the language be changed to reflect the differences in those instances where the ruling is made orally on the record and where the ruling is written. The Committee discussed this point and by a vote of 8 to 2 initially decided to use the word "entered" on line 9 of the proposed rule. Following additional discussion, however, the Committee voted to reconsider that vote (by a margin of 9 to 1) and ultimately, on motion by Judge Trager, seconded by Professor King, voted by 9 to 1 to use the word "stated" instead on line 9.

Professor Schlueter noted that the Association had also suggested that Rule 72 be changed to include the language in Rule 59, concerning the failure to object. The Committee agreed that that was a matter within the jurisdiction of the Civil Rules Committee.

Next, Professor Schlueter informed the Committee that the Association had stated that the provision in the rule that would permit the judge to alter the time for filing objections is problematic and recommends that the 10-day time limit in Rule 72 be added to Rule 59 or that if an extension is requested, that it must be made within the 10-day period. The Committee discussed this suggestion and ultimately decided that the current language of the proposed new rule was sufficient to address those concerns.

Professor Schlueter also reported that the Association had suggested that it would be helpful to expand the Committee Note to address the differences in the scope of Rules

59 and 72, regarding referral of matters to magistrate judges. Following a brief discussion, the Committee agreed with Professor Schlueter's observation that it would be more appropriate for the Note not to include any discussion comparing the two rules, and instead focus on the scope and purposes of Rule 59.

Finally, he noted that the Association had written that the proposed rule does not address the effect of a report and recommendation in the absence of an objection. It suggests addition of a new Rule 54(b)(4) that would state that where no objection is filed that the report and recommendation is not self-executing and has no effect until the district court enters an order or judgment. The Committee discussed this proposal; a consensus emerged that the effect of the absence of a report and recommendation need not be reflected in the rule and that in keeping with other rules of procedure, it would be better not to state the effective dates for rulings.

Finally, Professor Schlueter reported that the Style Subcommittee had offered some suggested style changes to the Rule. Following brief discussion, those changes were generally included. In addition, Professor Schlueter suggested, at the urging of several members, additional language for the Note that would address the issue of what constitutes a "dispositive" or "nondispositive" matter, terms which do not appear in the governing statute.

Judge Trager moved, and Judge Jones seconded, a motion to approve the proposed new rule and forward it to the Standing Committee for its approval. The motion carried by a vote of 10 to 1.

V. PROPOSED AMENDMENTS TO RULES UNDER ACTIVE CONSIDERATION

A. Report of Subcommittee on Rules 3, 4, 5.1, 32.1, 40, 41 & 58.

Judge Battaglia reported that the subcommittee, consisting of himself as chair and Mr. Campbell and Ms. Rhodes as members, had considered possible amendments to a number of rules. The subcommittee had been charged with reviewing the rules for the purpose, inter alia, of determining whether any provision should be made for first, codifying the requirements of Gerstein v. Pugh, second, including provisions for filing documents by electronic means, including facsimile transmissions, and the question of entitlement to preliminary hearings.

1. Issue of Whether to Adopt Rule Codifying *Gerstein v. Pugh*.

Judge Battaglia reported that as to the first issue, whether to codify *Gerstein*, that the Subcommittee had decided not to propose any amendments. A survey of the

magistrate judges indicated that a number of different procedures and although the magistrates stated that they believed that adoption of a national rule would be helpful, they also stated that it would be important to maintain as much flexibility as possible. The Subcommittee believed that promulgating a rule on the topic might create additional, and unanticipated, problems of application. Judge Battaglia moved that no action be taken at this time. Mr. Campbell seconded the motion, which carried by a unanimous vote.

2. Amendments to Rules 3 and 4 to Allow for Issuance of Arrest Warrants by Facsimile.

Judge Battaglia next reported that the Subcommittee had considered a recommendation from Judge Bernard Zimmerman to amend Rule 4 to permit issuance of an arrest warrant by facsimile transmission; currently, Rule 4 does not address any particular means of issuing an arrest warrant. Similarly, the Subcommittee also considered whether Rule 3, which addresses use of complaints, was silent on the manner of presenting the necessary information to a magistrate judge. The Subcommittee, he stated, decided not to propose any amendments at this time; in its view, there are no perceived problems with using the rules or with the traditional methods of issuing arrest warrants. Judge Battaglia moved that the Committee take no further action on this proposal at this time. Mr. Campbell seconded the motion, which carried by a unanimous vote.

3. Rules 32.1(a)(6) and Rule 40, Regarding Release on Bond.

The Subcommittee also considered a conflict in Rules 32.1 and 40 concerning the ability of the court to consider bail in out of district cases. Judge Battaglia reported that the Subcommittee agreed with a recommendation from Magistrate Judge Robert Collings, that although Rule 32.1(a)(6) permits a court to consider bail in out of district proceedings regarding revocation of release. But Rule 40 does not. The Subcommittee recommended that Rule 40 be amended to conform to Rule 32.1. Judge Battaglia moved that Rule 40 be amended and that it be forwarded to the Standing Committee with a recommendation to publish it for public comment. Professor King seconded the motion, which carried by a unanimous vote.

4. Amendments Regarding Use of Other Reliable Electronic Means in Rules 5, 32.1, and 41.

Judge Battaglia stated that, at the suggestion of Judge William Sanderson, the Subcommittee had considered possible amendments to the rules regarding greater use of facsimiles or other electronic means in transmitting various documents. Although Judge Sanderson's proposal had focused only on Rule 32.1, the Subcommittee, at the direction of the Committee, had considered similar amendments to Rules 5 and 41. Those amendments would provide that the documents referenced in those rules could be

transmitted by "reliable electronic means." During the brief discussion on these amendments, Judge Battaglia noted that the key here is that the term "reliability" focuses on the quality of the transmission and not necessarily on the authenticity of the underlying document. Judge Battaglia moved that the Committee approve the amendments to Rules 5, 32.1, and 41 and that they be forwarded to the Standing Committee with a recommendation to publish them for public comment. Mr. Campbell seconded the motion, which carried by a unanimous vote. Turning to a discussion of the proposed Committee Note, Professor King moved that the last paragraph of the Note, which addresses the factors that a court may wish to consider in using electronic means, be deleted. Judge Jones seconded the motion. The Reporter pointed out that the language used in the proposed Notes to Rules 5, 32.1 and 41, was similar to that used in recent amendments to Rules 5 and 10 concerning video teleconferencing. The motion failed by a vote of 4 to 8.

5. Amendments Regarding Right to Preliminary Hearings; Rules 5 and 58

Referencing an e-mail from Magistrate Judge Nowak, Judge Battaglia reported that the Subcommittee had considered an amendment to Rule 58 that would resolve a conflict between that rule and Rule 5.1(a) concerning the right to a preliminary hearing. The Subcommittee noted that the right to a preliminary hearing is correctly stated in Rule 5.1, and rather that redrafting Rule 58 to clarify the issue, the Subcommittee recommended that Rule 58(b)(2)(G) be amended to delete the reference to those cases where the defendant is in custody and to simply refer the reader to Rule 5.1. Judge Battaglia moved that the amendment be approved and forwarded to the Standing Committee for publication. Judge Friedman seconded the motion, which carried by a unanimous vote.

6. Amendments to Rule 41 Regarding Expanded Use of Facsimile or Other Electronic Means

Finally, Judge Battaglia reported that in conducting the survey regarding possible codification of *Gerstein*, a number of Magistrate Judges indicated an interest in expanding the use of facsimiles or other electronic means in obtaining or issuing search warrants. The Subcommittee recommended that Rule 41 be amended to permit transmission of the warrant itself. During the discussion, Mr. Campbell noted that during the recent restyling of the rule, the introductory language in Rule 41(d)(3), "If the court determines it is reasonable under the circumstances," had been deleted. Although the deletion of that language was not specifically mentioned in the Committee Note, it was apparently deleted because the Committee believed it was unnecessary. Mr. Campbell's motion to restore the language failed for lack of a second.

Judge Battaglia moved that the amendments to Rule 41 be approved and forwarded to the Standing Committee with a recommendation that they be published for public comment. Mr. Campbell seconded the motion, which carried by a unanimous vote.

B. Rule 29; Proposed Amendment Regarding Deferral of Ruling on Motion for Judgment of Acquittal Until After Verdict.

Judge Carnes introduced the subject of a proposed amendment to Rule 29, which would require the court in all cases to defer ruling on a motion for a judgment of acquittal until after the jury had returned a verdict. He noted that the issue had been discussed at the last several meetings and that the Department of Justice had been asked to address two issues raised at the Fall 2003 meeting—first, the problem of multiple counts and multiple defendants, and second, the problem of the hung jury. Mr. Rabiej also reported that the Administrative Office had conducted an additional statistical study of cases during FY 2002 involving Rule 29 rulings. He noted that the study indicated that of the approximately 80,000 felony cases during that time frame and that of those, approximately 3000 cases were disposed of by trial and of those, the courts entered a a pre-verdict Rule 29 motion in favor of approximately 37 felony defendants. Mr. Leone and Mr. Wroblewski both commented that in some regards those statistics might be underinclusive.

Ms. Rhodes reported that the Department had considered both of those issues and had drafted an alternate version of Rule 29 that would address the issue of the hung jury, but not the problem of the multiple defendant or multiple counts cases. She also noted that Judge Levi had proposed a possible solution to the problem by suggesting that Rule 29 be amended to address specifically the issue of double jeopardy for pre-verdict rulings, and thus provide the possibility of a government appeal of an adverse ruling. She indicated that the Department would be willing to pursue that type of amendment and added that although the numbers of Rule 29 pre-verdict rulings was low, the numbers were still important to the Department. She added that those numbers indicate that only about 50 percent of the cases affected are pre-verdict cases. In addressing the proposed waiver provisions, Ms. Rhodes pointed out that from the Department's view, there are many benefits in proceeding to final verdict, noting that approximately 50 percent of cases are tried in one day and that approximately 96 percent are tried in nine days or less.

Judge Carnes noted that it would be difficult to articulate in a rule the competing interests in granting a pre-verdict motion, or continuing to a final verdict, especially in multi-count or multi-defendant cases. Mr. Fiske stated that the hung jury situation would be easier to address in a rule, and that in multiple defendant cases, the defendants who have their motions granted are out of the case. In the case of multiple counts, the matter becomes more complicated. Judge Levi added that in considering this issue, the Committee could expect a significant amount of opposition, for what some view as a

highly controversial topic. He noted that the waiver provision might be a good middle ground for further discussion.

Professor King stated that in her view the statistics provided by the Administrative Office may not have sufficiently pinpointed the specific problems on the multiple defendant and multiple count cases. Judge Bucklew noted that there is no constitutional right for a defendant to obtain a pre-verdict ruling and that the whole issue had been complicated by the 1971 Appeals Act, which expanded the government's right to appeal, and the fact that there were a few cases in which the courts had apparently granted the motion for wrong reasons. Judge Bartle observed that he was not convinced by the Department's cost-benefit approach and that it seemed arbitrary.

Mr. Goldberg indicated that the Department should consider the waiver provisions because it appeared to be a way to obtain the change the Department wished to see—the ability to appeal a bad ruling by the court. Mr. Campbell stated that he still opposed any further amendments to Rule 29 and that to do so was part of an alarming trend to transfer the outcome of a case to one of the parties. He also noted that in his view the low number of cases did not justify any further amendments to Rule 29. Mr. Fiske indicated that he supported an amendment to Rule 29 that would permit the defendant to waive any double jeopardy claims. Both Judge Jones and Judge Battaglia expressed the view that the costs of fixing the problem of erroneous Rule 29 rulings outweighed any possible benefits. Judge Jones stated that the costs of the amendment would include the possibility of the jury hearing evidence on all of the charges, regardless of how valid they were; in addition, prosecutors sometimes intentionally include many additional charges, which may or may not have merit. The proposed amendment requiring the courts to defer ruling on any Rule 29 motion until after verdict would deprive them of the ability to weed out bad counts. Professor King agreed with the view that there is no constitutional right to have the court rule on a pre-verdict motion, but that doing so makes good policy.

Judge Trager stated that he had originally supported the Department's proposal and that he supported Judge Levi's waiver proposals. He added that although the cases are few where the courts have erroneously granted Rule 29 motions, he believed that such rulings reflect poorly on the courts and the community.

Following additional discussion about the various options for amending Rule 29, Judge Jones moved that the Committee make no amendments to the Rule. Mr. Campbell seconded the motion, which carried by a vote of 9 to 3.

C. Proposed Amendments to Criminal Rules to Implement E-Government Act.

Professor Schlueter reported that the Committee has been asked to consider amendments to the Federal Rules of Criminal Procedure to implement provisions in the

E-Government Act of 2002 (Public Law 107-347). He noted that Section 205 of that Act, requires, in part, that every federal court to make available access to docket information, the substance of all written opinions of the court, and access to documents filed with the court in electronic form. It also authorizes the courts to convert any document into an electronic form; any document so converted, however, must be made available to the public online.

He continued by informing the Committee that the Act requires that the Judicial Conference use the Rules Enabling Act procedures to prescribe the appropriate rules and that they are to be applied in a uniform manner throughout the federal courts. In order to respond to the mandate to draft privacy rules for all of the Federal Rules of Procedure (Appellate, Bankruptcy, Civil and Criminal), Judge Levi (Chair of the Standing Committee) appointed the E-Government Subcommittee, chaired by Judge Sidney A. Fitzwater. Professor Schlueter continued by stating that the Subcommittee includes liaisons from each of the Rules Advisory Committees and several other committees of the Judicial Conference; the Reporters of the Advisory Committees serve as consultants. Professor Dan Capra, Reporter to the Evidence Advisory Committee, is serving as the Lead Reporter for the Subcommittee. Judge Strubhar represents this Committee on the Subcommittee.

Professor Schlueter reported that the Subcommittee had met in Scottsdale Arizona in January 2004, to discuss the approach and scheduling for drafting uniform privacy rules. The Subcommittee had asked each of the Rules Committees for their input on what information should be deleted from filings. Another Subcommittee Meeting is scheduled for June 2004. He indicated that it would be important at this stage for the Committee to provide guidance to Judge Carnes, Judge Strubhar, or himself on what the Criminal version of the rule might look like.

He further stated that he had drafted proposed amendments to Rule 49, Serving and Filing Papers, using Professor Capra's original template.

During the ensuing discussion, the Committee indicated that any privacy filing provisions should be listed in a separate new rule, Rule 49.1. Later in the meeting, Judge Carnes appointed an E-Government Subcommittee consisting of Judge Strubhar (chair), Judge Bartle, and Ms. Rhodes.

D. Other Proposed Amendments to Rules.

1. Rule 11(c)(1); Proposed Amendment Regarding Provision Barring Court from Participating in Plea Agreements.

Judge Carnes informed the Committee that Judge David Dowd, a former member of the Committee, had written again to the Committee urging it to address the problem in

those cases where a defendant pleading guilty has not been informed of a plea offer from the government. In his proposal, Judge Dowd included several decisions from the Sixth Circuit noting the problem. Judge Carnes noted that in his most recent proposal, Judge Dowd recommended that Rule 11 include a provision to the effect that a court may inquire of the defendant about whether the defendant has been fully apprised of any offered plea agreements, without violating the provision barring the court from taking part in the plea discussions.

Judges Trager and Bartle expressed the view that this has not been a problem in their courts. Judge Bucklew indicated that she does question the parties but does not view that as engaging in the plea discussions themselves. Judge Friedman agreed that making the inquiry is not considered to be a violation of the provision in Rule 11 that prevents the court from taking part in the plea discussions, and added that he did not see a need for an amendment to that rule. Judges Jones and Battaglia also stated that they did not see the need for any amendments to Rule 11. Following additional discussion, a consensus emerged that no change should be made to the rule.

2. Rule 11 & Rule 16; Proposed Amendment Regarding Disclosure of *Brady* Information; Report of Subcommittee.

Judge Carnes stated that after the last meeting, the Committee had received a proposal from the American College of Trial Lawyers to amend Rules 11 and 16 to require prosecutors to disclose favorable information, as required by *Brady v. Maryland.* He informed the Committee that he had appointed a Subcommittee consisting of Judge Bucklew (chair), Judge Trager, Mr. Campbell, Mr. Goldberg, and Mr. Wroblewski to study the proposal and report to the Committee.

Judge Bucklew reviewed the extensive written proposal from the College and stated that the Committee had met once and had been divided on whether to proceed with proposing any amendments to either Rule 11 or Rule 16. She indicated that one of the first issues that would have to be addressed is the definition of "favorable" evidence, noting that at this point, there is a large amount of case law that has interpreted *Brady.*

Judge Carnes noted briefly, the case law subsequent to *Brady*, which also includes an apparent change in the meaning of the term "materiality" and identified several potential problems of attempting to codify *Brady.* Mr. Fiske explained his role in the College's proposal; he indicated that as a past president of that organization he had spoken favor of the proposal at the meeting during which the proposal was considered. He also identified a number of issues that would have to be considered if the Committee was inclined to amend either Rule 11 or 16. Mr. Goldberg questioned the need for the rule, noting that he agreed with the Department of Justice's view that *Brady* is really a post-trial rule. He noted that prosecutors and judges apply a variety of timing

requirements, and that perhaps it would be beneficial to adopt some sort of bright line rule for the time to disclose the information.

Mr. Campbell stated that the proposal was worth pursuing and that it would be possible for the Committee to draft an amendment that addressed the core obligations. Mr. Goldberg questioned whether any states had such rules; if not, he noted, a federal rule could serve as a helpful model. Ms. Rhodes stated that the government takes its *Brady* obligations seriously, but that there are mistakes from time to time. She added that there is almost forty years of case law on the subject and that any amendment to Rule 16, for example, would not solve all of the problems associated with pre-trial discovery.

Judge Jones questioned what the Department's position might be to an amendment that required the prosecution to state on the record that it had used due diligence in attempting to discover favorable information. Ms. Rhodes responded that she was not sure that including that in a rule would add any weight to the existing obligations. In the following discussion, several members focused on the question of whether government attorneys are ever disciplined for withholding information favorable to the defense and the underlying problem of attempting to define what information must be disclosed.

Mr. Goldberg expressed the hope that any consideration of an amendment would flounder on the specifics of the rule itself. Judge Jones observed that the Committee could draft a rule that granted greater protections than *Brady*. Other members noted that attempts to codify *Jencks* had been unsuccessful.

Judge Friedman believed that it would be helpful to consider the issue further and that it might be time for an amendment to the rules. Other members agreed with that view, noting however that it would be important to address those issues that could be included in a rule. Mr. Goldberg moved that the Committee consider the College's proposal further. Mr. Fiske seconded the motion, which carried by a vote of 9 to 3. Judge Carnes appointed a subcommittee to consider the proposal: Mr. Goldberg (chair); Mr. Fiske, Mr. Campbell, Professor King, and Ms. Rhodes.

3. Rule 15; Discussion of Variance in Rule and Committee Note Regarding Payment of Costs.

Professor Schlueter informed the Committee that the Rules Committee Support Office had received information that there appeared to be an inconsistency between the text of Rule 15(d) and the Committee Note. The rule states that "if the deposition was requested by the government, the court *may*—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay..." (emphasis added). On the other hand, the Note states in relevant part: "Under the amended rule, if the deposition was requested by the government, the court *must* require the government to

pay..." (emphasis in original). Professor Schlueter indicated that the general policy is to not amend just the Committee Note and that in the absence of an amendment to the rule itself, it would probably not be appropriate to change the language of the Note to conform to the clear text of the rule itself. Following additional discussion, Mr. Rabiej offered to contact the publisher and point out the issue, with the thought that some sort of notation could be added, noting the inconsistency.

4. Rule 16(a)(1)(B)(ii); Proposed Amendment Regarding Defendant's Oral Statements.

Judge Carnes indicated that the Committee had a proposal from Magistrate Judge Robert Collings concerning a possible amendment to Rule 16. Judge Collings had recently decided a case involving interpretation of Rule 16 vis a vis the obligation of the government to give to the defense an agent's rough notes of an interview with the defendant. Judge Carnes continued by stating that Judge Collings believed that Rule 16 could be clarified by placing all of the provisions dealing with a defendant's oral statements under one subdivision. Several members of the Committee observed that the law concerning the disclose of an agents notes seemed settled and that revising Rule 16 would not change the substance of the law and that there appeared to be no need for the change. Following additional discussion, a consensus emerged that no further action was required on the proposed amendment.

5. Rule 31; Proposal to Permit Less Than Unanimous Verdicts.

Professor Schlueter stated that the Committee had received a suggestion from Judge James Trimble suggesting that the Criminal Rules be amended to permit a less than unanimous verdict, as is used in some state criminal and civil cases. The suggestion was apparently triggered by the recent mistrial in the *Tyco* case. Following a very brief discussion, a consensus emerged that no further action was needed on the proposal.

6. Rule 32; Proposed Amendment Regarding Requirement That Sentencing Judge Resolve Contested Information in Presentence Report.

Professor Schlueter reviewed a proposal from Judge Gregory Carman that Rule 32 be amended to require the court to resolve all objections to the presentence report, regardless of whether the matter would have an impact on the sentence. In support of his proposal, the judge had included a copy of his law review article entitled, "Fairness at the Time of Sentencing: The Accuracy of the Presentence Report." His proposal is grounded on the view that even if the sentencing court does not consider the objected-to matters in imposing a sentence, the Bureau of Prisons considers all of that information in making decisions about the defendant's incarceration. Professor Schlueter noted that the issue had been considered in some detail by the Committee during the restyling amendments to

the Rules in 2001. Mr. Campbell recognized that the Committee had considered a similar proposal but that the article made good sense and that it would be appropriate to reconsider the issue. He added that the Bureau of Prisons is not equipped to resolve incorrect information in the presentence report.

Ms. Rhodes noted that judges do make rulings on information that might have an impact on incarceration, even though the rule does not require them to do so; in her view, no amendment was required. Judge Carnes agreed with that assessment.

Following additional discussion on the various ways of dealing with information in the presentence report, a consensus emerged that no further action was required on the proposal.

III. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

1. Possible Amendments to Rule 46 Regarding Bail.

Mr. Rabiej reported that Congress had continued to consider amendments to Rule 46 that would restrict the ability of the court to revoke bail on grounds other than a failure to appear. He noted that the lobby for the Bail Bondsmen was extremely strong and that despite the clear opposition from the Judicial Conference on the issue, various congressional committees continued to discuss the issue and propose legislation to amend Rule 46. He added that Judge Carnes and Judge Davis, past chair of the Committee, had testified before congress on the matter and registered the Judicial Conference's position.

2. Possible Conforming Amendment to Rule 6.

Mr. Wroblewski reported that several years ago, Congress had voted to amend Rule 6 to provide for greater sharing of grand jury information vis a vis the war on terrorism. But the amendment was to an older version of Rule 6, which had gone into effect automatically under the provisions of the Rules Enabling Act. Because the amendment made no sense when applied to the new version of the rule, it had been considered a nullity. He added that the Department and the Administrative Office had continued to work with Congress in correcting the problem.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Carnes indicated that his term as chair and member of the Committee expired in September 1, 2004, and that the Chief Justice would be appointing his successor during the summer. He thanked the members for their service and indicated that it had been a high honor to work on the committee.

The Committee tentatively agreed to hold its next meeting in the Fall 2004 at Santa Fe, New Mexico. Judge Carnes asked the members to contact Mr. Rabiej concerning dates during which they could not meet.

The meeting adjourned at 9:30 a.m. on Friday, May 7, 2004

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee

Model Local Rule Regarding
Privacy and Public Access to Electronic Criminal Case Files

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to documents in the criminal case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court.

a. **Social Security numbers.** If an individual's Social Security number must be included, only the last four digits of that number should be used.
b. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of the child should be used.
c. **Dates of birth.** If an individual's date of birth must be included, only the year should be used.
d. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of the number should be used
e. **Home addresses.** If a home address must be included, only the city and state should be listed.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court, may, however, still require the party to file a redacted copy for the public file.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review filings for compliance with this rule.

COMMENTARY

Parties should consult the "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files." This Guidance explains the policy permitting remote public access to electronic criminal case

file documents and sets forth redaction and sealing requirements for documents that are filed. The Guidance also lists documents for which public access should not be provided. A copy of the Guidance is available at the court's website.

Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files

In September 2001, the Judicial Conference of the United States adopted a policy on privacy and public access to electronic case files (JCUS-SEP/OCT 01, pp. 48-50). This policy addressed civil, criminal, bankruptcy and appellate case files separately. With regard to criminal case files, the policy prohibited remote public access to criminal case files at that time, with the explicit statement that the Conference would revisit this issue within two years. In March 2002, the Judicial Conference approved the establishment of a pilot project that would allow 11 courts, ten district courts and one court of appeals, to provide remote electronic public access to criminal case files (JCUS-MAR 02, p. 10). A study of these courts conducted by the Federal Judicial Center outlined the advantages and disadvantages of such access, to court employees, the bar, and the public. The study did not reveal any instances of harm due to remote access to criminal documents. The results of the study were reported to the Committees on Court Administration and Case Management and Criminal Law.

The Committee on Court Administration and Case Management reviewed and discussed the study in depth, ultimately concluding that the benefits of remote public electronic access to criminal case file documents outweighed the risks of harm such access potentially posed. This decision was based not only on the results of the FJC study, but also on the extensive information the Committee, through its Privacy Subcommittee, gathered and evaluated during the period of deliberation that led to the Judicial Conference's adoption of the initial privacy policy in September 2001. That process included the receipt of 242 comments from a wide variety of interested persons including private citizens, privacy advocacy groups, journalists, attorneys, government agencies, private investigators, data re-sellers and members of the financial services industry. It also included a public hearing at which 15 individuals representing a wide spectrum of public, private, and government interest made oral presentations and answered questions from Privacy Subcommittee members.

From the comments received and presentations made, it was clear that remote electronic access to public case file information provides numerous benefits. Specifically, several speakers noted that such access provides citizens the opportunity to see and understand the workings of the court system, thereby fostering greater confidence in government. The benefit that electronic access "levels the geographic playing field" by allowing individuals not located in proximity to the courthouse easy access to what is

already public information was also frequently mentioned. Others noted that providing remote electronic access to this same public information available at the courthouse would discourage the creation of a "cottage industry" by individuals who could go to the courthouse, copy and scan information, download it to a private website and charge for access, thus profiting from the sale of public information and undermining restrictions intended to protect privacy.

After thoroughly analyzing and weighing all of the information before it, in June 2003, the Committee on Court Administration and Case Management recommended that the Judicial Conference amend its prohibition on remote public access to electronic criminal case files, the amendment to become effective only after specific guidance for the courts was developed. The Committee on Criminal Law concurred in this recommendation.

At its September 2003 session, the Conference discussed the issue and adopted the recommendation, thereby amending its policy regarding remote public access to electronic criminal case file documents to permit such access to be the same as public access to criminal case file documents at the courthouse with the effective date of this new policy delayed until such time as the Conference approves specific guidance on the implementation and operation of the policy developed by the Committees on Court Administration and Case Management, Criminal Law and Defender Services (JCUS-SEP 03, pp. 15-16).

This guidance, which was prepared by a specially-created subcommittee consisting of members from the Committees on Court Administration and Case Management, Criminal Law and Defender Services and approved by the Judicial Conference, sets forth the implementation guidelines required by the Judicial Conference. This document has three parts. The first provides a short explanation of the policy on remote public access to electronic criminal case files and explains how it relates to similar policies for other case types. The second part provides information about the redaction requirements which are an integral part of the policy and require the court to educate the bar and other court users. The third part is a discussion of specific documents that courts are not to make available to the public.

I. Explanation of the policy permitting remote public access to electronic criminal case file documents

Not all documents associated with a criminal case are properly included in the criminal case file. The policy regarding remote public electronic access to criminal case file documents is intended to make all case file documents that are available to the public at the courthouse available to the public via remote, electronic access if a court is making documents remotely, electronically available through the Case Management/Electronic Case Files system or by the scanning of paper filings to create an electronic image.

Simply stated, if a document can be accessed from a criminal case file by a member of the public at the courthouse, it should be available to that same member of the public through the court's electronic access system. This is true if the document was filed electronically or converted to electronic form.

This policy treats criminal case file documents in much the same way civil and bankruptcy case file documents are treated. Filers of documents have the obligation to partially redact specific personal identifying information from documents before they are filed. (See Section II, below for a discussion of redaction requirements.) However, because of the security and law enforcement issues unique to criminal case file information, some specific criminal case file documents will not be available to the public remotely or at the courthouse. (See Section III, below for a discussion of these documents.) It is not the intent of this policy to expand the documents that are to be included in the public criminal case file and, thereby, available both at the courthouse and electronically to those with PACER access.

It should also be noted that at its September 2003 session, the Judicial Conference adopted a policy that provides for the electronic availability of transcripts of court proceedings. The effective date of this policy is delayed pending a report of the Judicial Resources Committee regarding the impact the policy may have on court reporter compensation. However, once that policy becomes effective, there are separately articulated requirements and procedures regarding redaction which will apply to transcripts in criminal cases.

II. Redaction and Sealing Requirements

The policy adopted by the Conference in September 2003 states in part:

> Upon the effective date of any change in policy regarding remote public access to electronic criminal case file documents, require that personal data identifiers be redacted by the filer of the document, whether the document is filed electronically or in paper, as follows:
>
> 1. Social Security numbers to the last four digits;
> 2. financial account numbers to the last four digits;
> 3. names of minor children to the initials;
> 4. dates of birth to the year; and
> 5. home addresses to city and state[.]

In order to inform all court users of these requirements, courts should post a Notice of Electronic Availability of Criminal Case File Documents on their websites and in their clerks' offices. An example of such a notice appears below. As part of the pilot project

and study conducted by the Federal Judicial Center (FJC), participating courts were asked to implement similar redaction requirements and to inform all court users of these requirements. To assist in these requests, the participating courts were provided with a sample Notice of Electronic Availability of Criminal Case File Documents that was reviewed by a Subcommittee of the Committee on Court Administration and Case Management, with a representative from the Criminal Law Committee, that was working with the FJC on the study's design. It was suggested that the courts post this notice on their websites and in their clerks' offices in order to inform all filers and other court users that documents filed in criminal cases will be available to the general public on the Internet and that the filer has the obligation to redact the specified identifying information from the document prior to filing. A version of this notice, updated to reference the E-Government Act of 2002, is provided.

> Please be informed that documents filed in criminal cases in this court are now available to the public electronically.
>
> You shall not include sensitive information in any document filed with the court. You must remember that any personal information not otherwise protected will be made available over the Internet via WebPACER. The following personal data identifiers must be partially redacted from the document whether it is filed traditionally or electronically: Social Security numbers to the last four digits; financial account numbers to the last four digits; names of minor children to the initials; dates of birth to the year; and home addresses to the city and state.
>
> In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, also require the party to file a redacted copy for the public file.
>
> Because filings will be remotely, electronically available and may contain information implicating not only privacy but also personal security concerns, exercise caution when filing a document that contains any of the following information and consider accompanying any such filing with a motion to seal. Until the court has ruled on any motion to seal, no document that is the subject of a motion to seal, nor the motion itself or any response thereto, will be available electronically or in paper form.
>
> 1) any personal identifying number, such as driver's license number;
> 2) medical records, treatment and diagnosis;
> 3) employment history;

4) individual financial information;
5) proprietary or trade secret information;
6) information regarding an individual's cooperation with the government;
7) information regarding the victim of any criminal activity;
8) national security information; and
9) sensitive security information as described in 49 U.S.C. § 114(s).

Counsel is strongly urged to share this notice with all clients so that an informed decision about the inclusion of certain materials may be made. If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that all documents and pleadings comply with the rules of this court requiring redaction of personal data identifiers. The clerk will not review filings for redaction.

The court should also be aware that it will need to partially redact the personal identifiers listed above from documents it prepares that routinely contain such information (e.g., order setting conditions of release).

III. Documents for which public access should not be provided

The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:

- unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation)

Courts maintain the discretion to seal any document or case file *sua sponte*. If the court seals a document after it has already been included in the public file, the clerk shall remove the document from both the electronic and paper public files as soon as the order sealing the document is entered. Counsel and the courts should appreciate that the filing of an unsealed document in the criminal case file will make it available both at the

courthouse and by remote electronic access. Courts should assess whether privacy or law enforcement concerns, or other good cause, justify filing the document under seal.

There are certain categories of criminal case documents that are available to the public in the clerk's office but will not be made available electronically because they are not to be included in the public case file for individual criminal cases. These include but are not limited to vouchers for claims for payment, including payment for transcripts, (absent attached or supporting documentation) submitted pursuant to the Criminal Justice Act. (For detailed guidance about the public availability of Criminal Justice Act information, please see paragraph 5.01 of Volume VII of *Guide to Judiciary Policies and Procedures.*)

AGENDA # _____
Summer 2004

Long-Range Planning (Information)

The long-range planning meeting of Judicial Conference committee chairs was held on March 15, 2004. The meeting included several topics of interest to all committees. Judge Sim Lake, chair of the Committee on Criminal Law, discussed how sentencing policies over the past twenty years have eroded judicial discretion. Chief Judge John W. Lungstrum, chair of the Committee on Court Administration and Case Management, provided an update on the continuing decline in the number of trials. Both the number of civil trials and the percentage of civil cases reaching trial continued to decline slightly.

The main focus of the meeting was primarily on the judiciary's future budget outlook, both for the upcoming fiscal year and for several years into the future. Chief Judge Carolyn Dineen King, chair of the Executive Committee joined Chief Judge John G. Heyburn II, chair of the Budget Committee, in addressing the issues. The meeting also included a staff discussion of the program-based planning and budgeting concept. The report of the meeting is included as Attachment 1.

After the long-range planning meeting, the Chief Justice determined that the Executive Committee should spearhead a strategic financial policy and planning effort. The Executive Committee will develop an integrated strategy for controlling costs in fiscal year 2005 and beyond. The committee has sent letters to the chairs of committees with major policy and budgeting responsibility enlisting their participation in a comprehensive review of judiciary policies and practices under each committee's purview that have the greatest impact on judiciary costs.