COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Scottsdale, AZ
January 11-12, 2007

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 11-12, 2007

1. Opening Remarks of the Chair

   A. Report on the September 2006 Judicial Conference session
   B. Transmission of Judicial Conference-approved proposed rules amendments to the Supreme Court

2. **ACTION** – Approving Minutes of June 2006 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 Appellate Rules Committee

   A. Approval of proposed amendments to Rules 4 and 29 in principle; request to publish for public comment deferred until later time
   B. Minutes and other informational items

6. Report of the Criminal Rules Committee

   A. Consideration of proposed amendment to Rule 11 of the Rules Governing § 2254 and § 2255 proceedings, abolishing certain ancient writs
   B. Consideration of proposed redaction of grand jury person's name from indictment
   C. Minutes and other informational items

7. Report of the Evidence Rules Committee

   A. Proposed Rule 502 on waiver of attorney-client privilege and work-product protection
   B. Statutory requirement to study feasibility of amending rules to address harm-to-child exception to the marital privileges
   C. Feasibility of revising Evidence Rules for "style"
   D. Minutes and other informational items

8. Report of the Bankruptcy Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Rules 7052 and 9021, and proposed new Rule 7058
   B. Minutes and other informational items

9. Report of the Civil Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed technical amendment to Supplemental Rule C(6)(a) without publication
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 13(f), 15(a), and 48, and proposed new Rule 62.1 (publishing proposed amendment to Rule 8(c) approved at earlier meeting)
   C. Minutes and other informational items

10. Report of the Technology Subcommittee (Oral report)

11. Time-Computation Subcommittee Report

   A. **ACTION** – Approving proposed template governing computation of time periods
   B. Text of template
   C. Background information.

12. Long-Range Planning Report

13. Panel Discussion of Rules Impact on Decline in Number of Civil Trials

14. Next Meeting: June 11-12, 2007

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December 19, 2006
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G. Eric Brunstad, Jr., Esquire
James J. Waldron, *ex officio*

Subcommittee on E-Government
Judge Thomas S. Zilly
Judge Laura Taylor Swain
Professor Jeffrey W. Morris

Subcommittee on Forms
Judge Christopher M. Klein, Chair
Judge Irene M. Keeley
Judge Kenneth J. Meyers
J. Christopher Kohn, Esquire
James J. Waldron, *ex officio*
Patricia S. Ketchum, Esquire, Consultant

Subcommittee on Privacy, Public Access, and Appeals
William H. Pauley III, Chair
Judge Christopher M. Klein
Judge Richard A. Schell
G. Eric Brunstad, Jr., Esquire

Subcommittee on Style
Dean Lawrence Ponoroff, Chair
Judge Irene M. Keeley
Judge Christopher M. Klein
Judge Kenneth J. Meyers
J. Michael Lamberth, Esquire

Subcommittee on Technology and Cross Border Insolvency
Judge Mark B. McFeeley, Chair
Judge R. Guy Cole, Jr.
Judge Irene M. Keeley
Dean Lawrence Ponoroff
G. Eric Brunstad, Jr., Esquire

CM/ECF Working Group
Judge Mark B. McFeeley

December 19, 2006
Projects

ADVISORY COMMITTEE ON CIVIL RULES

SUBCOMMITTEES

Subcommittee on Rules 26(a) and 30(b)(6)
Judge David G. Campbell, Chair
Chilton Davis Varner, Esquire
Daniel C. Girard, Esquire
Anton R. Valukas, Esquire
Professor Richard L. Marcus, Special Reporter
DOJ Representative

Subcommittee on Rule 56 – Pleading
Judge Michael M. Baylson, Chair
Judge Paul J. Kelly, Jr.
Judge Vaughn R. Walker
Judge C. Christopher Hagy
Justice Randall T. Shepard
Robert C. Heim, Esquire
Anton R. Valukas, Esquire
DOJ Representative

Subcommittee on Time Counting
Subcommittee A
Judge David G. Campbell, Chair
Judge C. Christopher Hagy
Professor Steven S. Gensler
Daniel C. Girard, Esquire
Honorable Peter D. Keisler

Subcommittee B
Judge Michael M. Baylson, Chair
Judge Jose A. Cabranes
Chilton Davis Varner, Esquire
Robert C. Heim, Esquire
Honorable Peter D. Keisler

December 19, 2006
Projects

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Subcommittee on Blakely
(Open), Chair
Judge David G. Trager
Judge Anthony J. Battaglia
Professor Nancy J. King
(Open)
DOJ representative

Subcommittee on E-Government Act
Judge Harvey Bartle III, Chair
(Open)
DOJ representative

Subcommittee on Extraordinary Writs
Professor Nancy J. King, Chair
Judge David G. Trager
Thomas P. McNamara
DOJ Representative

Subcommittee on Grand Jury
(Open), Chair
(Open)
(Open)
(Open)
DOJ representative

Subcommittee on Preliminary Proceedings
Judge Anthony J. Battaglia, Chair
(Open)
DOJ representative

Subcommittee on Rule 16/Brady
(Open), Chair
Professor Nancy J. King
(Open)
Thomas P. McNamara
DOJ representative

Subcommittee on Rule 29
Judge David G. Trager
Professor Nancy J. King
DOJ representative

Subcommittee on Rule 32.2
Judge Mark L. Wolf, Chair
Judge James P. Jones
Professor Nancy J. King
Rachel Brill, Esquire
Thomas P. McNamara
DOJ Representative

Subcommittee on Rule 37
Professor Nancy J. King, Chair
Thomas P. McNamara
DOJ Representative

Subcommittee on Rule 41
(Open), Chair
Judge Harvey Bartle III
Professor Nancy J. King
(Open)
DOJ representative

Subcommittee on Victims Rights Act
Judge James P. Jones, Chair
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
DOJ representative

December 19, 2006
Projects

ADVISORY COMMITTEE ON EVIDENCE RULES

SUBCOMMITTEES

Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
(Open)
Professor Kenneth S. Broun, Consultant

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 22-23, 2006
Washington, D.C.
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 22-23, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Deputy Attorney General Paul J. McNulty
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida, Jeffrey N. Barr, and Timothy K. Dole, attorneys in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., consultant to the committee. Professor R. Joseph Kimble, style consultant to the committee, participated by telephone in the meeting on June 23.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Deputy Attorney General McNulty attended part of the meeting on June 22. The Department of Justice was also represented at the meeting by Associate Attorney General Robert D. McCallum, Jr.; Alice S. Fisher, Assistant Attorney General for the Criminal Division; Ronald J. Tenpas, Associate Deputy Attorney General; Benton J. Campbell, Counselor to the Assistant Attorney General; and Jonathan J. Wroblewski and Elizabeth U. Shapiro of the Criminal Division.

INTRODUCTORY REMARKS

Judge Levi welcomed Supreme Court Justice Samuel A. Alito, Jr. to the meeting and presented him with a plaque honoring his service as a member and chair of the Advisory Committee on Appellate Rules.

Later in the day, Chief Justice John G. Roberts, Jr. came to the meeting, greeted the members, and spent time with them in informal conversations. Judge Levi presented the Chief Justice with a framed resolution expressing the committee's appreciation, respect, and admiration for his support of the rulemaking process and his service as a member of the Advisory Committee on Appellate Rules. Judge Levi noted that the Chief Justice had been nominated as the next chair of that committee, but his elevation to the Supreme Court had intervened with the succession. The Chief Justice expressed his appreciation for the work of the rules committees and emphasized that he had experienced that work from the inside.

Judge Levi reported that Professor Struve had been appointed by the Chief Justice as the new reporter for the Advisory Committee on Appellate Rules, succeeding Patrick Schiltz, who had just been sworn in as a district judge in Minnesota. Judge Levi pointed out that Professor Struve had written many excellent law review articles and has been described as "shockingly prolific."

Judge Levi noted that Dean Kane would retire as dean of the Hastings College of the Law on June 30, 2006. He also reported that she, Judge Murtha, and Judge Thrash would be leaving the committee because their terms were due to expire on September 30, 2006. He said that their contributions to the committee had been enormous, particularly as the members of the committee's Style Subcommittee. He also reported with sadness that the terms of Judge Fitzwater and Justice Wells were also due to expire on September 30, 2006. They, too, had made major contributions to the work of the committee and would be sorely missed. He noted that all the members whose terms were about to expire would be invited to the next committee meeting in January 2007.

Judge Levi noted that the civil rules style project had largely come to a conclusion. The committee, he said, needed to make note of this major milestone. He said that the style project was extremely important, and it will be of great benefit in the future to law students, professors, lawyers, and judges. The achievement, he emphasized, had been the joint product of a number of dedicated members, consultants, and staff.

In addition to recognizing the Style Subcommittee – Judges Murtha and Thrash and Dean Kane – Judge Levi singled out Judge Rosenthal, chair of the Advisory Committee on Civil Rules, and Judges Paul J. Kelly, Jr. and Thomas B. Russell, who served as the chairs of the advisory committee's two style subcommittees. Together, they

shepherded the style project through the advisory committee. Judge Levi also recognized the tremendous assistance provided by Professors R. Joseph Kimble, Richard L. Marcus, and Thomas D. Rowe, Jr., and by Joseph F. Spaniol, Jr., all of whom labored over countless proposed drafts, wrote and read hundreds of memoranda, and participated in many meetings and teleconferences.

Judge Levi also thanked the staff of the Administrative Office for managing the process and providing timely and professional assistance to the committees – Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, Robert P. Deyling, and Jeffrey N. Barr, and their excellent supporting staff – who keep the records, arrange the meetings, and prepare the agenda books. Finally, he gave special thanks to Professor Cooper who, he emphasized, had been the heart and soul of the style project. Professor Cooper was tireless and relentless in reviewing each and every rule with meticulous care and great insight. He helped shape every decision of the committee.

Judge Levi said that there was little to report about the March 2006 meeting of the Judicial Conference. He noted that the Supreme Court had prescribed the proposed rule amendments approved by the Judicial Conference in September 2005, including the package of civil rules governing discovery of electronically stored information. The amendments, now pending in Congress, are expected to take effect on December 1, 2006.

Judge Levi also thanked Brooke Coleman, his rules law clerk, for her brilliant work over the last several years in assisting him in all his duties as chair of the committee. He noted that she would soon begin teaching at Stanford Law School.

Judge Levi reported that Associate Attorney General McCallum had been nominated by the President to be the U.S. ambassador to Australia. Accordingly, he said, this was likely to be Mr. McCallum's last committee meeting. He emphasized that he had been a wonderful member and had established a new level of cooperation between the rules committees and the Department of Justice. He said that it is very important for the executive branch to be involved in the work of the advisory committees, especially when its interests are affected. He noted that the Department is a large organization, and its internal decision making on the federal rules works well only when its top executives, such as the Associate Attorney General, are personally involved. He emphasized that Mr. McCallum had attended and participated in all the committee meetings, and that he is a brilliant lawyer and a great person.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 6-7, 2006.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters affecting the rules system. First, he pointed out that the Rules Enabling Act specifies that, unlike other amendments to the federal rules, any rule that affects an evidentiary privilege must be enacted by positive statute. He noted that the Advisory Committee on Evidence Rules had been working for several years on potential privilege rules, including a rule on waiver of the attorney-client privilege and work product protection. But before the committee could proceed seriously with a privilege waiver rule, it should alert Congress to all the relevant issues and obtain its acceptance in pursuing legislation to enact the rule. Accordingly, he said, Judge Levi and he had met on the matter with the chairman of the Judiciary Committee of the House of Representatives, F. James Sensenbrenner, Jr.

Chairman Sensenbrenner recognized that legislation would be necessary to implement the rule. Judge Levi reported that the chairman was very supportive and had urged the committee by letter to promulgate a rule that would: (1) protect against inadvertent waiver of privilege and protection, (2) permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and (3) allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in later proceedings.

Mr. Rabiej reported that the Advisory Committee on Evidence Rules had drafted a proposed rule, FED. R. EVID. 502, addressing the three topics suggested by Chairman Sensenbrenner. He added that Judge Levi would meet on June 23 with the chief counsel to the Senate Judiciary Committee and others to discuss the proposed rule.

Second, Mr. Rabiej reported that the Advisory Committee on Bankruptcy Rules had produced a comprehensive package of amendments and new rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed out that two senators had written recently to the Chief Justice objecting to three provisions in the advisory committee's proposed rules. The Director of the Administrative Office responded to the senators by explaining the basis for the advisory committee's decisions on these provisions and emphasizing that the committee would examine afresh the senators' suggestions, along with other comments submitted by the public, as part of the public comment process.

Third, Mr. Rabiej noted that a provision of the Class Action Fairness Act of 2005 required the Judicial Conference to report on the best practices that courts have used to make sure that proposed class action settlements are fair and that attorney fees are reasonable. He said that the Judicial Conference had filed the report with the judiciary committees of the House and Senate in February 2006. The thrust of the report

emphasized that the extensive 2003 revisions to FED. R. CIV. P. 23 had provided the courts with a host of rule-based tools, discretion, and guidance to scrutinize rigorously class action settlements and fee awards. The revised rule was intended largely to codify and amplify the best practices that district courts had developed to supervise class action litigation.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending projects of the Federal Judicial Center. He directed the committee's attention to two projects.

First, he noted, the Center was working with the Administrative Office to monitor developments in the courts following the Class Action Fairness Act of 2005. He said that the study was showing that class-action filings had increased since the Act. But not many class action cases are being removed from the state courts. Rather, he said, cases that previously would have been filed in the state courts are now being filed in the federal courts as original actions.

Second, the Center was studying the issue of appellate jurisdiction and how it affects resources in the appellate courts and district courts. He said that the Center would examine the exercise of jurisdiction under 28 U.S.C. § 1292(b), and a report would be forthcoming soon. He added, in response to a question, that concerns had been expressed regarding § 1292(b) motions in patent cases. He said that it had been difficult in the past to get district courts to certify an appeal and for the courts of appeals to accept the appeal. But the reluctance seems to have diminished, and changes are being seen.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Rules for Final Approval

FED. R. APP. P. 25(a)(5)
FED. R. BANKR. P. 9037
FED. R. CIV. P. 5.2
FED. R. CRIM. 49.1

Judge Fitzwater explained that the four proposed rules have been endorsed by the Technology Subcommittee and the respective advisory committees. They comply with the requirement of the E-Government Act of 2002 that rules be prescribed "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The substance of the proposed rules,

he said, was based on the privacy policy already developed by the Court Administration and Case Management Committee and adopted by the Judicial Conference. In essence, since all federal court documents are now posted on the Internet, the proposed rules impose obligations on people filing papers in the courts to redact certain sensitive information to protect privacy and security interests.

Professor Capra added that the statute specifies that the rules must be uniform "to the extent practicable." He referred to the chart in the agenda book setting forth the proposed civil, criminal, and bankruptcy rules side-by-side and demonstrating how closely they track each other. (The proposed amendment to the appellate rules would adopt the privacy provisions followed in the case below.) He said that the subcommittee and the reporters had spent an enormous amount of time trying to make the rules uniform, even down to the punctuation. He pointed out that individual rules differ from the template developed by the Technology Subcommittee only where there is a special need in a particular set of rules. For example, a special need exists in criminal cases to protect home addresses of witnesses and others from disclosure. Therefore, the criminal rules, unlike the civil and bankruptcy rules, require redaction of all but the city and state of a home address in any paper filed with the court. Professor Coquillette added that the consistent policy of the Standing Committee since 1989 has been that when the same provision applies in different sets of federal rules, the language of the rule should be the same unless there is a specific justification for a deviation.

Judge Levi pointed out that the Court Administration and Case Management Committee had raised two concerns with the proposed privacy rules. First, that committee had suggested that the criminal rules require redaction of the name of a grand jury foreperson from documents filed with the court. But, he said, the signature of a foreperson on an indictment is essential, and there has been litigation over the legality of an indictment that does not bear the signature of the foreperson.

Second, the Court Administration and Case Management Committee had raised concerns over arrest and search warrants that have been executed. Initially, he said, the Department of Justice had argued, and the advisory committee was persuaded, that the effort required to redact information from arrest and search warrants would be considerable and that redaction of these documents should not be imposed. Now, though, the Department was suggesting that search warrants can be redacted, but not arrest warrants. Judge Levi said that he had advised the Court Administration and Case Management Committee that these matters needed to be studied further, but he did not want to delay approval of the privacy rules because of the concerns over warrants.

The committee without objection by voice vote agreed to send the proposed new rules to the Judicial Conference for final approval.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 25(a)(5)

Judge Stewart reported that the advisory committee had met in April and that the E-Government privacy rule had been the major item on its agenda. He pointed out that the proposed appellate rule on privacy differs from the proposed civil, criminal, and bankruptcy rules in that it adopts a policy of "dynamic conformity." In other words, the appellate rule provides simply that the privacy rule applied to the case below will continue to apply to the case on appeal. He added that the advisory committee had been unanimous in approving this approach. The only objections raised in the committee related to some of the suggested style changes.

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Informational Items

Judge Stewart reported that the other items in the committee's report in the agenda book were informational. First, he said, the advisory committee had begun to consider implementing the time-computation template developed by the Standing Committee's Time-Computation Subcommittee by establishing a subcommittee to work on it. The subcommittee would begin work this summer to consider each time limit in the appellate rules. He added that Professor Struve had initiated the project with an excellent memorandum in which she identified time limits set forth in statutes. There is concern about statutes that impose time limits, he said, because FED. R. APP. P. 26 specifies that the method of counting in the rules is applicable to statutes. One problem is that the time limits for complying with many statutes — often 10 days — may be shortened because the template calls for counting each day, while the current time computation rule excludes weekends and holidays if a time limit is less than 11 days.

Judge Stewart reported that the advisory committee had also been asked to consider the provision in the time-computation template addressing the "inaccessibility" of the clerk's office. He said that the advisory committee would add Fritz Fulbruge, clerk

of the Court of Appeals for the Fifth Circuit in New Orleans, to the subcommittee. He has had relevant, actual experience with inaccessibility as a result of Hurricane Katrina.

Judge Stewart said that the advisory committee had conducted a thorough discussion of the "3-day rule" – FED. R. APP. P. 26(c). The committee voted unanimously not to make any change in the rule at the present time, but the members had a lively debate on the topic. Since electronic filing and service are just being introduced in the courts of appeals nationally, the committee will monitor their impact on the 3-day rule to see whether the rule should be modified.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 24, 2006 (Agenda Item 11).

Judge Zilly reported that the advisory committee had been very busy during the last 12 months, particularly in drafting rules and forms to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. In all, the committee had held six meetings. The most recent, held in March 2006 at the University of North Carolina in Chapel Hill, had lasted three full days, and the advisory committee took two additional votes after the meeting.

He noted that a great deal of material was being presented to the Standing Committee. In all, more than 70 changes to the rules were under consideration. He said that the advisory committee was recommending:

(1) final approval of eight rules not related to the recent bankruptcy legislation;
(2) withdrawal of one rule published for public comment;
(3) final approval of an amendment to Interim Bankruptcy Rule 1007 and a related new exhibit to the petition form;
(4) final approval of seven additional changes to the forms, to take effect on October 1, 2006;
(5) publication of a comprehensive package of amendments to the rules to implement the recent bankruptcy legislation, most of which had been approved earlier as interim rules; and
(6) publication of all the revisions in the Official Forms.

Amendments for Final Approval

Judge Zilly reported that the proposed amendments to FED. R. BANKR. P. 1014, 3001, 3007, 4001, 6006, and 7007.1 and new rules 6003, 9005.1, and 9037 had been published for comment in August 2005. A public hearing on them had been scheduled for January 9, 2006. But there were no requests to appear, and the hearing was cancelled. He noted that the proposed Rules 3001, 4001, 6006 and new Rule 6003 had generated a good deal of public comment.

FED. R. BANKR. P. 1014(a)

Judge Zilly said that Rule 1014 (dismissal and transfer of cases) would be amended to state explicitly that a court may order a change of venue in a case on its own motion.

Joint Subcommittee Recommendations on
FED. R. BANKR. P. 3007, 4001, 6003, and 6006

Judge Zilly explained the origin of the proposed changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003. He said that about three years ago, the Bankruptcy Administration Committee of the Judicial Conference, chaired by Judge Rendell, and the Advisory Committee on Bankruptcy Rules had formed a joint subcommittee to examine a number of issues arising in large chapter 11 cases. As a result of the subcommittee's work, changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003 were published. He added that the advisory committee was recommending a number of minor changes to the four rules as a result of the public comments.

FED. R. BANKR. P. 3007

Judge Zilly explained that Rule 3007 (objection to claims) was being amended in several ways. It would preclude a party in interest from including in a claims objection any request for relief that requires an adversary proceeding. The proposed rule would allow omnibus claims objections. Objections of up to 100 claims could be filed in a single objection to claims. It would also limit the nature of objections that may be joined in a single filing, and it would establish minimum standards to protect the due process rights of claimants.

FED. R. BANKR. P. 4001

Judge Zilly noted that Rule 4001 (relief from the automatic stay and certain other matters) would be amended to require that movants seeking approval of agreements related to the automatic stay, approval of certain other agreements, or authority to use

cash collateral or obtain credit submit along with their motion a proposed order for the relief requested and give a more extensive notice of the requested relief to parties in interest. The rule would require the movant to include within the motion a statement not to exceed five pages concisely describing the material provisions of the relief requested. Judge Zilly noted that the advisory committee had made some changes in the rule after publication, including deletion of an unnecessary reference to FED. R. BANKR. P. 9024 (relief from judgment or order).

FED. R. BANKR. P. 6003

Judge Zilly explained that proposed Rule 6003 (interim and final relief immediately following commencement of a case) is new. It would set limits on a court's authority to grant certain relief during the first 20 days of a case. Absent a need to avoid immediate and irreparable harm, a court could not grant relief during the first 20 days of a case on: (1) applications for employment of professional persons; (2) motions for the use, sale, or lease of property of the estate, other than a motion under FED. R. BANKR. P. 4001; and (3) motions to assume or assign executory contracts and unexpired leases. He added that subdivision (c) had been amended following publication to delete a reference to the rejection of executory contracts or unexpired leases. The amendment, he said, allows a debtor to reject burdensome contracts or leases.

FED. R. BANKR. P. 6006

Judge Zilly reported that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would authorize omnibus motions to reject executory contracts and unexpired leases. It would also authorize omnibus motions to assume or assign multiple executory contracts and unexpired leases under specific circumstances. The amended rule would establish minimum standards to ensure protection of the due process rights of claimants. Following publication, the advisory committee amended the rule to allow the trustee to assume but not assign multiple executory contracts and unexpired leases in an omnibus motion.

FED. R. BANKR. P. 7007.1

Judge Zilly explained that the proposed new Rule 7007.1 (corporate ownership statement) would require a party to file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed Rule 9005.1 (constitutional challenge to a statute) is new. It would make the new FED. R. CIV. P. 5.1 applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

The committee without objection by voice vote agreed to send the proposed amendments and new rules to the Judicial Conference for final approval.

FED. R. BANKR. P. 9037

As noted above on page 7, the committee approved the proposed new Rule 9037 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee. Adopted in compliance with § 205 of the E-Government Act of 2002, the rule would protect the privacy and security concerns arising from the filing of documents with the court, both electronically and in paper form, because filed documents are now posted on the Internet.

Judge Zilly noted that the proposed new bankruptcy rule is similar to the companion civil and criminal rules. It is slightly different in language, though, because it uses the term "entity," a defined term under the Bankruptcy Code, rather than "party" or "person." Entity includes a governmental unit under § 101(15) of the Code, while "person" excludes it in the definition section of the Code § 101(41).

Withdrawal of an Amendment

FED. R. BANKR. P. 3001(c) and (d)

Judge Zilly reported that the advisory committee had decided to withdraw the proposed amendments to Rule 3001 (proof of claim) following publication. The current rule states that when a claim (or an interest in property of the debtor) is based on a writing, the entire writing must be filed with the proof of claim. The proposed amendments, as published, would have provided that if the writing supporting the claim were 25 pages or fewer, the claimant would have to attach the whole writing. But if it exceeded 25 pages, the claimant would have to file relevant excerpts of the writing and a summary, which together could not exceed 25 pages. Similarly, any attachment to the proof of claim to provide evidence of perfection of a security interest could not exceed five pages in length.

Judge Zilly said that the advisory committee had received several comments opposing the amendments. One organization objected to the rule on the grounds that

summaries would be difficult to prepare. In light of the comments, the committee discussed increasing the page limitation on proof of perfection from five to 15 pages. After considering and debating all the comments, though, the committee decided to recommend that no changes be made to Rule 3001. But it agreed to change Form 10 (the proof of claim form) to warn users against filing original documents. The proposed language on the form would advise: "Do not send original documents. Attached documents may be destroyed after scanning."

The committee without objection approved withdrawal of the proposed amendment by voice vote.

Amendments to an Interim Rule and the Official Forms

Judge Zilly explained that to conform to the 2005 bankruptcy legislation, the committee had prepared interim rules that were then approved by the Standing Committee and the Executive Committee of the Judicial Conference for use as local rules in the courts. The interim rules had been drafted as revised versions of the Federal Rules of Bankruptcy Procedure. The courts were encouraged, but not required, to adopt them as local rules. The interim rules included 35 amendments to the existing rules and seven new rules. All the courts adopted the rules before the October 17, 2005, effective date of the bankruptcy law, some with minor variations.

In addition, the advisory committee prepared amendments to 33 of the existing Official Forms and created nine new forms, all of which were approved in August 2005 by the Standing Committee and the Judicial Conference, through its Executive Committee. The forms, under FED. R. BANKR. P. 9009, became new Official Forms and must be used in all cases.

Judge Zilly reported that the advisory committee had received comments from various sources on both the interim rules and the Official Forms. Based on those comments, it was now recommending a change in Interim Rule 1007 to require a debtor to file an official form that includes a statement of the debtor's compliance with the new pre-petition credit counseling obligation under § 109(h) of the Code. The amendment would be sent to the courts with the recommendation that it be adopted as a standing order effective October 1, 2006. Also based on the comments, the advisory committee was recommending changes to OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, and 23 and new Exhibit D to OFFICIAL FORM 1. In addition, he said, the advisory committee recommended having the Judicial Conference make the changes in the Official Forms and have them take effect on October 1, 2006.

FED. R. BANKR. P. 1007

Judge Zilly explained that the 2005 Act had amended § 109(h) of the Bankruptcy Code to require that all individual debtors receive credit counseling before commencing a bankruptcy case. In its current form, Interim Rule 1007 (lists, schedules, statements, and other documents) implements § 109(h) by requiring the debtor to file with the petition either: (1) a certificate from the credit counseling agency showing completion of the course within 180 days of filing; (2) a certification attesting that the debtor applied for but was unable to obtain credit counseling within 5 days of filing; or (3) a request for a determination by the court that the debtor is statutorily exempt from the credit counseling requirement.

Case law developments have shown that some debtors have completed the counseling but have been unable to obtain a copy of the certificate from the provider of the counseling. As a result, debtors have filed a petition with the court, paid a filing fee, and then had their case dismissed by the court even when they had received the counseling but not filed the certificate. The proposed amendments to Rule 1007(b) and (c) address the problem by permitting debtors in this position to file a statement that they have completed the counseling and are awaiting receipt of the appropriate certificate. In that event, the debtor will have 15 days after filing the petition to file the certificate with the court.

Professor Morris added that the advisory committee was recommending amending both the interim rule and the final Rule 1007.

The committee without objection by voice vote agreed to send the proposed amendment to the interim rule to the Judicial Conference for final approval.

OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, 23
and Exhibit D to OFFICIAL FORM 1

Judge Zilly added that the advisory committee was recommending a new Exhibit D to OFFICIAL FORM 1 (voluntary petition) to implement the proposed amendment to Rule 1007(b)(3). Exhibit D is the debtor's statement of compliance with the credit counseling requirement. Among other things, it includes a series of cautions informing debtors of the consequences of filing a bankruptcy petition without first receiving credit counseling. Many pro se debtors, for example, are unaware of the significant adverse consequences of filing a petition before receiving the requisite counseling, including dismissal of the case, limitations on the automatic stay, and the need to pay another filing fee if the case is refiled. The warnings may deter improvident or premature filings, and they should both reduce the harm to those debtors and ease burdens on the clerks, who often are called upon to respond to inquiries from debtors on these matters.

Judge Zilly added that the advisory committee was recommending that the Judicial Conference make changes in the following seven Official Forms, effective October 1, 2006:

1	Voluntary petition
5	Involuntary petition
6	Schedules
9	Notice of commencement of a case, meeting of creditors, and deadlines
22A	Chapter 7 statement of current monthly income and means test calculation
22C	Chapter 13 statement of current monthly income and calculation of commitment period and disposable income
23	Debtor's certification of completion of instructional course concerning personal financial management

Judge Zilly reported that the advisory committee recommended that OFFICIAL FORMS 1, 5, and 6 be amended to implement the statistical reporting requirements of the 2005 bankruptcy legislation that take effect on October 17, 2006. The proposed amendments to OFFICIAL FORMS 9, 22A, 22C, and 23 are stylistic or respond to comments received on the 2005 amendments to the Official Forms.

Judge Zilly pointed out that each of the forms was described in the agenda book. Once approved by the Judicial Conference, he said, they would become official and must be used in all courts. But, he said, the proposed changes in the seven forms will also be published for public comment, even though they will become official on October 1, 2006, because they had been prepared quickly to meet the statutory deadline and had not been published formally.

The committee without objection by voice vote agreed to send the proposed revisions in the forms to the Judicial Conference for final approval.

Amendments to the Rules for Publication

Judge Zilly reported that the advisory committee was seeking authority to publish the interim rules – together with proposed amendments to five additional rules not included in the interim rules – as a comprehensive package of permanent amendments to implement the 2005 bankruptcy legislation and other recent legislation. They would be published in August 2006 and, following the comment period, would be considered afresh by the advisory committee in the spring of 2007 and brought back to the Standing Committee for final approval in June 2007.

Thirty-five of the rules that the advisory committee was seeking authority to publish had been approved previously by the Standing Committee. They had to be in place in the bankruptcy courts in advance of the effective date of the Act, October 17, 2005 – FED. R. BANKR. P. 1006, 1007, 1009, 1010, 1011, 1017, 1019, 1020, 1021, 2002, 2003, 2007.1, 2007.2, 2015, 2015.1, 2015.2, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 5008, 5012, 6004, 6011, 8001, 8003, 9006, and 9009. Judge Zilly explained that minor modifications, largely stylistic in nature, had been made in the rules. More significant improvements had been made to nine of the rules and are explained in the agenda book – FED. R. BANKR. P. 1007, 1010(b), 1011(f), 2002(g)(5), 2015(a)(6), 3002(c)(5), 4003, 4008, and 8001(f)(5).

Judge Zilly reported that five changes to the rules in the package were new and had not been seen before by the Standing Committee. Changes to four rules were necessary to comply with the various provisions of the Act, but did not have to be in place by October 17, 2005 – FED. R. BANKR. P. 1005, 2015.3, 3016 and 9009 (the changes to 3016 and 9009 are distinct from previous changes to those rules made by the Interim Rules). In addition, the proposed change to Rule 5001 was necessary to comply with the new 28 U.S.C. § 152(c), which authorizes bankruptcy judges to hold court outside their districts in emergency situations.

He noted that the proposed amendment to Rule 1005 (caption of the petition) conforms to the Act's increase in the minimum time allowed between discharges from six to eight years. New Rule 2015.3 would implement § 419 of the Act requiring reports of financial information on entities in which a Chapter 11 estate holds a controlling or substantial interest. The proposed amendment to Rule 3016(d) (filing plan and disclosure statement) would implement § 433 of the Act and allow a reorganization plan to serve as a disclosure statement in a small business case. The amendment to Rule 9009 (forms) would provide that a plan proponent in a small business Chapter 11 case need not use the Official Form of a plan of reorganization and disclosure statement.

The committee without objection approved the proposed amendments for publication by voice vote.

Amendments to the Official Forms for Publication

Judge Zilly reported that the advisory committee recommended publishing for comment all the amendments made to the 20 forms amended or created in 2005 to implement the changes brought about because of the Act (*i.e.*, OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24). He noted that publishing for comment forms already in effect as Official Forms was an unusual step. But because the new law required so many changes to the forms, the advisory committee wanted to give the bench and bar a full, formal opportunity to comment on them.

Judge Zilly said that the advisory committee had, at the direction of Congress, finished drafting and was recommending publishing for comment, three new forms to be used in small business cases: Form 25A (sample plan of reorganization); Form 25B (sample disclosure statement); and Form 26 (form to be used to report on value, operations, and profitability as required by § 419 of the Act). He noted that new Rule 2015.3 would require the debtor in possession to file Form 26 in all Chapter 11 cases. He also said that the advisory committee's recommended new change to Rule 9009 was on account of the congressional directive that the sample plan and sample disclosure statement (Forms 25A and 25B) be illustrative only. The change excepts Forms 25A and 25B from Rule 9009's general requirement that the use of applicable Official Forms is mandatory.

The committee without objection approved the proposed forms for publication by voice vote.

Informational Items

Judge Zilly noted that when Congress enacted the 2005 legislation, it required the debtor's attorney in a Chapter 7 case to certify that the attorney has no knowledge, after inquiry, that the information provided by the debtor in the schedules and statements is incorrect. The legislation also states that it is the sense of Congress that FED. R. BANKR. P. 9011 should be modified to include a provision to that effect. In addition, he said, Senator Grassley and Senator Sessions had sent letters urging the committee to include the provision in the rule and forms.

Judge Zilly said that the advisory committee was not yet recommending any change to Rule 9011 or to any of the forms. As it stands now, he said, Rule 9011 provides that an attorney's signature on any paper filed with the court other than the schedules amounts to a certification by the attorney after a reasonable inquiry that any factual allegations are accurate. Changes made by the Act would generally extend the attorney's certification to bankruptcy schedules, at least in chapter 7. He said that it has been a long-standing, consistent principle of the committee not to amend the rules simply to restate statutory provisions. He stated the advisory committee takes the Senators' concerns seriously and has formed a subcommittee to further consider how Rule 9011 and the forms might be amended, and that the subcommittee would report on its progress at the next advisory committee meeting in September.

Judge Zilly reported that the term of Professor Alan Resnick had come to an end. He had been the advisory committee's reporter, and then a member of the committee, for more than 20 years. Judge Zilly noted that Professor Resnick has an extraordinary institutional memory and unmatched insight and wisdom that will be greatly missed by the committee. Judge Zilly also thanked the committee's current reporter, Professor

Morris, its consultant on the bankruptcy forms, Patricia Ketchum, and the staff attorneys in the Administrative Office who have supported the committee with great talent and dedication – James Wannamaker and Scott Myers.

Judge Levi concluded the discussion by observing the enormity of the work and the work product of the advisory committee in implementing the comprehensive 500-plus page legislation within such a short time period.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of June 2, 2006 (Agenda Item 12).

Amendments for Final Approval

FED. R. CIV. P. 5.2

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

STYLE PACKAGE

Judge Rosenthal explained that the final product of the style project, presented to the Standing Committee for final approval, consisted of four separate parts:

(1) the pure style amendments to the entire body of civil rules – FED. R. CIV. P. 1-86;
(2) the style-plus-substance amendments – FED. R. CIV. P. 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78;
(3) the restyled civil forms; and
(4) the restyled version of rule amendments currently pending in Congress – FED. R. CIV. P. 5.1, 24(c), and 50 – and the electronic discovery rules – FED. R. CIV. P. 16, 26, 33, 34, 37, and 45.

Judge Rosenthal reported that the advisory committee had made a few changes in the rules following publication, two of which are particularly important. First, she said, the committee expanded the note to FED. R. CIV. P. 1 to provide more information about the style project and its intentions. She noted that the committee had decided at the very start of the style project that there needed to be a brief statement somewhere in the rules

or accompanying documents describing the aims and style conventions of the project. The committee concluded ultimately that the statement should be placed in an expanded note to Rule 1 identifying the drafting guidelines used and summarizing what the committee did and why. The committee note, for example, emphasizes that the style changes to the civil rules are intended to make no changes in substantive meaning. It also explains the committee's formatting changes and rule renumbering and its removal of inconsistencies, redundancies, and intensifying adjectives.

Second, the advisory committee responded to a fear expressed in some of the public comments that when the restyled rules take effect on December 1, 2007, they will supersede any potentially conflicting provision in existing statutes. Judge Rosenthal explained that that clearly was not the intent of the committee. Moreover, she said, supersession had not proven to be a problem with the restyled appellate rules and criminal rules.

She pointed out that Professor Cooper had prepared an excellent memorandum emphasizing that the committee intended to make no change in any substantive meaning in any of the rules. It also recommends a new FED. R. CIV. P. 86(b) that would make explicit the relationship between the style amendments and existing statutes, putting to rest any supersession concern. The proposed new rule specifies that if any provision in any rule other than new Rule 5.2 "conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007."

The committee without objection by voice vote agreed to send all the changes recommended by the style project to the Judicial Conference for final approval.

Judge Rosenthal commended Judge Levi and Judge Anthony Scirica – the current and former chairs of the Standing Committee – for their decision to go forward with restyling the civil rules after completion of the appellate and criminal rules restyling projects. She noted that an attempt had been made in the 1990's to begin restyling the civil rules, but the project had been very difficult and time-consuming. After laboring through several rules, the advisory committee decided at that time that the effort was simply too difficult and time-consuming, and it was detracting from more pressing matters on the committee's agenda. Therefore, the civil rules project had been deferred for years. She said that it took a great deal of vision, belief, and understanding of the benefits for Judges Scirica and Levi to bring it back and see it through to its successful conclusion.

Judge Rosenthal thanked the Standing Committee's Style Subcommittee – Judges Thrash and Murtha and Dean Kane – emphasizing that they had been tireless, gracious, and amazing. Also, she said, Professors Marcus and Rowe had been stalwarts of the

project, researching every potential problem that arose. The project, she added, could not have been handled without the support of the Administrative Office – Peter McCabe, John Rabiej, James Ishida, Jeff Hennemuth, Jeff Barr, and Bob Deyling – who coordinated the work and kept track of 750 different documents and versions of the rules. She added that Joe Spaniol had been terrific, offering many great suggestions that the committee adopted.

Judge Rosenthal explained that it was hard to say enough about Professor Kimble's contributions. The results of the style project, she said, are a testament to his love of language. His concept was that the rules of procedure can be as literary and eloquent as any other kind of writing. His stamina and dedication to the project, she said, had been indispensable.

Finally, she thanked Professor Cooper, explaining that he had been the point person at every stage of the project. Noting the extremely heavy volume of e-mail exchanges and memoranda during the course of the project, she emphasized that Professor Cooper had read and commented on every one of them and had been an integral part of every committee decision. His unique combination of acute attention to detail and thorough understanding of civil procedure had kept the project moving in the right direction and made the final product the remarkable contribution to the bench and bar that it will be. She predicted that within five years, lawyers will not remember that the civil rules had been phrased in any other way.

Professor Cooper added that the most important element to the success of the project, by far, had been the decision to accelerate the project and get the work done within the established time frame. The success, he said, was due to Judge Rosenthal. The project had been completed well ahead of time and turned out better than any of the participants could have hoped. Judge Murtha and Professor Kimble echoed these sentiments and expressed their personal satisfaction and pride in the results.

Informational Items

Judge Rosenthal reported that the advisory committee had approved several amendments for publication at its last meeting. The committee, though, was not asking to publish the amendments in August 2006, but would will defer them to August 2007. The bar, she said, deserves a rest. Therefore, the advisory committee was planning to come back to the Standing Committee in January 2007 with proposed amendments to FED. R. CIV. P. 13(f) and 15(a), and 48, and new Rule 62.1. The proposals, she said, were described in the agenda book.

FED. R. CIV. P. 13(f) and 15(a)

Judge Rosenthal explained that the proposed amendments to Rules 13(f) (omitted counterclaim) and 15(a) (amending as a matter of course) deal with amending pleadings. Rule 13(f) is largely redundant of Rule 15 and potentially misleading because it is stated in different terms. Under the committee's proposal, an amendment to add a counterclaim will be governed by Rule 15. The Style Subcommittee, she said, had recommended deleting Rule 13(f) as redundant, but the advisory committee decided to place the matter on the substance track, rather than include it with the style package.

Judge Rosenthal reported that the advisory committee's proposal to eliminate Rule 13(f) would be included as part of a package of other changes to Rule 15. It would also amend Rule 15(a) to make three changes in the time allowed a party to make one amendment to its pleading as a matter of course.

Professor Cooper added that the advisory committee had decided not to make suggested amendments to Rule 15(c), dealing with the relation back of amendments. The committee had not found any significant problems with the current rule. Moreover, the proposed changes would be very difficult to make because they raise complex issues under the Rules Enabling Act. Therefore, the committee had removed it from the agenda.

One member suggested that the proposed change to Rule 15 could take away a tactical advantage from defendants by eliminating their right to cut off the plaintiff's right to amend. The matter, he said, could be controversial. Judge Rosenthal responded that the advisory committee had thought that amendment of the pleadings by motion is routinely given. Moreover, it is often reversible error for the court not to allow an amendment. She said that the publication period will be very helpful to the committee on this issue.

FED. R. CIV. P. 48(c)

Judge Rosenthal reported that the advisory committee would propose an amendment to Rule 48 (number of jurors; verdict) to add a new subdivision (c) to govern polling of the jury. The proposal, she said, had been referred to the advisory committee by the Standing Committee. She explained that it was a simple proposal to address jury polling in the civil rules in the same way that it is treated in the criminal rules. But, she added, there is one difference between the language of the civil and criminal rules because parties in civil cases may stipulate to less than a unanimous verdict.

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the advisory committee would propose a new Rule 62.1 (indicative rulings). It had been on the committee agenda for several years and would provide explicit authority in the rules for a district judge to rule on a matter that is the subject of a pending appeal. Essentially, it adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) to vacate a judgment that is pending on appeal. Almost all the circuits now allow district judges to deny post-trial motions and also to "indicate" that they would grant the motion if the matter were remanded by the court of appeals for that purpose. The proposed new rule would make the indicative-ruling authority explicit and the procedure clear and consistent.

Professor Cooper added that the advisory committee was considering publishing two versions of the indicative-ruling proposal. One alternative would provide that if the court of appeals remands, the district judge "would" grant the motion. The other would allow the district judge to indicate that he or she "might" grant the motion if the matter were remanded. The court of appeals, though, has to determine whether to remand or not.

One member inquired as to why the advisory committee had decided to number the new rule as Rule 62.1 and entitle it "Indicative Rulings." Professor Cooper explained that the advisory committee at first had considered drafting an amendment to Rule 60(b) because indicative rulings arise most often with post-judgment motions to vacate a judgment pending on appeal. The committee, however, ultimately decided on a rule that would apply more broadly. Therefore, it placed the proposed new rule after Rule 62, keeping it in the chapter of the rules dealing with judgments. Judge Stewart added that the Advisory Committee on Appellate Rules would like to monitor the progress of the proposed rule and might consider including a cross-reference in the appellate rules. Judge Rosenthal welcomed any suggestions and said that the committee was open to a different number and title for the rule.

FED. R. CIV. P. 30(b)(6)

Judge Rosenthal reported that the advisory committee had heard from the bar that many practical problems have arisen with regard to Rule 30(b)(6) depositions of persons designated to testify for an organization. The committee was in the process of exploring whether the problems cited could be resolved by amendments to the rules. She noted that the committee had completed a brief summary and was looking further at particular aspects in which amendments might be helpful. For example, should the rules protect against efforts to extract an organization's legal positions during a deposition? Some treatises state that if a witness testifies, the testimony binds the organization. But that is not the way the rule was intended to operate. Therefore, the advisory committee would consider whether the rule should be changed to make it clear that this is not the case.

That, she said, is just one of the problems that has been cited regarding depositions of organizational witnesses.

FED. R. CIV. P. 26(a)

Judge Rosenthal said that the advisory committee was also considering whether changes were needed to the provision in Rule 26(a) (disclosures) that requires some employees to provide an expert's written report. She noted that the rule and the case law appear to differ as to the type of employee who must give an expert's report. The rule says that no report is needed unless the employee's duties include regularly giving testimony, but the case law is broader. She also noted that the ABA Litigation Section has asked the House of Delegates to approve recommendations with respect to discovery of a trial expert witness's draft reports and discovery of communications of privilege matter between an attorney and a trial expert witness. These questions also will be considered.

One of the members suggested that the advisory committee's inquiry of Rule 26(a) should be broadened to also include the problems that have arisen with regard to the testimony of treating physicians.

FED. R. CIV. P. 56

Judge Rosenthal said that the final area being considered by the advisory committee involves the related subjects of summary judgment and notice pleading. She added that the committee planned to address issues in a leisurely way. She noted that the committee's work on restyling FED. R. CIV. P. 56 (summary judgment) was the most difficult aspect of the style project. It was a frustrating task because the rule is badly written and bears little relationship to the case law and local court rules. Since the national rule is so inadequate, she said, local court rules abound. She said that the advisory committee had decided to limit its focus to the procedures set forth in the summary judgment rule. Some of the time periods currently specified in the rule, such as leave to serve supporting affidavits the day before the hearing, are impracticable. But, she said, there was no enthusiasm in the advisory committee for addressing the substantive standard for summary judgment. That would continue be left to case law.

Related to summary judgment, she noted, is the issue of pleading standards. Much interest had been expressed over the years in reexamining the current notice pleading standard system. To that end, she said, the advisory committee had examined how it might structure an appropriate inquiry into both summary judgment and notice pleading. Certainly, she recognized, it would be difficult, and very controversial, to attempt to replace notice pleading with fact pleading. But, she said, the advisory committee had not closed the door on the subject.

As part of the inquiry, the advisory committee has considered recasting Rule 12(e) (motion for a more definite statement) and giving it greater applicability. Today, a pleading has to be virtually unintelligible before a motion for a more definite statement will be granted. The committee will consider liberalizing the standard as a way to help focus discovery.

FED. R. CIV. P. 54(d)(2), 58(c)(2)

Professor Cooper reported that the Advisory Committee on Appellate Rules had suggested that the Civil Rules Committee consider the interplay between the rules that integrate motions for attorney fees and the rules that govern time for appeal – FED. R. CIV. P. 54(d)(2) (claims for attorney's fees) and 58(c)(2) (entry of judgment, cost or fee award) and Fed. R. App. P. 4 (time to appeal). He explained that there is a narrow gap in the current rules. But, he said, the Civil Rules Committee was of the view that the matter was extremely complex, and that it was better to live with the current complexity than to amend the rules and run the risk of unintended consequences or even greater complexity.

Judge Rosenthal reported that the Advisory Committee on Civil Rules has begun to work on the time-computation project and would consider it further at its September 2006 meeting. She predicted that the committee could likely come to the conclusion that the problem of time limits set forth in statutes will not turn out to be as great in practice as in theory. The committee planned to go forward in accord with the initial schedule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of May 20, 2006 (Agenda Item 7).

Amendments for Final Approval

FED. R. CRIM. P. 11(b)

Judge Bucklew reported that the proposed amendment to Rule 11 (pleas) was part of a package of amendments needed to bring the rule into conformity with the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), which effectively made the federal sentencing guidelines advisory rather than mandatory.

She noted that Rule 11(b) specifies the matters that a judge must explain to the defendant before accepting a plea. Under the current rule, the judge must advise the defendant of the court's obligation to apply the sentencing guidelines. But, since *Booker*

has made the guidelines advisory, that advice is no longer appropriate. Accordingly, the amended rule specifies that the judge must inform the defendant of the court's obligation to "calculate" the applicable range under the guidelines, as well as to consider that range, possible departures under the guidelines, and the other sentencing factors set forth in 18 U.S.C. § 3553(a).

Judge Bucklew said that the advisory committee had received comments both from the federal defenders and the U.S. Sentencing Commission. The defenders, she said, had argued that the proposed amendment would give too much prominence to the guidelines, and they suggested that the committee recast the language to require a judge to consider all the factors in 18 U.S.C. § 3553(a). The Sentencing Commission asked the committee to change the word "calculate" to "determine and calculate." The advisory committee, she said, had considered both suggestions in detail, but it decided not to make the proposed changes and agreed to send the proposed amendment forward as published.

Professor Beale added that the advisory committee had added a paragraph to the committee note pointing out that there have been court decisions stating that under certain circumstances, the court does not have to calculate the guidelines *(e.g., United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005)). She pointed out that the added language was limited and had been worked out with the Department of Justice to make sure that it is not too broad.

One member suggested, though, that the added paragraph was inconsistent with the developing case law in his circuit, which requires district judges to calculate the guidelines in every case. Other members suggested, though, that it is a waste of time for a judge to calculate the guidelines in, say, a case with a mandatory minimum sentence. Some participants suggested possible improvements to the language of the last paragraph of the note. Judge Bucklew and Professor Beale agreed to work on the language during the lunch break, and subsequently reported their conclusion that the language should be withdrawn.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

FED. R. CRIM. P. 32(d) and (h)

Judge Bucklew reported that the advisory committee had proposed several changes to Rule 32 (sentence and judgment). First, it inserted the word "advisory" into the heading of Rule 32(d)(1) (presentence report) to emphasize that the sentencing guidelines are advisory rather than mandatory.

She noted that the committee had received several comments on the proposed revision of subdivision (h) (notice of intent to consider other sentencing factors) to require notice to the parties of a judge's intent to consider other sentencing factors. The current rule, she said, specifies that if the court is going to depart under the guidelines for a reason of which the parties have not been notified, the court must provide "reasonable notice" and a chance to argue. She explained that the advisory committee would expand the rule to require reasonable notice whenever the court is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence for a reason not identified either in the presentence report or a party's pre-hearing submission. She said that the advisory committee had added more specific language to the rule following the comment period, stating that the notice must specify "any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence."

Professor Beale added that there had been litigation on this matter, but the committee was of the view that non-guideline sentences should be treated the same as departures. She noted that the committee had also adopted some refinements in language suggested by the Sentencing Commission.

Judge Bucklew reported that the advisory committee had added language to Rule 32(d)(2)(F) to require the probation office to include in the presentence report any other information that the court requires, including information relevant to the sentencing factors specified in 18 U.S.C. § 3553(a). Professor Beale said that the central question is how much information the probation office must include in the presentence investigation report. As revised, the rule specifies that the report must include any other information that the court requires, including information relevant to the factors listed in § 3553(a). She noted that the probation offices in many districts already include this information in the reports. But, she added, there is quite a variance in practice, and the revised language will provide helpful guidance.

A member expressed concern about the provision requiring special notice of a non-guidelines sentence, questioning whether it would undercut the right of allocution and interfere with judicial discretion. He suggested that matters arise at an allocution that the judge should take into account and may affect the sentence. He asked whether the sentencing judge would be required to adjourn the hearing and instruct the parties to return later. He also saw a difference between the obligation to notify parties in advance that the judge is considering a departure under the guidelines and a sentence outside the guidelines.

Other members shared the same concerns and expressed the view that the language of the proposed rule might restrict the authority of a judge to impose an appropriate sentence under *Booker* and 18 U.S.C. § 3553(a). One asked what the remedy

would be for a failure by the court to comply with the requirement. He added that there is also the question of whether the defendant can forfeit rights on appeal under the rule by not raising objections in the district court.

Judge Bucklew said that the case law in the area was very fluid. She noted that the advisory committee had no intention of restricting the court or requiring that any formal notice be given. Rather, she said, the focus of the committee's effort had been simply to avoid surprise to the parties. One participant emphasized that the rule uses the term "reasonable notice," which has not changed since *Booker* and has a long history of interpretation. Another participant noted that lawyers will have to look at the law of their own circuit.

One member added that the problem of surprise arises because parties normally have an expectation that the judge will impose a sentence within the guideline range. But, he added, in at least one circuit, the guidelines are now only one factor in sentencing, and the parties do not have the expectation of a guideline sentence.

Judge Hartz moved to send the proposed amendments to subdivision (h) back to the advisory committee to consider the matter anew in light of the concerns expressed and the developing case law. One member noted that the appellate court decisions on these precise points appear to be going in different directions. Another added that the matter is very fluid, and the committee should avoid writing into the rules a standard that will change over time.

The committee with one objection approved Judge Hartz's motion to send the proposed revisions to Rule 32(h) back to the advisory committee.

The committee without objection by voice vote agreed to send the proposed amendments to Rule 32(d) to the Judicial Conference for final approval.

FED. R. CRIM. P. 32(k)

Judge Bucklew reported, by way of information, that the advisory committee had decided to withdraw the published amendment to Rule 32(k) (judgment). It would have required judges to use a standard judgment and statement of reasons form prescribed by the Judicial Conference. But, she said, a recent amendment to the USA PATRIOT Act requires judges to use the standard form. Thus, there was no longer a need for an amendment.

FED. R. CRIM. P. 35(b)

Judge Bucklew reported that the only purpose of the proposed amendment to Rule 35 (correcting or reducing a sentence) was to remove language from the current rule that seems inconsistent with *Booker*. She added that the National Association of Criminal Defense Lawyers had suggested during the comment period that any party should be allowed to bring a Rule 35 motion, not just the attorney for the government. She said that the advisory committee did not adopt the change and recommended that the rule be approved as published.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

FED. R. CRIM. P. 45(c)

Judge Bucklew explained that the proposed revision of Rule 45 (computing and extending time) would bring the criminal rule into conformance with the counterpart civil rule, FED. R. CIV. P. 6(e) (additional time after certain kinds of service). It specifies how to calculate the additional three days given a party to respond when service is made on it by mail and certain other specified means.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

FED. R. CRIM. P. 49.1

As noted above on page 7, the committee approved the proposed new Rule 49.1 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Amendments for Publication

FED. R. CRIM. P. 29

Judge Bucklew reported that the proposed revision to Rule 29 (motion for judgment of acquittal) had a long and interesting history. She pointed out that the proposal had been initiated by the Department of Justice in 2003. The principal concern of the Department, she said, was that a district judge's acquittal of a defendant in the middle of a trial prevents the government from appealing the action because of the Double Jeopardy Clause of the Constitution. She explained that the Department's

proposed rule would have precluded a judge in all cases from granting an acquittal before the jury returns a verdict.

Judge Bucklew noted that the advisory committee had considered the rule at two meetings, in 2003 and 2004. At the first, she said, the committee had been inclined to approve a rule in principle, and it asked the Department of Justice to provide additional information. At the second meeting, however, the committee decided that no amendment to Rule 29 was necessary.

At the January 2005 Standing Committee meeting, the Department made a presentation in favor of amending Rule 29. In doing so, it pointed to a number of cases in which district judges had granted acquittals in questionable cases. As a result, she said, the Standing Committee returned the rule to the advisory committee and asked it to: (1) draft a proposed amendment to Rule 29, and (2) recommend whether that amendment should be published.

Judge Bucklew reported that the advisory committee had considered the rule again, and it took several meetings to refine the text. The committee was in agreement on the language of the rule. But, she said, it was divided on wisdom of proceeding with the rule as a matter of policy. It recommended publication by a narrow vote of 6-5. She noted that one committee member had been absent, and his vote would have made the vote 7-5 for publication.

She emphasized that the reservations of certain members were not as to the language of the rule, but as to the policy. The objectors, she explained, were concerned that the rule would restrict the authority of trial judges to do justice in individual cases and to further case management. She added that there also was real doubt among the advisory committee members as to the need for any amendment. They accepted the fact that there had been a few cases of abuse under the current rule, but the number of problems had been minimal.

Judge Bucklew stated that the revised Rule 29 would specify that if a court is going to grant a motion for acquittal before the jury returns a verdict, it must first inform the defendant personally and in open court of its intent. The defendant then must waive his or her double jeopardy rights and agree that the court may retry the case if the judge is reversed on appeal.

One of the participants observed that a sentence in the proposed committee note declared that the rule would apply equally to motions for judgment of acquittal made in a bench trial. Professor Beale replied that the rule did not apply to bench trials, and the sentence would be removed.

Deputy Attorney General McNulty thanked the advisory committee and the Standing Committee for considering the recommendations of the Department of Justice. He said that Department attorneys felt very strongly about the subject and wanted the committee to go forward with publication. He added that the vast majority of judges exercise their Rule 29 authority wisely and in a way that allows the government to seek judicial review. But, he said, there had been some bad exceptions that have had a large impact and had undercut the jury's ability to decide the case and the government's right to have its charging decision given appropriate deference. He said that Rule 29 presented a unique situation that needed to be addressed, and he added that it had been the policy of Congress to provide greater opportunity to the government for appellate review.

Finally, he said, the waiver approach adopted by the advisory committee with the revised rule achieves a fine balance. It gives the judge the opportunity to do justice and further case management objectives, while preserving the right of the government to appeal. He concluded by strongly urging the committee to approve publication.

One of the members objected on the grounds that the rule represents a major shift in the architecture of trials that would upset the balance in criminal trials and diminish the rights of defendants. First, he said, such a large change in criminal trials should be made by Congress through legislation, and not through rulemaking by the committee. Second, he expressed concern over the closeness of the vote in the advisory committee. The 6-5 vote, he said, was essentially a statistical tie, and the fact that the matter had been debated and deferred at so many meetings demonstrates that there are serious problems with the proposal. Third, he expressed concern that the defendant must waive his or her constitutional rights. This, he said, was unsettling. Fourth, he emphasized that he was aware of many instances in which the government overcharges, particularly by including extraneous counts and peripheral defendants. The courts, he argued, should have the power to winnow out the extra charges and defendants, and the hands of judges should not be bound by the rule. Fifth, he said that it is unfair for defendants to have a "sword of Damocles" hanging over their heads for two or three years, while the government appeals the trial judge's decision to acquit. Finally, he summarized, the rule was sure to lead to unintended consequences, and the changes the government wants should not be made through the rules process.

Several members of the committee expressed sympathy for these views, but they nevertheless announced that they favored publication of the rule.

Judge Levi added some background on the history of the rules. He noted that it had been on the agenda for some time, and it had been approved originally by the advisory committee with considerable support, perhaps by an 8-4 vote. Then, however, at the next meeting the committee changed its mind.

Initially, he explained, the proposal of the Department of Justice had been to prevent a judge from entering a pre-verdict of acquittal in any circumstances. But the district judges on the advisory committee asked how they would be able to deal with problems arising from excess defendants, excess counts, and hung juries.

The waiver proposal, he said, had been developed to address these competing concerns. It would preserve the discretion of the district judges and help them manage their cases. Yet it would give the government the right to appeal a district judge's pre-verdict acquittal. Nevertheless, he pointed out, the advisory committee rejected the waiver proposal and decided that no change was needed in the rule.

At the January 2005 Standing Committee meeting, Associate Deputy Attorney General Christopher Wray made strong arguments in support of the proposed rule amendment that included the waiver procedure. Judge Levi said that the Department had been very persuasive, and the Standing Committee took a strong position and directed the advisory committee to draft a proposed amendment. Then, he said, the Department went back to the advisory committee and made the argument for the proposed amendment, which the committee approved on a 6-5 vote.

Judge Levi said that he would prefer to handle the proposal through the rulemaking process, rather than have the Department go to Congress for legislation.

One member expressed concerns over the proposal, but said that he had been convinced to support publication because the rule was supported by Robert Fiske, a distinguished member of the advisory committee who had served as both a prosecutor and defense lawyer. He added that while the number of abuses is very small, the cases in which abuse has occurred under Rule 29 have tended to be prominent.

He added that the rules do in fact affect the architecture of trials. The waiver proposal, he said, may be unique, but it is an innovative attempt to assist judges in managing cases and addressing overcharging by prosecutors. He added that it was important to foster dialogue between the judiciary and the Department of Justice and to solicit the views of the bench and bar on the proposal. To date, he said, the proposal had been debated only by the members of the committees, but not by the larger legal community. Publication, he said, would be very beneficial.

Another member said that the proposed rule is a very nice solution to the problem. He said that it can be a travesty of justice when a judge makes a mistake under the current rule. The right of a judge to grant an acquittal remains in the rule, but it is subject to further judicial scrutiny.

One member asked whether there were other rules that require defendants to waive their constitutional rights. One member suggested that an analogy might be made to conditional pleas under FED. R. CRIM. P. 11(a)(2). Professor Capra added that FED. R. CRIM. P. 7 provides for waiver of indictment by the defendant, and FED. R. CRIM. P. 16 (discovery and inspection) contains waiver principles when the defendant asks for information from the government. Both require a defendant to waive constitutional rights in order to take advantage of the rule.

Judge Levi pointed out that the committee could withdraw the rule after the public comment period, and it had done so with other proposals in the past. But, he said, as a matter of policy, the committee should not publish a proposal for public comment unless it has serious backing by the rules committees.

One member expressed concern that if the rule were published, it might lead the public to believe that it enjoyed the unanimous support of the committee. Judge Levi responded that the committee does not disclose its vote in the publication because it wants the public to know that it has an open mind. Mr. Rabiej explained that the publication is accompanied by boilerplate language that tells the public that the published rule does not necessarily reflect the committee's final position. He added that the report of the advisory committee is also included in the publication, and it normally alerts the public that a proposal is controversial.

The Deputy Attorney General stated that the Department of Justice wanted to have its points included in the record to continue the momentum into the next stage of the rules process. He said that he had been surprised over the arguments that the proposed change should be made by legislation, rather than through the rules process. He pointed out that he had worked as counsel for the House Judiciary Committee for eight years and had heard consistently from the courts that the rulemaking process should be respected. He said that it was in the best interest of all for the proposal to proceed through the rulemaking process, rather than have the Department seek legislation. He noted that while there had only been a few cases of abuse by district judges, those few tended to occur in alarming situations and could be cited by the Department if it were to seek legislation.

He said that the Department had worked for several years on the proposal with the committees through the rulemaking process and would like to continue on that route. The proposal, he said, had substantial merit and should be published.

He added that the Department disagreed with the characterization that the proposed amendment would alter the playing field. Rather, he said, it would preserve the right to present evidence and to have the court's ruling on acquittal preserved for appellate review. A pre-verdict judgment of acquittal, he emphasized, stands out from all

other actions and is inconsistent with the way that other matters are handled in the courts. He pointed out, too, that the Department was deeply concerned about the dismissal of entire cases without appellate review. On the other hand, it was not as concerned with a court dismissing tangential charges. He concluded that the Department would do all it could to work toward a balanced solution to a very difficult problem. The waiver proposal, he said, is a good approach. It is a good compromise and offered a balanced solution to the competing interests. He said that the Department appreciated the opportunity to come back to the committee.

One member suggested deleting the word "even" from line 20 in Rule 29(a)(2). It was pointed out that the word had been inserted as part of the style process. Judge Levi suggested that Style Subcommittee take a second look at the wording as part of the public comment process.

The committee, with one dissenting vote, approved the proposed rule for publication by voice vote.

FED. R. CRIM. P. 41(b)(5)

Judge Bucklew reported that the proposed amendment to Rule 41(b)(search warrants) would authorize a magistrate judge to issue a search warrant for property located in a territory, possession, or commonwealth of the United States that lies outside any federal judicial district. Currently, a magistrate judge is not authorized to issue a search warrant outside his or her own district except in terrorism cases..

She noted that the Department of Justice had raised its concern about the gap in authority at the last meeting of the advisory committee. The Department had asked the committee to proceed quickly because of concerns over the illegal sales of visas and like documents. It felt constrained because overseas search warrants could not be issued in the districts where the investigations were taking place. She explained that the proposed amendment to Rule 41(b)(5) would allow an overseas warrant to be issued by a magistrate judge having authority in the district where the investigation is taking place, or by a magistrate judge in the District of Columbia. The advisory committee, she added, had voted 10-1 to publish the rule.

Judge Bucklew advised the committee of developments that had occurred since the vote. She noted that at Judge Levi's suggestion, Mr. Rabiej had sent the proposal to Judge Clifford Wallace, who chairs the Ninth Circuit's Pacific Islands Committee. In turn, Judge Wallace contacted the Chief Justice of American Samoa, who objected to the proposed amendment. Judge Wallace suggested that the proposal be remanded back to the advisory committee in order to give American Samoa a chance to respond. She added that she was not sure exactly what American Samoa's concerns were, but it appeared that

the Chief Justice did not want judges in other parts of the country issuing warrants for execution in American Samoa.

Judge Bucklew reported that after speaking with Judge Wallace, the Administrative Office had polled the advisory committee as to whether it should wait until the Chief Justice of American Samoa and the Pacific Islands Committee of the Ninth Circuit respond. Accordingly, it voted 9-2 to allow time for a response. She noted that the Department of Justice representative objected, along with one other advisory committee member. She added that later discussions have suggested that the proposal could still be published, with American Samoa and the Pacific Islands Committee commenting during the public comment period.

She pointed out that after the advisory committee meeting, the House of Representatives passed a bill containing a provision similar to the proposal to amend Rule 41(b). Basically, it would allow investigation of possible fraud and corruption by officers and employees of the United States in possible illegal sales of passports, visas, and other documents. It would authorize the district court in the District of Columbia to issue search warrants for property located within the territorial and maritime jurisdiction of the United States. She added that she was not sure what the Department's position would be on the bill, and she noted that the legislation probably did not cover everything in the proposed rule amendment.

Professor Beale said that the Department of Justice's largest concern was with visa fraud. This, in turn, was connected with larger issues of illegal immigration and terrorism. In addition, the question arose whether the committee would have to republish the current proposal if its reference to a territory of the United States were deleted following the public comment period. She concluded that republication would probably not be required. She explained that subdivision (a) of the rule, which refers to territories, was not connected to subdivisions (b) and (c), which authorize search warrants for property in diplomatic or consular missions and residences of diplomatic personnel. She said that the committee could place brackets around subdivision (a) and invite comment from American Samoa and others as to whether subdivision (a) should be included.

Judge Bucklew also pointed out, as mentioned in the advisory committee's report, that a similar, but broader proposal had been approved by the Judicial Conference but rejected by the Supreme Court in 1990.

Judge Levi suggested bracketing the language regarding American Samoa. He noted from speaking with Judge Wallace that there is a great deal of sensitivity in American Samoa about any intrusion into its judicial process. He noted that the situation is very different from the other Pacific Islands territories, such as Guam and the Northern Marianas, both of which have Article I federal district courts. The history of how the

United States acquired American Samoa is different from that of other territories, and the relevant treaty explicitly requires the United States to respect the judicial culture of American Samoa. He noted, too, that there had been a proposal to establish an Article I federal court in American Samoa, but it has been very controversial.

Judge Levi also pointed out that Judge Wallace warned that if the proposal to amend Rule 41 is published without bracketing American Samoa, there could be a good deal of needless controversy generated. The primary concern of the Department of Justice, he said, is with oversees searches, and not with American Samoa. He asked whether the advisory committee would be amenable to bracketing the language dealing with American Samoa.

Judge Bucklew responded that the advisory committee would certainly approve placing brackets around the provision to flag it for readers. She said that the proposed amendments to Rule 41 were very beneficial, and it would be a shame not to have them proceed because of a controversy over a matter of relatively minor concern to the government.

The committee unanimously approved the proposed amendment, with the pertinent language of subsection (A) bracketed, for publication by voice vote.

MODEL FORM 9 ACCOMPANYING THE SECTION 2254 RULES

Mr. Rabiej stated that the committee needed to abrogate Form 9 accompanying the § 2254 rules. He noted that the form is illustrative and implements Rule 9 of the § 2254 rules (second or successive petitions). The form, however, was badly out of date, even before the habeas rules were restyled, effective December 1, 2004. For example, it contains references to subdivisions in Rule 9 that no longer exist and includes provisions that have been superseded by the Antiterrorism and Effective Death Penalty Act of 1996.

He added that when the restyled habeas corpus rules had been published for comment in August 2002, the advisory committee received comments from district judges recommending that the form not be continued because the courts relied instead on local forms. The courts wanted to retain flexibility to adapt their forms to local conditions instead of following a national form. The advisory committee and its habeas corpus subcommittee did not specifically address abrogation of the form. Thus, technically Form 9 still remains on the books. He added that the form had been causing some confusion, and the legal publishing companies no longer include it in their publications. In addition, Congressional law revision counsel thought that the form had been abrogated and no longer included it in their official documents. Therefore, Mr. Rabiej said, it would be best for the committee to officially abrogate the form through the

regular rulemaking process. *i.e.,* approval by the committee and forwarding to the Supreme Court and Congress.

The committee without objection by voice vote agreed to ask the Judicial Conference to abrogate Form 9 accompanying the § 2254 Rules.

Informational Items

Judge Bucklew reported that the advisory committee was still working on a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection), which would expand the government's obligation to disclose exculpatory and impeaching information to the defendant. She said that the matter was controversial, and the Department of Justice was strongly opposed to any rule amendment. Instead, she said, it had offered to draft amendments to the *United States Attorneys' Manual* as a substitute for an amendment. The matter, she added, was still in negotiation. Deputy Attorney General McNulty and Assistant Attorney General Fisher said that the Department was still working on the manual and was hopeful of making progress.

Judge Bucklew said that the committee was also considering a possible amendment to FED. R. CRIM. P. 41 (search warrants) that would address search warrants for computerized and digital data. It was also looking at possible amendments to the § 2254 rules and § 2255 rules to restrict the use of ancient writs and prescribe the time for motions for reconsideration.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of May 15, 2006 (Agenda Item 8).

New Rule for Publication

FED. R. EVID. 502

Judge Smith reported that the advisory committee had only one action item to present — proposed new FED. R. EVID. 502 to govern waiver of attorney-client privilege and work product protection. He referred back to the report of the Administrative Office and Mr. Rabiej's description of the exchange between Judge Levi and the chairman of the House Judiciary Committee. He noted that the committee had received a specific request from Chairman Sensenbrenner to draft a rule that would:

1. protect against inadvertent waiver of privilege and protection,

2. permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and

3. allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in subsequent proceedings.

He explained that rules that affect privilege must be addressed by Congress and enacted by legislation. Thus, the rules committees could produce a rule through the Rules Enabling Act process that would then be enacted into law by Congress.

Judge Smith noted that the advisory committee had conducted a very profitable conference at Fordham Law School in New York at which 12 invited witnesses commented on a proposed draft of the rule. He said that the committee had refined the rule substantially as a result of the conference, and the improved product was ready for approval by the Standing Committee to publish. He explained that the rule incorporated the following basic principles agreed upon unanimously by the advisory committee:

1. A subject-matter waiver should be found only when privileged material or work product has already been disclosed and a further disclosure "ought in fairness" to be required.

2. There should be no waiver if there is an inadvertent disclosure and the holder of the protection takes reasonable precautions to prevent disclosure and reasonably prompt measures to rectify the error.

3. Selective waiver should be allowed.

4. Parties should be able to get an order from a court to protect against waiver vis a vis non-parties in both federal and state courts.

5. Parties should be able to contract around the common-law waiver rules. But without a court order, their agreement should not bind non-parties.

Judge Smith pointed out that the rule included some controversial matters, but it was needed badly to control excessive discovery costs. He said that the burdens and cost of preserving the privileged status of attorney-client information and trial preparation materials had gotten out of hand without deriving any countervailing benefits.

Judge Smith pointed out that selective waiver was the most controversial provision in the rule. It would protect a party making a disclosure to a government law enforcement or regulatory agency from having that disclosure operate as a waiver of the privilege or protection vis a vis non-governmental persons or entities. He explained that the advisory committee would place the provision in brackets when the rule is published and state that the committee had not made a final decision to include it in the rule.

Professor Capra agreed that the most controversial aspect of the rule was the selective waiver provision. He pointed out that the proposed rule takes a position inconsistent with most current case law. He emphasized that the advisory committee had not decided to promulgate that part of the rule, so the provision is set forth in brackets. In addition, the accompanying letter to the public states that the committee had not made a decision to proceed and wanted comments directed to the advisability of including a selective waiver provision. Judge Levi added that Chairman Sensenbrenner had specifically asked the committee to include a selective waiver provision in the rule.

Professor Capra explained that the original version of the rule had a greater effect on state court activity and sought to control state law and state rules on waiver. But the Federal-State Jurisdiction Committee of the Judicial Conference – and the advisory committee itself after its hearing in New York – concluded that the draft was too broad. Accordingly, it was amended and now covers only activity occurring in a federal court.

Judge Levi noted that the representative of an American Bar Association's Task Force on the Attorney-Client Privilege opposed the rule at the New York conference because he said that it would foster the "coercive culture of waiver." The task force, he explained, is concerned that waivers are being extorted by government agencies from businesses as part of the regulatory and law enforcement processes.

Judge Levi added that he had spoken to the chair of the task force and emphasized that the committee was not trying to encourage the use of waivers. Nor was it taking a position on Department of Justice memoranda to U.S. attorneys encouraging them to weigh a corporations's willingness to waive the attorney-client privilege in assessing its level of cooperation for sentencing purposes. Rather, he emphasized, the rules committee was just trying to promote the public interest by facilitating the conduct of government investigations into public wrongs. Judge Levi added that, in response to the concerns of the ABA task force, the committee should include a statement in the publication to the effect that the committee was not taking a position regarding the government's requests for waivers. The addition, he said, could avoid misdirected criticism of the rule.

Associate Attorney General McCallum agreed that the explanation would be helpful to the organized corporate bar. He said that the Department had been surprised by the feedback at the Fordham conference, where some participants had voiced strong

opposition to the proposal on the ground that it would foster a culture of waiver. He said that the Department supported the pending new Rule 502 and would continue to work with the organized bar over their concerns.

One member questioned the effect of the proposal on state court proceedings. He asked whether the advisory committee had examined the power of Congress under the Commerce Clause of the Constitution to effect changes in the rules of evidence in the state courts. Professor Capra responded that the committee had indeed examined the issue and had invited an expert to testify on it at the mini-conference. In addition, he said, Professor Kenneth Broun, a consultant to the committee and a former member of the committee, had also completed a good deal of research on the issue. He said that the proposed rule dealt only with the effect on state court proceedings of disclosures made in the federal courts. It did not address the more questionable proposition of whether the rule could control disclosures made in state court proceedings. The literature, he said, suggests that Congress has the power to regulate even those disclosures. But, he said, the advisory committee narrowed the rule to cover only disclosure at the federal level.

One member asked whether the Department of Justice favored selective waiver in order to promote law enforcement and regulatory enforcement efforts. He noted that he had sat on a case in which the panel of the court of appeals had asked the Department to file an amicus curiae brief on the issue, but had received none. He said that the panel had been frustrated by the uncertainty regarding the Department's views on the issue. Associate Attorney General McCallum pointed out that the Department acts as both plaintiff and defendant and that some components of the Department strongly favor selective waiver. He noted, by way of example, that the prosecutions in the Enron case would have been more difficult and time-consuming if waivers had not been given. The waivers, he emphasized, had been voluntarily given with the advice of counsel. He explained that the Department favors selective waiver, but had not yet taken an official position on the matter.

Judge Levi explained that the purpose of selective waiver is to encourage companies to cooperate in regulatory enforcement proceedings. He said that the Securities and Exchange Commission favored the proposed Rule 502, and it would be very helpful to obtain the views of other law enforcement and regulatory authorities in order to develop the record for the advisory committee. Professor Capra added that the strong weight of authority among the circuits, as expressed in the case law, was against selective waiver. Therefore, he said, there needed to be a strong showing in favor of it during the public comment period. Judge Levi concurred and added that a strong case also needs to be made by the state attorneys general and other regulatory authorities.

The committee unanimously approved the new rule for publication by voice vote.

Informational Items

Professor Capra reported that the advisory committee had been monitoring the developing case law on testimonial hearsay following *Crawford v. Washington,* 541 U.S. 36 (2004). He noted that the Supreme Court had just issued some opinions dealing with *Crawford,* but the issues in the cases were relatively narrow and do not provide sufficient guidance on how to treat hearsay exceptions in the federal rules. The advisory committee, he said, would continue to monitor developments, and it wanted to avoid drafting rules that later could become constitutionally questionable.

Professor Capra also reported that the advisory committee was considering restyling the Federal Rules of Evidence, mainly to conform the rules to the electronic age and to account for information in electronic form. He noted that the committee had had discussions on how to address the matter, and it had considered the possibility of restyling the entire body of evidence rules. He added that he planned to work with Professor Kimble to restyle a few rules for the committee to consider at its next meeting. Finally, he noted, the view of the Standing Committee on whether to restyle the evidence rules will be very important.

Professor Capra reported that draft legislation was being considered in Congress that would establish a privilege for journalists. The legislative activity, he said, stemmed in part from the controversies surrounding the celebrated cases involving the imprisonment of New York Times reporter Judith Miller and the leak of the identity of C.I.A. employee Valerie Plame. He explained that the Administrative Office had reviewed the proposed legislation and offered some suggestions on how its language could be clarified. Mr. Rabiej added that many of the suggestions had been adopted by the Congressional drafters.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of January 20, 2006 (Agenda Item 9).

Judge Kravitz reported that the advisory committees at their Spring 2006 meetings had embraced the time-computation template developed by the subcommittee, including its key feature of counting all days and not excluding weekends and holidays.

He pointed out that the Standing Committee at its January 2006 meeting had asked the subcommittee and the advisory committees specifically to address two issues: (1) the inaccessibility of a clerk's office to receive filings; and (2) whether to retain the provision that gives a responding party an additional three days to act when service is

made on it by mail or by certain other means, including electronic means. He noted that the advisory committees had decided that the issue of inaccessibility needed additional study, and the subcommittee was willing to take on the task. Professor Capra added that the Technology Subcommittee had already considered these issues as part of its participation in the project to develop model local rules to implement electronic filing.

As for the "three-day rule," Judge Kravitz reported that the sense of the advisory committees was to leave the rule in place without change at this time. He said that it seemed odd to give parties an extra three days when they have been served by electronic means, but many filings are now made electronically over weekends and the committees were concerned about potential gamesmanship by attorneys. So, the general inclination has been not to amend the rule at this point.

Judge Kravitz said that the Advisory Committee on Civil Rules had suggested some helpful improvements to the template. First, he noted, the language of the template speaks in terms of filing a "paper." But in the electronic age, he said, it makes sense to eliminate the word "paper."

Second, he pointed out that the template speaks in terms of a day in which "weather or other conditions" make the clerk's office inaccessible. He said that the advisory committee was concerned about the specific reference to "weather" because it implies that only physical conditions may be considered. Instead, the language might be improved by simply referring to a day on which the clerk's office "is inaccessible." The committee note could explain, though, that elimination of the word "weather" is not intended to remove weather as a condition of inaccessibility.

Third, the advisory committee suggested deleting state holidays as days to exclude in computing deadlines. Most federal courts, he said, are in fact open on state holidays. He noted that the subcommittee had not decided to make this change, but would be amenable to doing so if the Standing Committee expressed support for the change.

Fourth, he said that the advisory committee had noted that "virtual holidays" were not included in the template, *e.g.,* the Friday after Thanksgiving and the Monday before a national holiday that falls on a Tuesday. Some federal courts, he said, are effectively closed on those days, although their servers are available to accept electronic filings.

Fifth, he said that the advisory committee had suggested including a definition of the term "last day" in the text of the rule. He reported that Professor Cooper had drafted a potential definition, drawing on the text of local court rules implementing electronic filings. It states that, for purposes of electronic filing, the "last day" is midnight in the time zone where the court is located. For other types of filings, it is the normal business hours of the clerk's office, or such other time as the court orders or permits.

Judge Kravitz explained that the civil, bankruptcy, and appellate rules – unlike the criminal rules – apply in calculating statutory deadlines as well as rules deadlines. He pointed out that Professor Struve had completed an excellent memorandum on the subject in which she identified many important statutory deadlines. Her initial study had found more than 100 statutory deadlines of 10 days or fewer. Many of them, he added, are found in bankruptcy. Moreover, some apply not to lawyers, but to judges. Under the current rules, he said, a deadline of 10 days usually means 14 days or more because weekends and holidays are not counted. But under the approach adopted in the template, 10 days will mean exactly 10 days.

Judge Kravitz reported that the Advisory Committee on Civil Rules had suggested that the advisory committees should consider expressing all, or most, time periods in multiples of seven days. The concept, he noted, seems generally acceptable but may not work well across-the-board for all deadlines. It may be, he said, that deadlines below 30 days would normally be expressed in multiples of seven, but the longer periods now specified in the rules, such as 30, 60, or 90 days might be retained.

Finally, Judge Kravitz thanked Judge Patrick Schiltz, former reporter for the appellate rules committee and special reporter for the time-computation project, for his superb research and memoranda and for drafting the template and supporting materials that got the project moving. He also thanked Professor Struve for picking up the work from Judge Schiltz and for her excellent memorandum on statutory deadlines. He also praised the advisory committees for their dedication to the project and their invaluable help to the subcommittee.

Professor Struve highlighted the backward-counting provision in the template rule and wondered about its practical effect. Judge Kravitz explained that the advisory committee had wanted a simple rule. He acknowledged that there are scenarios under the template in which litigants may lose a day or two in filing a document, and judges would gain a day or two. But, he said, even though the subcommittee consisted mostly of practicing attorneys, all endorsed the basic principle – in the interest of simplicity – that once one starts counting backward, the count should continue in the same direction.

Professor Cooper added that the bar for years had urged the Advisory Committee on Civil Rules to make the rules as clear as possible, and one attorney recently had asked the committee to draft a clear rule telling users how to count backwards, *e.g.,* to calculate a deadline when a party has to act a certain number of days *before* an event, such as a hearing. To that end, he said, it might be advisable to put back into the template the words "continuing in the same direction," which had been dropped from an earlier draft in the interest of simplicity. Including those words would make it clear that backward counting follows the same pattern as forward counting. A member of the committee strongly urged including the clarifying language in the rule.

Judge Kravitz said that the most difficult issue appeared to be the applicability of the rule to statutory deadlines. A few statutes, he said, speak specifically in terms of calendar days. But when statutes do not specify calendar days, it can be assumed that only business days are counted under the current rule when a deadline is 10 days or fewer. He pointed out that the practical impact of the template rule would be to shorten statutory deadlines of 10 days or fewer. That result, he said, might undercut the bar's acceptance of the time-computation project.

Professor Morris added that the template rule would have a substantial impact on bankruptcy practice because a great many state statutes are in play in bankruptcy cases. Under the current bankruptcy rule, he said, the statutes are calculated by counting only business days.

Professor Morris also noted that the proposed template rule speaks of inaccessibility in such a way that it could be interpreted to include inaccessibility on a lawyers' end, as well as the inaccessibility of the clerk's office to accept filings. He suggested that the rule might be broad enough to cover the situation where a law firm's server is not working.

Judge Rosenthal explained that the civil advisory committee had considered that situation and had decided tentatively that it was not possible to write a rule to cover all situations. She suggested that it should be left up to the lawyers to decide whether they need to ask a court for an extension of time in appropriate situations. She cautioned, however, that there are a handful of time limits in the rules that a court has no authority to extend.

One participant urged that the time had come to move forward with the time-computation project, despite the complications posed by statutory deadlines. He suggested, moreover, that Congress might well be amenable to making appropriate statutory adjustments in this area to accommodate the time-computation project, especially if the bar associations agree with the committee's proposal.

Judge Levi asked whether the subcommittee was contemplating further changes or additions to the template. Judge Kravitz responded that at least three changes should be made. First, he said the subcommittee would eliminate the word "paper." Second, he said that he had been persuaded to eliminate the word "weather," so the rule would state simply that the last day is not counted if the clerk's office is "inaccessible." Third, he agreed to add to the rule a definition of "last day" along the lines of Professor Cooper's proposal. That definition, he noted, is workable and already exists in most of the local court rules dealing with electronic filing.

In addition to those three changes, Judge Kravitz said that he had no objection to eliminating state holidays from the rule if there were support for the change. As for closure of the federal court on a "virtual holiday," he said that the problem would be taken care of by revising the rule to specify that the last day is not counted if the clerk's office is inaccessible. Several members of the committee suggested that both state holidays and virtual holidays be eliminated from the rule. Thus, the only exclusions in the rule would be for federal holidays and days when the clerk's office is "inaccessible." Another member added that it should be made clear in the rule that "inaccessibility" applies only to problems arising at the courthouse, and not in a lawyer's office.

Judge Kravitz noted that the instructions from the Standing Committee were for the advisory committees to review individually each of the individual time limits in their respective rules and to recommend appropriate adjustments to them in light of the template's mandate to count all days, including weekends and holidays.

One participant suggested that the only significant issue relating to statutes was the problem that the proposed rule would shorten statutory deadlines of 10 days or fewer. Another participant pointed out, though, that the supersession provision of the Rules Enabling Act might also be implicated.

One advisory committee chair suggested that it would be very helpful for the advisory committees to have a list of all the various statutory deadlines and an indication of how often they actually arise in daily situations. Some of the statutes, she said, might make a big difference in federal practice, such as the 10 days given a party by statute to object to a magistrate judge's report.

One member said that the problem of shortening statutory deadlines had the potentiality of undermining the whole time-computation project and wasting a great deal of time and work by the advisory committees.

Another added that it was questionable whether judges have authority to extend statutory deadlines. He suggested that it might be appropriate to speak with members of Congress about the issue. Another participant said that Congress might give its blessing to fine tuning the calculation of statutory deadlines, as long as the particular deadlines affected are not politically charged.

Professor Struve added that she had just scratched the surface with her initial research into statutory deadlines. She said that it would be a truly major project to gather all the statutes, and the committee was bound to make a mistake or two. Professor Cooper pointed out that, unless the new rule also sweeps up all future statutes, some time periods could end up being counted one way and others another way – the worst possible outcome.

One member asked whether lawyers in fact even look to the federal rules to calculate a deadline in a statute. Or do they merely look to the statute itself? In other words, if a statutory deadline is 10 days, do lawyers assume that it means 10 days, as set forth in the plain language of statute itself, or 14 days, as calculated under the federal rules?

Judge Kravitz suggested that the choice for the advisory committees was either: (1) to continue their examination of each time limit in their respective rules, or (2) to try to solve the statutory deadline problems first, present a solution to those problems at the January 2007 Standing Committee meeting, and then resume work on the specific time limits. One advisory committee chair said that it was important to have a firm road map in place before the advisory committees commit themselves to a great deal of work.

One participant concluded that the committees may not be able to resolve all the open questions regarding statutory interpretation and the interplay between statutes and rules. Professor Cooper pointed out that supersession questions already make it unclear in several instances whether a statute or a related rule should control the computation of a given time limit. Many of those questions have never been faced and answered. In the interest of simplicity, though, he suggested that it may make sense simply to abolish the 11-day rule explicitly for both rules and statutes, even if that results in certain statutory time limits being shortened.

Two members suggested that another possible resolution of the statutory problems would be to eliminate all reference in the rule to calculating time limits set forth in statutes. Therefore, the rules, as revised, would apply only in calculating time limits set forth in rules and court orders. Another member pointed out that this solution would bring the civil and bankruptcy rules into line with the current criminal rules, which do not extend to calculation of statutory time limits.

One advisory committee chair suggested that there was great value in continuing the momentum that the Technology Subcommittee had created. She said that the civil advisory committee had made a good deal of progress, and it would be best to continue its work over the summer, despite the uncertainties over statutes.

Another advisory committee chair pointed out that there is a difference between counting hours and counting days. Under the rules, he explained, days are considered as units, not 24-hour periods. Therefore, a party has until the end of the last day in which to act. On the other hand, in counting hours, an hour counts as exactly 60 minutes, not as a unit. Therefore, a party has exactly 60 minutes in which to act. The time period is not rounded up to the end of the last hour. He suggested that the committee consider specifying in the template that 60 minutes is 60 minutes precisely.

One participant recommended that the committee consider whether Congress contemplates that its statutes will be interpreted according to the time-computation provisions in the federal rules. He suggested that the committee, by changing the method of calculating shorter statutory deadlines, might be contradicting the intentions of Congress in enacting the statutes.

Judge Kravitz added that the rule should provide clear advice to judges and lawyers on how to count time limits set forth in statutes. The proposed revision of the federal rules would effectively shorten the time for people to act. Therefore, he said, the committee should study such matters as how judges and lawyers actually count time in statutes, how many statutory deadlines there are, how often they arise in the courts, and whether they have caused practical problems. Once the committees understand these issues better, they should be able to propose the appropriate solution to the problem of counting time as set forth in statutes.

One member emphasized that the bar wants a clear, revised rule, and the time has come to promulgate it. Among other things, he said, lawyers are deeply concerned about achieving clarity because missing a deadline is a serious mistake that can lead to a malpractice claim. He suggested, among other things, that the committee expressly solicit the views of the bar regarding statutory deadlines or hold a conference with members of the bar on the subject.

Judge Levi suggested that each advisory committee decide how it should proceed on the matter in light of the discussion. Judge Stewart added that the template, with the various adjustments suggested at the meeting, provides the appropriate vehicle for the advisory committees.

LONG RANGE PLANNING

Mr. Ishida reported that the Judicial Conference's Long Range Planning Group, comprised of the chairs of the Conference's committees, had met in March 2006, and its report was included in the agenda book (Agenda Item 10). The group, he said, was preparing the agenda for its next meeting and had asked the chairs of each committee to submit suggested topics.

The planning group first asked the Standing Committee to identify key strategic issues affecting the rulemaking process and to report on what initiatives or actions it was taking to address those issues. Second, the planning group asked the committee to identify trends in the courts that merit further study and could lead to new rules. Mr. Ishida asked the members to consider these requests and send him any ideas that could be included in the committee's report to the planning group.

Mr. McCabe suggested that it would be very helpful for the committee to take advantage of the new statistical system being built by the Administrative Office. He said that the committee should consider the kinds of data that might be extracted from court docket events to develop a sound empirical basis for future rules amendments. Judge Levi endorsed the Administrative Office's efforts to improve and expand collection of statistical information from the courts.

One member suggested that the committee might also consider pro se cases as an area that needed to be addressed in future rulemaking.

Judge Levi agreed to work with Mr. Ishida on a response from the committee to the long range planning group.

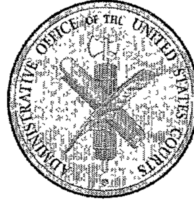
NEXT COMMITTEE MEETING

The next committee meeting of the committee will be held in Phoenix in January 2007. The exact date of the meeting was deferred to give the chair and members an opportunity to check their calendars and for the staff to explore the availability of accommodations.

Respectfully submitted,

Peter G. McCabe,
Secretary

3-A



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 18, 2006

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Thirty-three bills were introduced in the 109th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following matters.

Privilege Waiver

In January 2006, House Judiciary Committee Chairman F. James Sensenbrenner, Jr., wrote to then Judicial Conference Secretary Leonidas Ralph Mecham requesting that the Judicial Conference initiate rulemaking to address issues arising from disclosure of matter subject to attorney-client privilege or work product protection. At its Spring 2006 meeting, the Evidence Rules Committee approved for publication proposed new Evidence Rule 502, which includes the following provisions: (1) inadvertent disclosure does not constitute a waiver if the holder of the privilege or work product protection took reasonable steps to prevent disclosure and rectify the error once it was discovered; (2) parties may protect against the consequences of waiver by seeking a confidentiality order from the court, which is binding on nonparties in federal and state court; (3) subject-matter waiver may be found only when privileged or work product materials have been disclosed and a further disclosure "ought in fairness" be required to avoid any misrepresentation that may arise from the earlier disclosure; and (4) the privileged or protected status of matter disclosed to law enforcement officials as part of an investigation is maintained as against all third parties. The proposed new rule was published for comment in August 2006, with the comment period ending on February 15, 2007.

There are several related developments. First, the Conference of Chief Justices adopted a resolution on August 2, 2006, expressing concerns with proposed Evidence Rule 502. (See Attachment A.) The Rules Committee's chair and reporter met with representatives of the Conference to discuss their concerns.

Second, the ABA House of Delegates adopted a resolution at its August 7-8, 2006, recommending that "consistent rules be established throughout the federal, state, and territorial courts to address how the courts and counsel should resolve issues involving claims of

inadvertent disclosure of materials protected by the attorney-client privilege or attorney work product doctrine." (See Attachment B.)

Third, the President signed the "Financial Services Regulatory Relief Act of 2006" on October 13, 2006 (Pub. Law. No. 109-351). Section 607, which amends the Federal Deposit Insurance Act, has a selective waiver provision protecting disclosures to a federal banking agency, state bank supervisor, or foreign banking authority made "in the course of any supervisory or regulatory process of such agency, supervisor, or authority[.]" (See Attachment C.)

The Senate Judiciary Committee held a hearing on September 12, 2006, regarding "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations." The "Thompson Memorandum," written by former Deputy Attorney General Larry Thompson, sets forth a number factors a federal prosecutor must consider in determining whether to seek an indictment against a corporation. A subsequent clarification was issued by Associate Deputy Attorney General Robert McCallum. (The Memoranda require prosecutors to consider, among other things, a corporation's payment of employees' legal fees, retention of personnel who assert the Fifth Amendment privilege against self-incrimination during a government investigation, and refusal to waive the attorney-client privilege or work product protection.) The Evidence Rules Committee takes no position on this issue, and there is nothing in proposed Evidence Rule 502 that is intended either to promote or deter government attempts to seek waivers of privilege or work product protection. On December 12, 2006, Deputy Attorney General Paul McNulty issued new policy guidelines superseding the "Thompson" and "McCallum" memoranda. (See Attachment D.) The new policy requires the approval of the Deputy Attorney General before a government prosecutor may request a corporation to waive its attorney-client privilege or work product protection. If the requested privileged or protected matter consists only of "purely factual information," the approval of the assistant Attorney General for the Criminal Division is required.

<u>Marital Communication/Spousal Privilege</u>

On July 27, 2006, the President signed the "Adam Walsh Child Protection and Safety Act of 2006" (Pub. L. No. 109-248). Under section 214, the Standing and Evidence Rules Committees are to consider whether the Federal Rules of Evidence should be amended to make the confidential marital communications privilege and the adverse spousal privilege inapplicable "in any Federal proceeding in which a spouse is charged with a crime against . . . (1) a child of either spouse; or (2) a child under the custody or control of either spouse." (See Attachment E.) The Evidence Rules Committee discussed the matter at its November 2006 meeting and will continue to consider it for action at its Spring 2007 meeting.

Journalists' Shield

On July 18, 2005, Representative Pence introduced the "Free Flow of Information Act of 2005" (H.R. 3323, 109th Cong., 1st Sess.). Senator Lugar introduced similar legislation on May 18, 2006. ("Free Flow of Information Act of 2006," S. 2831, 109th Cong., 2nd Sess.) Both bills generally give journalists a limited privilege to withhold the identity of a confidential informant or other confidential information. A party seeking to overcome the privilege must generally show, by clear and convincing evidence, that the information is relevant and critical and cannot reasonably be obtained from any other source.

At the request of staff for House and Senate Judiciary Committee members, comments on the legislation, prepared by Professor Capra and approved by Judges Smith and Levi, were transmitted to Congress this past summer. On September 20, 2006, the Senate Judiciary Committee held a hearing on S. 2831. There has been no further action on the legislation.

American Samoa

On February 8, 2006, Representative Faleomavaega introduced the "Federal District Court of American Samoa Act of 2006" (H.R. 4711, 109th Cong., 2nd Sess.), which would, among other things, establish an Article I federal district court in American Samoa. The bill was referred to the House Judiciary Committee on February 8, 2006. There has been no further action on the legislation.

We are monitoring the bill because a proposed amendment to Criminal Rule 41 was published in August 2006, which authorizes a magistrate judge to issue a search warrant for property located within United States jurisdiction, but outside any state or federal judicial district. At the request of the Ninth Circuit Judicial Council's Pacific Islands Committee, the proposal excluded American Samoa although comments were invited on its exclusion.

Other Developments of Interest

Time Computation. In September 2006, Judge Levi met with staff for the House Judiciary Committee and discussed the Time Computation Project and its aim of simplifying time counting in litigation. Judge Levi mentioned that the time-counting provisions in the rules also apply to deadlines imposed by statutes, which may create conflicts and ambiguities. Judge Levi noted that statutory amendments may also be needed. House staff indicated general approval of the concept and suggested the Rules Committees work with the Congressional Research Service to identify all statutes that may be affected by the project.

Bankruptcy Reform Act. The Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts scheduled an oversight hearing on December 6, 2006, regarding the implementation of the *Bankruptcy Abuse Prevent and Consumer Protection Act of 2005*. A statement from Judge Zilly on behalf of the Judicial Conference was transmitted to the

subcommittee. (See Attachment F.) In addition, a letter was sent to Senator Grassley explaining the rules committees' reasons in adopting a provision, recognizing an allowance for transportation expense, in an Official Bankruptcy Form which the senator criticized. (See Attached G.)

James N. Ishida

Attachments A-G

Attachment A

Policy Statements & Resolutions

CONFERENCE OF CHIEF JUSTICES
CONFERENCE OF STATE COURT ADMINISTRATORS

Resolution 1
Regarding Waiver of Attorney-Client Privilege and Work Product

WHEREAS, policy leaders in both the United States Courts and the Congress of the United States have publicly expressed concerns about the common law of waiver of attorney-client privilege or work product in situations such as where there has been an inadvertent or minuscule disclosure by a party to litigation or by a person or corporation in response to a government investigation; and

WHEREAS, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ["Federal Rules Committee"] has undertaken the promulgation of a new Federal Rule of Evidence 502 ["Rule 502"] governing certain disclosures of information protected by the attorney-client privilege that are inadvertent or occur in the course of investigative or regulatory proceedings; and

WHEREAS, proposed Rule 502 is commendably designed to reduce the high costs of privilege reviews in discovery intensive litigation, particularly where electronic records are involved, by protecting against the forfeiture of privilege where a disclosure is the result of innocent mistake, by agreement of the parties to litigation, or by virtue of cooperation with government investigation; and

WHEREAS, the Federal Rules Committee has already revised previous drafts of proposed Rule 502 to address federalism concerns by, for example, removing a provision that would have extended protection against forfeiture of privilege in cases of inadvertent disclosure in state court litigation; and

WHEREAS, current proposed Rule 502(b) may conflict with principles of federalism by providing that inadvertent disclosures in federal litigation do not operate as a waiver in state proceedings; and

WHEREAS, current proposed Rule 502(d) may also conflict with principles of federalism by providing that confidentiality orders by federal courts would bind persons or entities in state court proceedings; and

WHEREAS, the public policy in some states with respect to forfeiture of privilege after inadvertent disclosure or pursuant to confidentiality orders may differ from what would be mandated by proposed Rule 502; and

WHEREAS, principles of comity and federalism would suggest that changes to attorney-client privilege policy should be determined in and through state courts and legislatures which are best situated to determine and control the impact of reform within their own communities; and

WHEREAS, proposed Rule 502 is the subject of a six-month public comment period ending approximately in February 2007;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators engage in a dialogue with the appropriate Rules Committees of the Judicial Conference to share the federalism concerns of the state judiciary with proposed Rule 502.

Adopted as proposed by the CCJ Board of Directors at the 58th Annual Meeting on August 2, 2006.

Attachment B

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
August 7-8, 2006

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that consistent rules be established throughout the federal, state and territorial courts to address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of materials protected by the attorney-client privilege or attorney work product doctrine (collectively "privilege").

FURTHER RESOLVED, That the American Bar Association recommends that relevant Federal Rules of Evidence and/or Federal Rules of Civil Procedure, and state rules be adopted or amended to provide as follows:

1) A producing party should be required to raise the privileged status of inadvertently disclosed materials within a specified period of days of actually discovering the inadvertent disclosure by giving notice to the other parties and amending its discovery responses to identify the materials and the privileges. The period should commence when the party actually discovers the disclosure has been made, not from when the material was produced.

2) A party receiving notice that any inadvertently disclosed materials have been produced to it should be required to promptly return, sequester or destroy the specified materials and any copies and may not use or disclose the materials until the issue is resolved.

3) Specific grounds for testing the inadvertent disclosure should be set forth and should include the following general provisions:

A) The receiving party should be allowed to challenge the disclosing party's claim that the material is privileged.

B) The receiving party should be allowed to challenge the timeliness of the producing party's notice recalling the material on a claim of privilege.

C) The receiving party should be allowed to assert that the circumstances surrounding the production or disclosure warrant a finding that the disclosing party has waived any claim of privilege.

4) In deciding whether privilege has been waived, the court should apply the generally accepted multi-factor analysis followed by the majority of federal courts and many state courts that assesses (a) the reasonableness of the precautions taken to prevent inadvertent disclosure; (b) the scope of discovery; (c) the extent of the disclosure; and (d) whether the interests of justice would be served by relieving the party of its error.

Attachment C

--S.2856--

S.2856

One Hundred Ninth Congress

of the

United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,

the third day of January, two thousand and six

An Act

To provide regulatory relief and improve productivity for insured depository institutions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title- This Act may be cited as the `Financial Services Regulatory Relief Act of 2006'.

(b) Table of Contents- The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I--BROKER RELIEF

Sec. 101. Joint rulemaking required for revised definition of broker in the Securities Exchange Act of 1934.

TITLE II--MONETARY POLICY PROVISIONS

Sec. 201. Authorization for the Federal Reserve to pay interest on reserves.

Sec. 202. Increased flexibility for the Federal Reserve Board to establish reserve requirements.

Sec. 203. Effective date.

institutions involved in the merger transaction; or

`(ii) the merger transaction involves solely an insured depository institution and 1 or more of the affiliates of such depository institution.'.

(b) Technical and Conforming Amendments- Section 18(c)(6) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)(6)) is amended--

(1) in the second sentence, by striking `banks or savings associations involved and reports on the competitive factors have' and inserting `insured depository institutions involved, or if the proposed merger transaction is solely between an insured depository institution and 1 or more of its affiliates, and the report on the competitive factors has'; and

(2) by striking the penultimate sentence and inserting the following: `If the agency has advised the Attorney General under paragraph (4)(B)(ii) of the existence of an emergency requiring expeditious action and has requested a report on the competitive factors within 10 days, the transaction may not be consummated before the fifth calendar day after the date of approval by the agency.'.

SEC. 607. NONWAIVER OF PRIVILEGES.

(a) Insured Depository Institutions- Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) is amended by adding at the end the following:

`(x) Privileges Not Affected by Disclosure to Banking Agency or Supervisor-

`(1) IN GENERAL- The submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority.

`(2) RULE OF CONSTRUCTION- No provision of paragraph (1) may be construed as implying or establishing that--

`(A) any person waives any privilege applicable to information that is submitted or transferred under any circumstance to which paragraph (1) does not apply; or

`(B) any person would waive any privilege applicable to any information by submitting the information to any Federal banking agency, State bank supervisor, or foreign banking authority, but for this subsection.'

(b) Insured Credit Unions- Section 205 of the Federal Credit Union Act (12 U.S.C.

1785) is amended by adding at the end the following:

`(j) Privileges Not Affected by Disclosure to Banking Agency or Supervisor-

`(1) IN GENERAL- The submission by any person of any information to the Administration, any State credit union supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Board, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Board, supervisor, or authority.

`(2) RULE OF CONSTRUCTION- No provision of paragraph (1) may be construed as implying or establishing that--

`(A) any person waives any privilege applicable to information that is submitted or transferred under any circumstance to which paragraph (1) does not apply; or

`(B) any person would waive any privilege applicable to any information by submitting the information to the Administration, any State credit union supervisor, or foreign banking authority, but for this subsection.'.

SEC. 608. CLARIFICATION OF APPLICATION REQUIREMENTS FOR OPTIONAL CONVERSION FOR FEDERAL SAVINGS ASSOCIATIONS.

(a) Home Owners' Loan Act- Section 5(i)(5) of the Home Owners' Loan Act (12 U.S.C. 1464(i)(5)) is amended to read as follows:

`(5) CONVERSION TO NATIONAL OR STATE BANK-

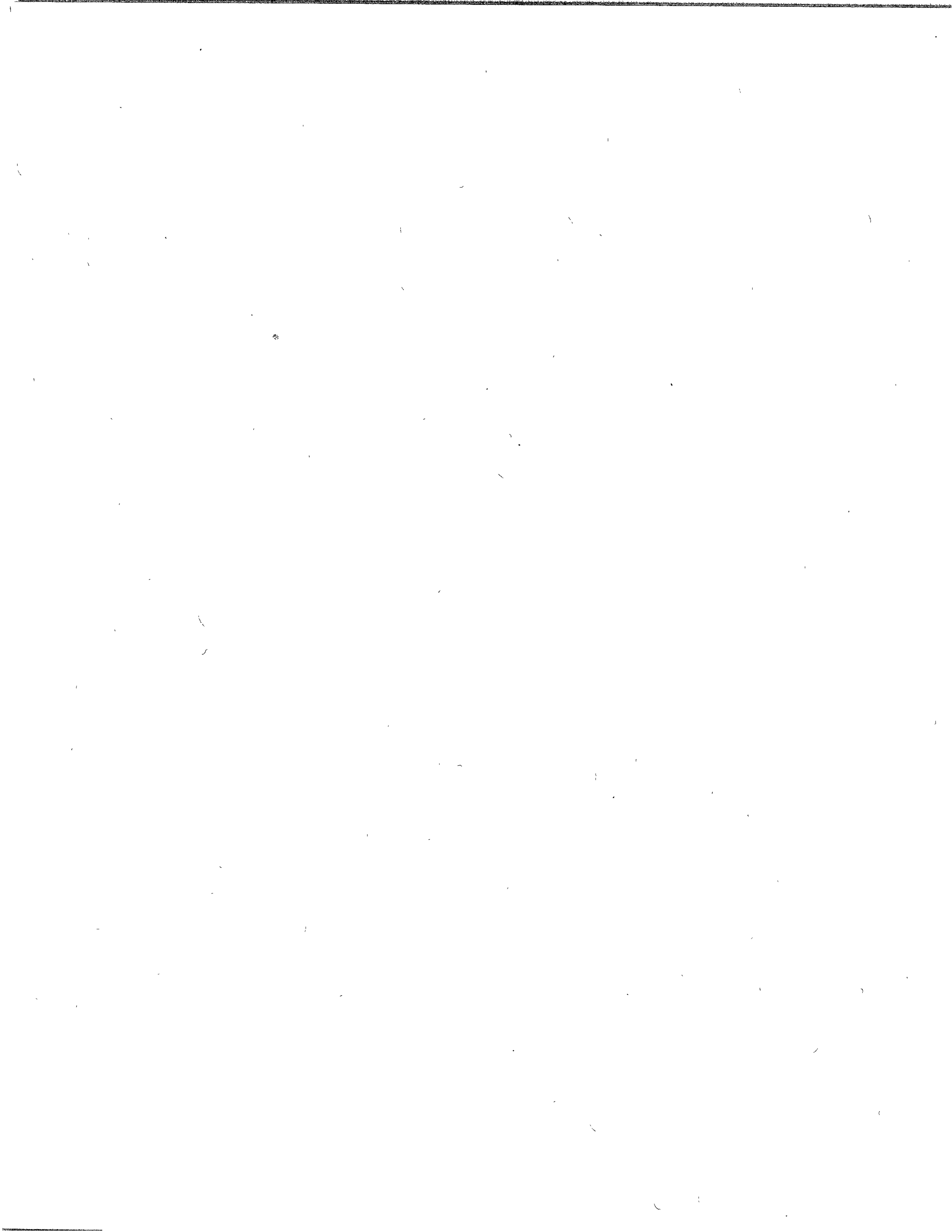
`(A) IN GENERAL- Any Federal savings association chartered and in operation before the date of enactment of the Gramm-Leach-Bliley Act, with branches in operation before such date of enactment in 1 or more States, may convert, at its option, with the approval of the Comptroller of the Currency for each national bank, and with the approval of the appropriate State bank supervisor and the appropriate Federal banking agency for each State bank, into 1 or more national or State banks, each of which may encompass 1 or more of the branches of the Federal savings association in operation before such date of enactment in 1 or more States subject to subparagraph (B).

`(B) CONDITIONS OF CONVERSION- The authority in subparagraph (A) shall apply only if each resulting national or State bank--

`(i) will meet all financial, management, and capital requirements applicable to the resulting national or State bank; and

`(ii) if more than 1 national or State bank results from a conversion

Attachment D



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

The Department experienced unprecedented success in prosecuting corporate fraud during the last four years. We have aggressively rooted out corruption in financial markets and corporate board rooms across the country. Federal prosecutors should be justifiably proud that the information used by our nation's financial markets is more reliable, our retirement plans are more secure, and the investing public is better protected as a result of our efforts. The most significant result of this enforcement initiative is that corporations increasingly recognize the need for self-policing, self-reporting, and cooperation with law enforcement. Through their self-regulation efforts, fraud undoubtedly is being prevented, sparing shareholders from the financial harm accompanying corporate corruption. The Department must continue to encourage these efforts.

Though much has been accomplished, the work of protecting the integrity of the marketplace continues. As we press forward in our enforcement duties, it is appropriate that we consider carefully proposals which could make our efforts more effective. I remain convinced that the fundamental principles that have guided our enforcement practices are sound. In particular, our corporate charging principles are not only familiar, but they are welcomed by most corporations in our country because good corporate leadership shares many of our goals. Like federal prosecutors, corporate leaders must take action to protect shareholders, preserve corporate value, and promote honesty and fair dealing with the investing public.

We have heard from responsible corporate officials recently about the challenges they face in discharging their duties to the corporation while responding in a meaningful way to a government investigation. Many of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel. To the extent this is happening, it was never the intention of the Department for our corporate charging principles to cause such a result.

Therefore, I have decided to adjust certain aspects of our policy in ways that will further promote public confidence in the Department, encourage corporate fraud prevention efforts, and clarify our goals without sacrificing our ability to prosecute these important cases effectively. The new language expands upon the Department's long-standing policies concerning how we evaluate the authenticity of a corporation's cooperation with a government investigation.

This memorandum supersedes and replaces guidance contained in the Memorandum from Deputy Attorney General Larry D. Thompson entitled Principles of Federal Prosecution of Business Organizations (January 20, 2003) (the "Thompson Memorandum") and the Memorandum from the Acting Deputy Attorney General Robert D. McCallum, Jr. entitled Waiver of Corporate Attorney-Client and Work Product Protections (October 21, 2005)(the "McCallum Memorandum").

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Federal Prosecution of Business Organizations[1]

I. Duties of the Federal Prosecutor; Duties of Corporate Leaders

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating wrongdoing and bringing charges for criminal conduct, the Department plays an important role in protecting investors and ensuring public confidence in business entities and in the investment markets in which those entities participate. In this respect, federal prosecutors and corporate leaders share a common goal. Directors and officers owe a fiduciary duty to a corporation's shareholders, the corporation's true owners, and they owe duties of honest dealing to the investing public in connection with the corporation's regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal prosecutions are designed to serve.

A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in

[1] While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

which we do our job as prosecutors – the professionalism we demonstrate, our resourcefulness in seeking information, and our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation – impacts public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion, and that professionalism and civility have always played an important part in putting these principles into action.

II. Charging a Corporation: General Principles

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (I) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

Agents, however, may act for mixed reasons -- both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. *See United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated--at least in part--by an intent to benefit the corporation.). In *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "*Partucci* was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Furthermore, in *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 969-70 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999), the D.C. Circuit rejected a corporation's argument that it should not be held criminally liable for the actions of its vice-president since the vice-president's "scheme was designed to -- and did in fact -- defraud [the corporation], not benefit it." According to the court, the fact that the vice-president deceived the corporation and used its money to contribute illegally to a congressional campaign did not preclude a valid finding that he acted to benefit the corporation. Part of the vice-president's job was to cultivate the corporation's relationship with the congressional candidate's brother, the Secretary of Agriculture. Therefore, the court held, the jury was entitled to conclude that the vice-president had acted with an intent, "however befuddled," to further the interests of his employer. *See also United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; *quoting Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945)).

III. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM § 9-27.220, *et seq*. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see section IV, *infra*);

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (see section V, *infra*);

3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (see section VI, *infra*);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, *infra*);

5. the existence and adequacy of the corporation's pre-existing compliance program (see section VIII, *infra*);

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see section IX, *infra*);

7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution (see section X, *infra*);

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions (see section XI, *infra*).

B. Comment: In determining whether to charge a corporation, the foregoing factors must be considered. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their judgment in applying and balancing these factors and this process does not mandate a particular result.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities -- are adequately met, taking into account the special nature of the corporate "person."

IV. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*, voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the

heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

V. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, *e.g.*, salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. *See* USSG §8C2.5, comment. (n. 4).

VI. Charging a Corporation: The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a

corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, *e.g.*, subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. *See* USSG § 8C2.5(c) & comment.(n. 6).

VII. Charging a Corporation: The Value of Cooperation

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence. Relevant considerations in determining whether a corporation has cooperated are set forth below.

1. Qualifying for Immunity, Amnesty or Pretrial Diversion

In some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. *See* USAM § 9-27.600-650. These principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See* USAM §9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

2. Waiving Attorney-Client and Work Product Protections[2]

The attorney-client and work product protections serve an extremely important function in the U.S. legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under U.S. law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1976). As the Supreme Court has stated "its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The work product doctrine also serves similarly important interests.

Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.

Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely

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[2] The Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* USSG §8C2.5(g). The reference to consideration of a corporation's waiver of attorney-client and work product protections in reducing a corporation's culpability score in Application Note 12, was deleted effective November 1, 2006. *See* USSG §8C2.5(g), comment. (n.12).

desirable or convenient to obtain privileged information. The test requires a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government's investigation.

Whether there is a legitimate need depends upon:

(1) the likelihood and degree to which the privileged information will benefit the government's investigation;

(2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;

(3) the completeness of the voluntary disclosure already provided; and

(4) the collateral consequences to a corporation of a waiver.

If a legitimate need exists, prosecutors should seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information. Prosecutors should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct ("Category I"). Examples of Category I information could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.

Before requesting that a corporation waive the attorney-client or work product protections for Category I information, prosecutors must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. A prosecutor's request to the United States Attorney for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category I information must be maintained in the files of the United States Attorney. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

A corporation's response to the government's request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government's investigation.

Only if the purely factual information provides an incomplete basis to conduct a thorough investigation should prosecutors then request that the corporation provide attorney-client communications or non-factual attorney work product ("Category II"). This information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred.

This category of privileged information might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation.

Prosecutors are cautioned that Category II information should only be sought in rare circumstances.

Before requesting that a corporation waive the attorney-client or work product protections for Category II information, the United States Attorney must obtain written authorization from the Deputy Attorney General. A United States Attorney's request for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category II information must be maintained in the files of the Deputy Attorney General. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

If a corporation declines to provide a waiver for Category II information after a written request from the United States Attorney, prosecutors must not consider this declination against the corporation in making a charging decision. Prosecutors may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation.

Requests for Category II information requiring the approval of the Deputy Attorney General do not include:

(1) legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense; and

(2) legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege.

In these two instances, prosecutors should follow the authorization process established for requesting waiver for Category I information.

For federal prosecutors in litigating Divisions within Main Justice, waiver requests for Category I information must be submitted for approval to the Assistant Attorney General of the Division and waiver requests for Category II information must be submitted by the Assistant Attorney General for approval to the Deputy Attorney General. If the request is authorized, the Assistant Attorney General must communicate the request in writing to the corporation.

Federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government. However, voluntary waivers must be reported to the United States Attorney or the Assistant Attorney General in the Division where the case originated. A record of these reports must be maintained in the files of that office.

3. Shielding Culpable Employees and Agents

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, *e.g.*, through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into contractual obligations to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate.[3] This prohibition is not meant to prevent a prosecutor from asking questions about an

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[3] In extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation. In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny. *See discussion in* Brief of Appellant-United States, *United States v. Smith and Watson*, No. 06-3999-cr (2d Cir. Nov. 6, 2006). Where these circumstances exist, approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor in their charging decisions. Prosecutors should follow the authorization process established for waiver requests of Category II information (see section VII-2, *infra*).

attorney's representation of a corporation or its employees.[4]

4. Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct intended to impede the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; overly broad or frivolous assertions of privilege to withhold the disclosure of relevant, non-privileged documents; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

5. Offering Cooperation: No Entitlement to Immunity

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VIII. Charging a Corporation: Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is

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[4] Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, frequently arise in the course of an investigation. They may be necessary to assess other issues, such as conflict-of-interest. Such questions are appropriate and this guidance is not intended to prohibit such inquiry.

not adequately enforcing its program. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*. *See United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if... such acts were against corporate policy or express instructions."). In *United States v. Potter*, 463 F.3d 9, 25-26 (1st Cir. According to the court, a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts; "even a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." Similarly, in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.[5] It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient; "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." *See also United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but ... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held

[5] Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the *Hilton* case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus, bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1006 & n4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated "that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws."

legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.[6] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonably designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *In re: Caremark*, 698 A.2d 959 (Del. Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

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[6] For a detailed review of these and other factors concerning corporate compliance programs, *see* USSG §8B2.1.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

IX. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

X. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (*e.g.*, publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.

Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

XI. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

XII. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993.

XIII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. *See* USSG §§ 8B1.1, 8C2.1, *et seq*. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See section VIII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. See generally section VII, *supra*.

This memorandum provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

Attachment E

--H.R.4472--

H.R.4472

One Hundred Ninth Congress

of the

United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,

the third day of January, two thousand and six

An Act

To protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title- This Act may be cited as the `Adam Walsh Child Protection and Safety Act of 2006'.

(b) Table of Contents- The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. In recognition of John and Reve Walsh on the occasion of the 25th anniversary of Adam Walsh's abduction and murder.

TITLE I--SEX OFFENDER REGISTRATION AND NOTIFICATION ACT

Sec. 101. Short title.

Sec. 102. Declaration of purpose.

Sec. 103. Establishment of program.

Subtitle A--Sex Offender Registration and Notification

the Executive Branch of the Federal Government.

`(D) DEFINITION- For purposes of this paragraph, the term `crime victim' means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.'.

SEC. 213. KIDNAPPING JURISDICTION.

Section 1201 of title 18, United States Code, is amended--

(1) in subsection (a)(1), by striking `if the person was alive when the transportation began' and inserting `, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense'; and

(2) in subsection (b), by striking `to interstate' and inserting `in interstate'.

SEC. 214. MARITAL COMMUNICATION AND ADVERSE SPOUSAL PRIVILEGE.

The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--

(1) a child of either spouse; or

(2) a child under the custody or control of either spouse.

SEC. 215. ABUSE AND NEGLECT OF INDIAN CHILDREN.

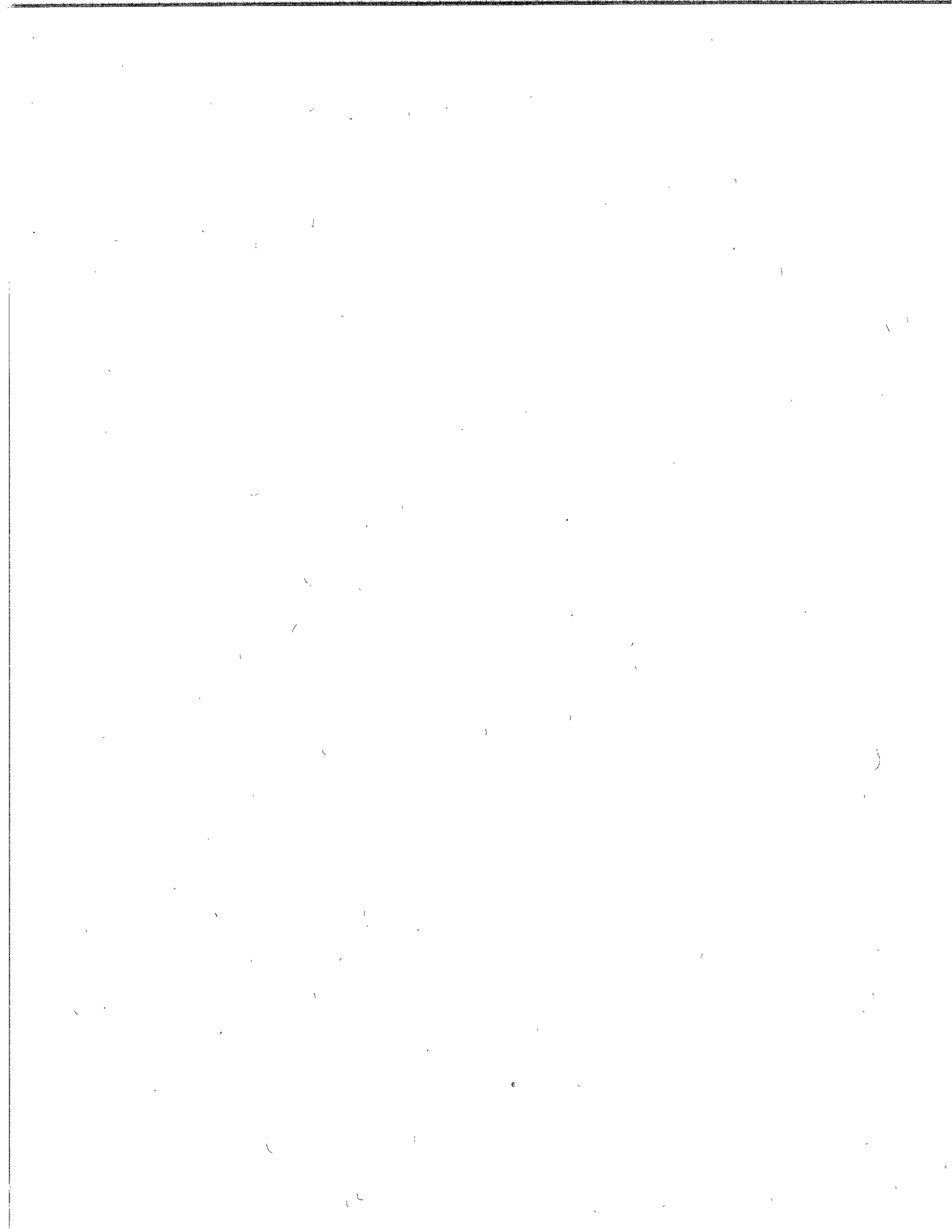
Section 1153(a) of title 18, United States Code, is amended by inserting `felony child abuse or neglect,' after `years,'.

SEC. 216. IMPROVEMENTS TO THE BAIL REFORM ACT TO ADDRESS SEX CRIMES AND OTHER MATTERS.

Section 3142 of title 18, United States Code, is amended--

(1) in subsection (c)(1)(B), by inserting at the end the following: `In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring

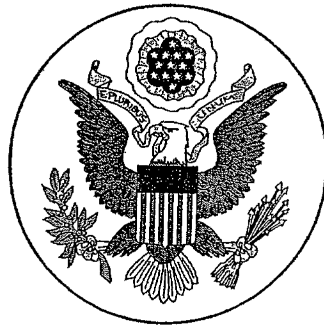
Attachment F



JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE THOMAS S. ZILLY

SENIOR JUDGE, UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

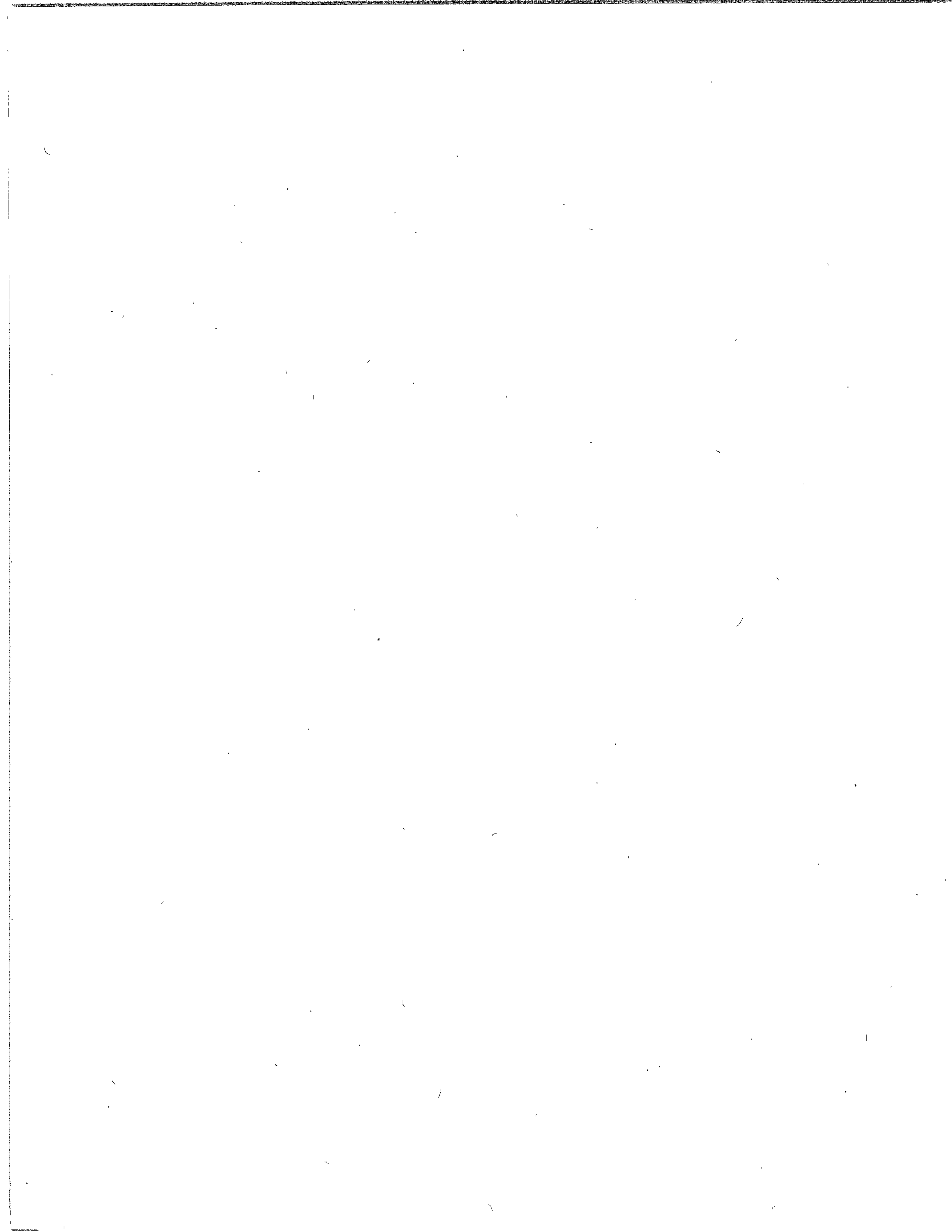


FOR THE
SUBCOMMITTEE ON ADMINISTRATIVE
OVERSIGHT AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON
OVERSIGHT OF THE IMPLEMENTATION OF THE BANKRUPTCY
ABUSE PREVENTION AND CONSUMER PROTECTION ACT

December 6, 2006

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700



STATEMENT OF SENIOR JUDGE THOMAS S. ZILLY
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I am Senior Judge Thomas S. Zilly of the United States District Court for the Western District of Washington and chair of the Judicial Conference's Advisory Committee on Bankruptcy Rules. I am submitting this statement on behalf of the Judicial Conference of the United States, the policy-making arm of the federal courts, to report on the actions taken by the federal judiciary to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act").

I welcome this opportunity to share with you some of the highlights of the hard work that the federal judiciary has done in implementing this comprehensive legislation within a relatively brief period of time. The provisions of the Act generally took effect on October 17, 2005, only six months after its enactment. The Act exceeds 500 pages in length and affects virtually every aspect of bankruptcy cases. Among other things, the law:

- Requires that debtors complete and pass a "means test" to be eligible to file for relief under Chapter 7;

- Specifies that individual debtors may not file a bankruptcy case unless they have received a credit counseling briefing by a nonprofit agency approved by the bankruptcy administrator or U.S. trustee for the district;

- Specifies that Chapter 7 and Chapter 13 debtors may not receive a discharge of their debts unless they have completed a financial management course approved by the bankruptcy administrator or U.S. trustee for the district;

- Makes extensive changes in Chapter 13 that affect the content of repayment plans, timing of confirmation, exceptions from discharge, length of time that the debtor must pay under a plan, and a number of other areas of Chapter 13 practice;

- Places additional duties on debtors-in-possession and trustees in Chapter 11 cases, alters the requirements for individual debtor Chapter 11 cases, and expedites the handling of small business Chapter 11 cases;

- Makes Chapter 12 reorganization for family farmers a permanent feature of the Code and adds family fishermen as a new group entitled to use Chapter 12;

- Includes new provisions governing health-care businesses;

- Adds a new Chapter 15 to the Code governing cross-border insolvencies that incorporates the Model Law on Cross-Border Insolvency drafted by the U.N. Commission on International Trade Law;

- Amends the appellate structure to allow certain appeals from decisions of bankruptcy judges to be taken directly to the courts of appeal;

- Requires significant changes in the form for reaffirmation agreements;

- Increases bankruptcy filing fees and reapportions them among the Treasury, the Department of Justice, and the Judiciary;

- Authorizes bankruptcy courts to waive filing fees for certain low-income debtors;

- Requires a significant increase in case management by bankruptcy judges;

- Substantially expands the statutory duties and the responsibilities of bankruptcy administrators and U.S. trustees;

- Requires bankruptcy administrators and U.S. trustees to conduct random audits of Chapter 7 and Chapter 13 cases to determine the accuracy, veracity, and completeness of the financial schedules and statements filed by debtors;

- Places additional responsibilities and liabilities on the attorneys for debtors;

- Requires the judiciary to collect and report new statistical data; and

- Authorizes 28 new temporary bankruptcy judgeships, which represents about half the number of bankruptcy judgeships requested by the Judicial Conference.

Implementing these provisions within the six months provided under the Act presented the federal judiciary with an unprecedented challenge. The Act's wide-ranging demands raised significant coordination problems that required not only the attention of judicial officers throughout the federal judiciary but also of officials within the Executive Office for United States

Trustees and other agencies, including the Internal Revenue Service, the Department of Health and Human Services, and the Census Bureau. A major segment of the federal judiciary, consisting of countless numbers of district court judges, bankruptcy court judges, bankruptcy court staff, Administrative Office staff, and Federal Judicial Center staff, was required on a short timetable to modify or develop new rules, forms, court procedures, computer software programs, statistical reports, manuals, and training programs, and to address a host of other tasks.

The added demands of the Act have increased the already enormous pressures to cope with the day-to-day responsibilities in the administration of justice, straining the federal judiciary's personnel and resources. Though the challenges were many and daunting, I am pleased to report that the judiciary has faithfully fulfilled its responsibilities and met the statutory deadlines.

I have attached a report on the impact of the Act, which was prepared by the Administrative Office for the United States House and Senate Committees on Appropriations, dated August 2006. The report summarizes many of the tasks that the judiciary accomplished in implementing the Act. I have also attached an internal Administrative Office document, which contains a detailed record of the major actions taken as of July 10, 2006, to fulfill the Act's requirements. The document was intended to be used solely as an internal management tool. But it also serves as a record that accurately captures the immense scope and magnitude of the federal judiciary's undertakings in executing the Act's provisions. A brief perusal of the 92-page report substantiates the extent of the federal judiciary's labors. I would like to highlight several of them.

Changes in Operating Procedures

Following a careful review of the Act, the judiciary developed guidelines and procedures addressing various new provisions added by the Act, such as those authorizing waiver of Chapter 7 filing fees, handling copies of debtor-tax returns filed with the court, nationwide noticing of creditors, and routing fraudulent statements to the Department of Justice. Significant changes were also initiated to reprogram the judiciary's Case Management/Electronic Case Files system (CM/ECF), which is now operational in virtually all bankruptcy courts. This system serves as the judiciary's docket, recording every action taken in cases filed in the federal courts.

Training

The Federal Judicial Center and the Administrative Office have instituted training programs for bankruptcy judges, bankruptcy clerks and bankruptcy administrators, and court staff, including case administrators in the clerks' offices, who will use the revised CM/ECF system. Court personnel have been trained at specifically-designated seminars, at conferences, and via the "FJTN," the Federal Judicial Center's closed-circuit television broadcast channel.

Bankruptcy Administrator Program

The Administrative Office has worked directly with the six bankruptcy administrator offices in the states of Alabama and North Carolina to prepare them to handle all the new duties and responsibilities required of them under the Act. These courts do not participate in the United States Trustee Program and are responsible for handling the trustees' duties themselves. First, the Act was analyzed to identify all the new duties, whether they are explicitly imposed on bankruptcy administrators by the Act or are needed to maintain parallel treatment with new duties imposed on United States trustees. The bankruptcy administrator offices were then

notified of the changes in the law, changes in the courts' operating procedures, and changes to the bankruptcy administrators' own duties and responsibilities, such as overseeing means testing and small business Chapter 11 cases, certifying consumer credit counseling and financial management courses, and taking on new audit and reporting responsibilities. The Administrative Office has maintained regular contact with each bankruptcy administrator office. In addition, current bankruptcy administrator procedures and manuals have been revised substantially, and changes have been made to their automated case management systems.

Statistics

The judiciary's statistical systems have been substantially modified, both to adjust to the many changes in the bankruptcy system required by the Act generally and to comply with § 601 of the Act, which requires the Administrative Office to collect information and produce a new set of reports on consumer debtor cases. After the Judicial Conference approved amended and new bankruptcy forms, the Administrative Office worked closely with bankruptcy clerks to reprogram the case management system, design extraction programs, and build an entirely new enterprise data system capable of receiving and processing the data. The judiciary has recently begun collecting all the new required data and expects to produce the reports mandated under the Act within the specified deadlines.

Federal Rules of Bankruptcy Procedure

I would like to briefly report on the actions taken by the Advisory Committee on Bankruptcy Rules (the "Advisory Committee" or "Committee") to develop rules and Official Forms implementing the Act.

The Rules Enabling Act rulemaking process is set out in 28 U.S.C. §§ 2071-2077. It is a

painstaking and time-consuming process that ensures that the best possible rules are promulgated. Soon after the Bankruptcy Act's enactment, the Advisory Committee decided that a two-track process was necessary to promulgate rules implementing the Act because its impending effective date of six months did not provide sufficient time to proceed under the regular rulemaking process, which ordinarily takes three years. Similar actions have been taken in the past to implement changes in or additions to the rules necessitated by amendments to the Bankruptcy Code. Under the first track, temporary interim rules were issued that apply to bankruptcy cases during a transitional period until the promulgation of national permanent rules. The Committee addressed two tasks: (a) identify which rules-related provisions in the Act required an immediate response; and (b) develop interim rules and forms addressing these time-sensitive provisions well before the October 17, 2005, deadline so that the courts would have adequate time to implement them. Under the second track, permanent national rules implementing the Act would be promulgated based on the interim rules. The Committee would monitor the courts' experiences with the interim rules and forms, simultaneously proceeding with the regular rulemaking process and inviting public comment beginning in August 2006 on converting the interim rules to permanent federal rules.

Under the first track, interim rules were circulated in August 2005 to the courts with a recommendation that they be adopted without change as part of a standing or general order. Recommending interim rules and authorizing Official Forms without going through the regular Rules Enabling Act rulemaking process was an unavoidable expedient compelled by the Act's effective date. To meet the Act's deadline, the Advisory Committee devoted substantial time and effort in developing interim rules and forms that faithfully implemented the Act. It worked

closely with the Executive Office for United States Trustees. It consulted with experts who participated in the legislation, who at times disagreed among themselves over the meaning of particular provisions in the Act, making the Committee's job all the more difficult. It reached out to many corners of the bar for assistance. It relied on its members' varied experiences, including members who represent creditors and others who represent debtors in their private practice. All these efforts were undertaken in an open fashion to ensure that the process remained transparent, a hallmark of the rulemaking process. The bankruptcy courts incorporated virtually all the interim rules into their local rules. The interim rules were well received by the bench and bar.

The Advisory Committee has initiated the second track, publishing proposed amendments to the Federal Rules of Bankruptcy Procedure based on the interim rules for public comment in August 2006 for a six-month period ending February 15, 2007. The Committee also published for comment additional proposed rule amendments not included as part of the time-sensitive interim rules package.

In accordance with the regular rulemaking process, the Advisory Committee will review public comments and any statements submitted on proposed amendments to 32 existing rules, 8 new rules, 20 existing Official Forms, and 5 new Official Forms implementing the Act at its March 2007 meeting. If approved, the Committee will transmit the proposed rules and forms to the Committee on Rules of Practice and Procedure (Standing Committee) in June 2007 with a recommendation that they be approved and submitted to the Judicial Conference at its September 2007 session. If approved by the Standing Committee and the Conference, the proposed rules will then be submitted to the Supreme Court for its consideration. (Changes to the Official Forms, however, do not have to be approved by the Court and most of them took effect in late

2005. Additional changes may be made to the forms in light of public comment.) The Court has until May 1, 2008, to prescribe the rules and transmit them to Congress. The rules then will take effect on December 1, 2008, unless Congress acts otherwise.

At each stage of the rulemaking process, the proposed rule amendments and forms have been subjected to exacting scrutiny. Participation of the bench, bar, and public in the rules process ensures that the procedural rules implementing the Act, which were initially adopted as interim rules, will be the best that we can conceive.

As part of its review of the proposed rules amendments, the Advisory Committee has under study the concerns raised by Senator Charles E. Grassley and Senator Jeff Sessions in their March 13, 2006, letter to the late Chief Justice William Rehnquist about pleading requirements involving a motion to dismiss, the effect of an attorney's signature on a pleading, and the means-testing forms. (A copy of the letter and the Committee's response are attached.) In addition, the Committee has reviewed § 319 of the Act as it relates to the sense of Congress that Rule 9011 be modified.

At its September 2006 meeting, the Advisory Committee considered the Senators' concerns and specifically addressed the concern about the attorney's responsibility to investigate the accuracy of underlying facts contained in the petition, pleadings, or written motions. The Committee agreed, subject to reconsideration in light of forthcoming public comment, to revise the "Voluntary Petition" consistent with the Act in cases involving an individual debtor whose debts are primarily consumer debts to include a warning under the attorney's signature that the signature constitutes a certification that the attorney has no knowledge, after an inquiry, that the information in the schedules filed with the debtor's petition is incorrect. The Committee is

studying whether Rule 9011 itself should also be amended to address these concerns, and if so, whether the amendment should be limited to Chapter 7 cases only, or whether it should be extended to all Chapters for cases filed by individuals whose debts are primarily consumer debts. The Committee has also implemented changes to the means test form, which became effective as Official Forms on October 1, 2006.

The amount of work required of the judiciary as a whole to implement the Act has been immense and costly, especially considering the short timeframe available to accomplish the extensive revisions required of the existing systems. The judiciary has responded admirably to the demands placed on it by the new legislation. I believe that the steps taken and those that are under further review will ensure that the Act will be fully implemented according to the intent of Congress.

Thank you.

Attachment G

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

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

December 20, 2006

Honorable Charles E. Grassley
United States Senate
135 Hart Senate Office Building
Washington, DC 20510-6276

Dear Senator Grassley:

I regret that I was unable to appear at the oversight hearing held on December 6, 2006, on the implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act (the "Act") before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts. I was in the middle of a criminal trial and could not attend. I submitted a statement on behalf of the Judicial Conference of the United States, which included extensive attachments documenting the enormous efforts undertaken by the federal judiciary in implementing the Act. I respectfully request that this letter be made part of the record of the oversight hearing.

I would like to take this opportunity to address an issue that you raised in your written statement prepared for the hearing. You noted that: "[i]t's my understanding that this form actually directs consumers to claim deductions for expenses a debtor may not even have. That certainly wasn't the intent of the law." The reference is to entry line 22 of Official Form 22A (means test form), which deals with a debtor's transportation expenses in a Chapter 7 consumer bankruptcy case. The form was developed by the Advisory Committee on Bankruptcy Rules and, with the Judicial Conference's approval, took effect on October 17, 2005. Entry line 22 notifies the debtor that: "[y]ou are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation." The Advisory Committee concluded that the plain language of the Act required this result.

The Act establishes a means test designed to identify abusive petitions filed by debtors. The first step of the test is to calculate the debtor's current monthly income as defined under the Act. Specified deductions are then allowed from the current monthly income. If the net result is more than a certain amount, the filing is presumed abusive. One of the deductions allowed under § 707 of the Bankruptcy Code (as amended by § 102 of the Act) pertains to transportation expenses, the subject of entry line 22..

Section 707(b)(2)(A)(ii) of the Code is clear and leaves no room for interpretation. It delineates calculation methods for two categories of a debtor's expenses. The two categories of deductions are those set out in the National Standards and Local Standards as issued by the Internal Revenue Service. A copy of the relevant sections is attached for your convenience. Under the first category of deductions, which applies, among other things, to transportation expenses, the "debtor's monthly expenses *shall be* the debtor's applicable expense amounts specified under the Internal Revenue Service National Standards and Local Standards..." (emphasis added). The IRS National Standards provide a specific allowance for food, clothing, household supplies, and personal care, depending on income and household size. The IRS Local Standards specify an amount for housing and utilities expenses and a separate amount for transportation expenses, depending on location. Though the amount of transportation expenses permitted under the IRS Local Standards sets a cap on actual expenses in the context of tax laws, the Act's plain language entitles a debtor to an allowance for this amount for purposes of calculating the means test in the same way that the Act provides an allowance for food and clothing expenses. This meaning is underscored by the provision immediately following, which applies to other expenses.

Under the same subparagraph of § 707(b)(2)(A)(ii), the "debtor's *actual monthly expenses* for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides ..." (emphasis added) are authorized as allowable deductions. The language of this provision is equally unequivocal and, unlike food and transportation expenses, requires itemization of "other necessary" expenses actually incurred by the debtor. The juxtaposition of the two provisions in the same sentence makes clear that Congress deliberately adopted different methods of calculating these two types of expense deductions. In the first category a debtor may include an allowance for food, clothing, transportation, household supplies, and personal care specified in the IRS standards; in the second category a debtor may include other necessary expenses <u>only</u> to the extent actually incurred by the debtor.[1]

The Advisory Committee's overarching obligation in developing the Official Forms was to faithfully execute the Act's language. The Act's language governing the calculation of deductions for transportation expenses in entry line 22 is clear and compelling.

Official Form 22A was not originally published for public comment in accordance with the regular rulemaking process, because the Act provided short time deadlines and the form was needed well before the Act's effective date. In order to obtain the public's input, all forms

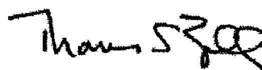
---

[1]The House Judiciary Committee Report on S. 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, explains the operation of this provision and says: "[T]he debtor's monthly expenses ... must be the applicable monthly amounts set forth in the Internal Revenue Service Financial Analysis Handbook as Necessary Expenses under the National and Local Standards categories and the debtor's actual monthly expenditures for items categorized as Other Necessary Expenses." H.R. Rept. No. 109-31 (Part 1) (2005).

implementing the Act have now been published for public comment in August 2006 for a six-month period, expiring February 15, 2007. I will advise the Advisory Committee of your concerns with Form 22A at its March 29-30, 2007, meeting, when it will consider all comments submitted on the forms.

Thank you.

Sincerely,



Thomas S. Zilly
Chair, Advisory Committee
on Bankruptcy Rules

Enclosures

cc: Honorable David F. Levi
Honorable Jeff Sessions
Honorable Arlen Specter
Honorable Patrick J. Leahy
Honorable Orrin Hatch

Internal Revenue Service
United States Department of the Treasury

Part 5. Collecting Process
Chapter 15. Financial Analysis
Section 1. Financial Analysis Handbook

5.15.1 Financial Analysis Handbook

- 5.15.1.1 Expectations
- 5.15.1.2 Analyzing Financial Information
- 5.15.1.3 Verifying Financial Information
- 5.15.1.4 Shared Expenses
- 5.15.1.5 Internal Sources
- 5.15.1.6 External Sources
- 5.15.1.7 Allowable Expense Overview
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- Exhibit 5.15.1-2 Financial Analysis: On-Line Access to the Allowable Expense Tables (Reference 5.15.1)

5.15.1.7 (05-01-2004)
Allowable Expense
Overview

1. Allowable expenses include those expenses that meet the necessary expense test. *The necessary expense test is defined as expenses that are necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income.* The expenses must be reasonable. The total necessary expenses establish the minimum a taxpayer and family needs to live.

2. There are three types of necessary expenses:

   National Standards

   Local Standards

   Other Expenses

National Standards: These establish standards for reasonable amounts for five necessary expenses. Four of them come from the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey: food, housekeeping supplies, apparel and services, and personal care products and services. The fifth category, miscellaneous, is a discretionary amount established by the Service. It is $100 for one person and $25 for each additional person in the taxpayer's household.

Note:

All five standards are included in one total national standard expense.

3. Local Standards: These establish standards for two necessary expenses: housing and transportation. Taxpayers will be allowed the local standard or the amount actually paid, whichever is less.

   Housing - Standards are established for each county within a state. When deciding if a deviation is appropriate, consider the cost of moving to a new residence; the increased cost of transportation to work and school that will result from moving to lower-cost housing and the tax consequences. The tax consequence is the difference between the benefit the taxpayer currently derives from the interest and property tax deductions on Schedule A to the benefit the taxpayer would derive without the same or adjusted expense.

   Transportation - The transportation standards consist of nationwide figures for loan or lease payments referred to as ownership cost, and additional amounts for operating costs broken down by Census Region and Metropolitan Statistical Area. Operating costs were derived from BLS data. If a taxpayer has a car payment, the allowable ownership cost added to the allowable operating cost equals the allowable transportation expense. If a taxpayer has no car payment only the operating cost portion of the transportation standard is used to figure the allowable transportation expense. Under ownership costs, separate caps are provided for the first car and second car. If the taxpayer does not own a car a standard public transportation amount is allowed.

4. Other - Other expenses may be allowed if they meet the necessary expense test. The amount allowed must be reasonable considering the taxpayer's individual facts and circumstances.

5. Conditional expenses. These expenses do not meet the necessary expenses test. However, they are allowable if the tax liability, including projected accruals, can be fully paid within five years.

6. National local expense standards are guidelines. If it is determined a standard amount is inadequate to provide for a specific taxpayer's basic living expenses, allow a deviation. Require the taxpayer to provide reasonable substantiation and document the case file.

7. Generally, the total number of persons allowed for national standard expenses should be the same as those allowed as dependents on the taxpayer's current year income tax return. Verify exemptions claimed on taxpayer's income tax return meet the dependency requirements of the IRC. There may be reasonable exceptions. Fully document the reasons for any exceptions. For example, foster children or children for whom adoption is pending.

8. A deviation from the local standard is not allowed merely because it is inconvenient for the taxpayer to dispose of valued assets.

9. Revenue officers should consider the length of the payments. Although it may be appropriate to allow for payments made on the secured debts that meet the necessary expense test, if the debt will be fully repaid in one year only allow those payments for one year.

5.15.1.8 (05-01-2004)
National Standards

1. National standards include the following expenses:

   Apparel and services. Includes shoes and clothing, laundry and dry cleaning, and shoe repair.

   Food. Includes all meals, home and away.

   Housekeeping supplies. Includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary; and other miscellaneous household supplies.

   Personal care products and services. Includes hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances.

   Miscellaneous. A discretionary allowance of $100 for one person and $25 for each additional person in a taxpayer's family.

1. Allow taxpayers the total national standard amount for their income level.

   Example: *The taxpayer's expenses are: housekeeping supplies - $150, clothing - $150, food - $600, miscellaneous - $400 (Total Expenses - $1,300). The taxpayer is allowed the national standard of $1,100.*

2. A taxpayer that claims more than the total allowed by the national standards must substantiate and justify each separate expense of the total national standard amounts.

   Example: *A taxpayer may claim a higher food expense than allowed. Justification would be based on prescribed or required dietary needs.*

5.15.1.9 (05-01-2004)
Local Standards

1. Local standards include the following expenses:

   Housing and Utilities. The utilities include gas, electricity, water, fuel, oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, and telephone. Housing expenses include: mortgage or rent, property taxes, interest, parking, necessary maintenance and repair, homeowner's or renter's insurance, homeowner dues and condominium fees. Usually, this is considered necessary only for the place of residence. Any other housing expenses should be allowed only if, based on a taxpayer's individual facts and circumstances, disallowance will cause

the taxpayer economic hardship.

Transportation. Vehicle insurance, vehicle payment (lease or purchase), maintenance, fuel, state and local registration, required inspection, parking fees, tolls, driver's license, public transportation. Transportation costs not required to produce income or ensure the health and welfare of the family are not considered necessary. Consider availability of public transportation if car payments (purchase or lease) will prevent the tax liability from being paid in part or full. Public transportation costs could be an option if it does not significantly increase commuting time and inconvenience the taxpayer.

Note:

If the taxpayer has no car payment, or no car, question how the taxpayer travels to and from work, grocer, medical care, etc. The taxpayer is only allowed the operating cost or the cost of transportation.

5.15.1.10 (05-01-2004)
Other Expenses

1. Other expenses may be considered if they meet the necessary expense test - they must provide for the health and welfare of the taxpayer and/or his or her family or they must be for the production of income. This is determined based on the facts and circumstances of each case.

2. If other expenses are determined to be necessary and, therefore allowable, document the reasons for the decision in your history.

3. The amount allowed for necessary or conditional expenses depends on the taxpayer's ability to full pay the liability within five years and on the taxpayer's individual facts and circumstances. If the liability can be paid within 5 years, it may be appropriate to allow the taxpayer the excessive necessary and conditional expenses. If the taxpayer cannot pay within 5 years, it may be appropriate to allow the taxpayer the excessive necessary and conditional expenses for up to one year in order to modify or eliminate the expense. (See IRM 5.14, Installment Agreements)

Expense Item	**Expense is Necessary if:**	**Notes/Tips**
Accounting and legal fees.	Representation before the Service is needed or meets the necessary expense tests. Amount must be reasonable.	Disallow any other accounting or legal fees. Disallow costs not related to solving current liability.
Charitable contributions *(Donations to tax exempt organizations)*	If it is a condition of employment or meets the necessary expense tests. Example: A minister is required to tithe according to his employment contract.	Disallow any other charitable contributions that are not considered necessary. Example: Review the employment contract.
Child Care *(Baby-sitting, day care, nursery and preschool)*	It meets the necessary expense test. Only reasonable amounts are allowed.	Cost of child care can vary greatly. Do not allow unusually large child care expense if more reasonable alternatives are available. Consider the age of the child and if both parents work.

Court-Ordered Payments*(Alimony, child support, including orders made by the state, and other court ordered payments)*	If court ordered and being paid, they are allowable. If payments are not being made, do not allow the expense. Child support payments for natural children or legally adopted dependents may be allowed.	Review the court order.
Dependent Care*(For the care of the elderly, invalid, or handicapped.)*	If there is no alternative to the taxpayer paying the expense.	
Education	It is required for a physically or mentally challenged child and no public education providing similar services is available. Also allowed only for the taxpayer and only if required as condition of employment.	**Example:** An attorney must take so many education credits each year or they will not be accredited and could eventually lose their license to practice before the State Bar. A teacher could lose their position or in some States their pay is commensurate with their education credits.
Health Care	Required for the health and welfare of the family. Elective surgery would not be allowed such as plastic surgery or elective dental work. The taxpayer must provide proof of excessive out of pocket medical expenses.	To determine monthly expenses, the total out of pocket expenses would be divided by 12. The Schedule A may also be used to determine the yearly expense. Ensure that the amount used is out of pocket after insurance claims are paid. Substantiate that payments are being made.
Involuntary Deductions	If it is a requirement of the job; i.e. union dues, uniforms, work shoes.	To determine monthly expenses, the total out of pocket expenses would be divided by 12.
Life Insurance	If it is a term policy on the life of the taxpayer only.	If there are whole life policies, these should be reviewed as an asset for borrowing against or liquidating. Life insurance used as an investment is not a necessary expense.
Secured or legally perfected debts	If it meets the necessary expense test.	Taxpayer must substantiate that the payments are being made.
Unsecured Debts	If the taxpayer substantiates and justifies the expense, the minimum payment may be allowed. The necessary expense test of health and welfare and/or production of income must be met. Except for payments required for the production of income, payments on unsecured debts will not be allowed if the tax liability, including projected accruals, can be paid in full within 90 days.	Examples of unsecured debts which may be necessary expenses include: Payments required for the production of income such as payments to suppliers and payments on lines of credit needed for business and payment of debts incurred in order to pay a federal tax liability.
Taxes	It is for current federal, FICA, Medicare, state and local taxes.	Current taxes are allowed regardless of whether the taxpayer made them in the past or not. Delinquent state and local taxes are allowable depending on the priority of the FTL and/or Service agreement with the state and

		local taxing agencies.
Optional Telephones and Telephone Services *(Cell phone, pager, Call waiting, caller identification or long distance)*	It must meet the necessary expense test.	
Student Loans	If it is secured by the federal government and only for the taxpayer's education.	Taxpayer must substantiate that the payments are being made.
Internet Provider/E-mail	If it meets the necessary expense test - generally for production of income.	
Repayment of loans made for payment of Federal Taxes	If the loan is secured by the taxpayer's assets when those assets are of reasonable value and are necessary to provide for the health and welfare of the family.	

Allowable Living Expenses for Transportation

Disclaimer: *IRS Allowable Expenses are intended for use in calculating repayment of delinquent taxes. Expense information for use in bankruptcy calculations can be found on the website for the U.S. Trustee Program.*

Collection Financial Standards
Financial Analysis - Local Standards: Transportation *

	First Car	Second Car
National	$471	$332

Region	No Car	One Car	Two Cars
Northeast Region	$238	$311	$393
Boston	$267	$300	$382
New York	$313	$402	$484
Philadelphia	$245	$304	$386
Pittsburgh	$167	$274	$357
Midwest Region	$199	$275	$358
Chicago	$264	$327	$410
Cincinnati	$227	$260	$343
Cleveland	$204	$280	$362
Detroit	$320	$390	$473
Kansas City	$252	$296	$379
Milwaukee	$214	$254	$336
Minneapolis-St. Paul	$284	$333	$416
St. Louis	$207	$264	$346
South Region	$203	$260	$343
Atlanta	$291	$238	$320
Baltimore	$233	$271	$353
Dallas-Ft. Worth	$317	$348	$430
Houston	$287	$338	$420
Miami	$292	$348	$431
Tampa	$264	$253	$336
Washington, D.C.	$299	$350	$433
West Region	$252	$338	$420
Anchorage	$319	$341	$423
Denver	$312	$338	$420
Honolulu	$300	$328	$410
Los Angeles	$284	$426	$508
Phoenix	$275	$351	$433

Portland	$194	$297	$379
San Diego	$322	$382	$464
San Francisco	$325	$401	$484
Seattle	$267	$329	$412

* Does not include personal property taxes. (effective February 1, 2006)

National Standards for Allowable Living Expenses

Disclaimer: *IRS Allowable Expenses are intended for use in calculating repayment of delinquent taxes. Expense information for use in bankruptcy calculations can be found on the website for the U.S. Trustee Program.*

Collection Financial Standards for Food, Clothing and Other Items. Due to their unique geographic circumstances and higher cost of living, separate standards have been established for Alaska and Hawaii.

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	175	203	232	257	292	333	373	483
Housekeeping supplies	18	24	30	31	32	33	34	49
Apparel & services	47	48	62	68	89	104	140	217
Personal care products & services	17	24	27	32	33	41	46	57
Miscellaneous	110	110	110	110	110	110	110	110
Total	**$367**	**$409**	**$461**	**$498**	**$556**	**$621**	**$703**	**$916**

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	305	306	322	368	418	460	514	723
Housekeeping supplies	27	33	42	43	50	51	55	85
Apparel & services	83	91	92	93	98	126	141	277
Personal care products & services	25	27	33	37	40	50	56	83
Miscellaneous	138	138	138	138	138	138	138	138
Total	**$578**	**$595**	**$627**	**$679**	**$744**	**$825**	**$904**	**$1,306**

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	422	423	424	425	512	513	565	754
Housekeeping supplies	41	42	43	44	51	52	61	86
Apparel & services	143	144	145	146	154	155	168	278

Personal care products & services	30	33	34	38	41	51	57	84
Miscellaneous	166	166	166	166	166	166	166	166
Total	**$802**	**$808**	**$812**	**$819**	**$924**	**$937**	**$1,017**	**$1,368**

Item	**less than $833**	**$833 to $1,249**	**$1,250 to $1,666**	**$1,667 to $2,499**	**$2,500 to $3,333**	**$3,334 to $4,166**	**$4,167 to $5,833**	**$5,834 and over**
Food	433	463	501	502	558	574	685	868
Housekeeping supplies	42	43	44	46	52	53	66	94
Apparel & services	144	145	151	152	190	191	201	302
Personal care products & services	44	46	47	48	49	52	58	89
Miscellaneous	193	193	193	193	193	193	193	193
Total	**$856**	**$890**	**$936**	**$941**	**$1,042**	**$1,063**	**$1,203**	**$1,546**

Item	**less than $833**	**$833 to $1,249**	**$1,250 to $1,666**	**$1,667 to $2,499**	**$2,500 to $3,333**	**$3,334 to $4,166**	**$4,167 to $5,833**	**$5,834 and over**
For each additional person, add to four-person total allowance:	$138	$149	$160	$171	$182	$193	$204	$216

Alaska - National Standards for Allowable Living Expenses

Disclaimer: *IRS Allowable Expenses are intended for use in calculating repayment of delinquent taxes. Expense information for use in bankruptcy calculations can be found on the website for the* *U.S. Trustee Program.*

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	179	207	237	262	298	340	380	493
Housekeeping supplies	18	24	31	32	33	34	35	50
Apparel & services	48	49	63	69	91	106	143	221
Personal care products & services	17	24	28	33	34	42	47	58
Miscellaneous	112	112	112	112	112	112	112	112
Total	**$374**	**$416**	**$471**	**$508**	**$568**	**$634**	**$717**	**$934**

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	311	312	328	375	426	469	524	737
Housekeeping supplies	28	34	43	44	51	52	56	87
Apparel & services	85	93	94	95	100	129	144	283
Personal care products & services	26	28	34	38	41	51	57	85
Miscellaneous	141	141	141	141	141	141	141	141
Total	**$591**	**$608**	**$640**	**$693**	**$759**	**$842**	**$922**	**$1,333**

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	430	431	432	434	522	523	576	769
Housekeeping supplies	42	43	44	45	52	53	62	88
Apparel & services	146	147	148	149	157	158	171	284
Personal care products & services	31	34	35	39	42	52	58	86
Miscellaneous	169	169	169	169	169	169	169	169

Total	$818	$824	$828	$836	$942	$955	$1,036	$1,396

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	442	472	511	512	569	585	699	885
Housekeeping supplies	43	44	45	47	53	54	67	96
Apparel & services	147	148	154	155	194	195	205	308
Personal care products & services	45	47	48	49	50	53	59	91
Miscellaneous	197	197	197	197	197	197	197	197
Total	**$874**	**$908**	**$955**	**$960**	**$1,063**	**$1,084**	**$1,227**	**$1,577**

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
For each additional person, add to four-person total allowance:	$141	$152	$163	$174	$186	$197	$208	$220

Effective February 1, 2006

Hawaii - National Standards for Allowable Living Expenses

Disclaimer: *IRS Allowable Expenses are intended for use in calculating repayment of delinquent taxes. Expense information for use in bankruptcy calculations can be found on the website for the U.S. Trustee Program.*

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	173	201	230	254	289	330	369	478
Housekeeping supplies	18	24	30	31	32	33	34	49
Apparel & services	47	48	61	67	88	103	139	215
Personal care products & services	17	24	27	32	33	41	46	56
Miscellaneous	109	109	109	109	109	109	109	109
Total	**$364**	**$406**	**$457**	**$493**	**$551**	**$616**	**$697**	**$907**

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	302	303	319	364	414	455	509	716
Housekeeping supplies	27	33	42	43	50	50	54	84
Apparel & services	82	90	91	92	97	125	140	274
Personal care products & services	25	27	33	37	40	50	55	82
Miscellaneous	137	137	137	137	137	137	137	137
Total	**$573**	**$590**	**$622**	**$673**	**$738**	**$817**	**$895**	**$1,293**

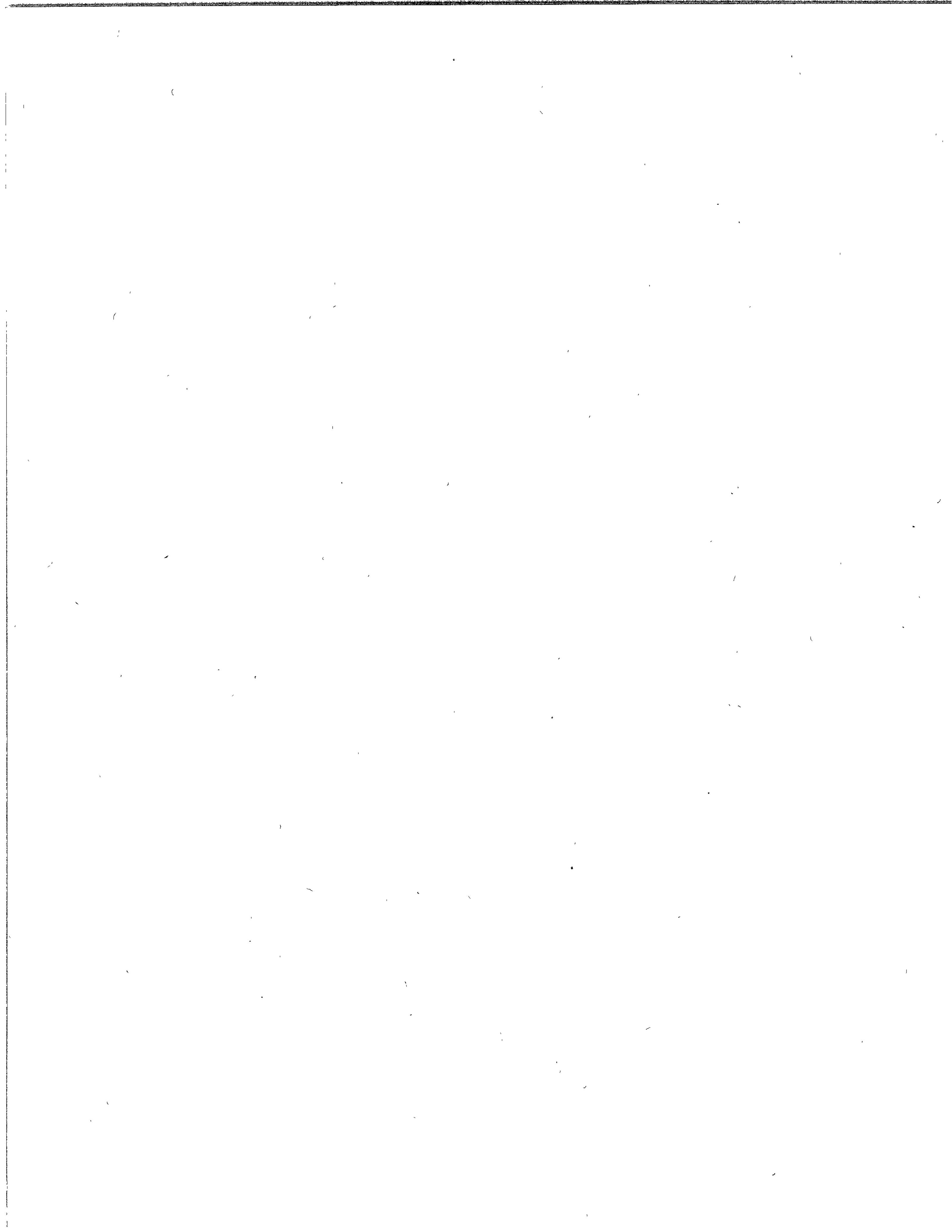
Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	418	419	420	421	507	508	559	746
Housekeeping supplies	41	42	43	44	50	51	60	85
Apparel & services	142	143	144	145	152	153	166	275
Personal care products & services	30	33	34	38	41	50	56	83
Miscellaneous	164	164	164	164	164	164	164	164

Total	$795	$801	$805	$812	$914	$926	$1,005	$1,353

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
Food	429	458	496	497	552	568	678	859
Housekeeping supplies	42	43	44	46	51	52	65	93
Apparel & services	143	144	149	150	188	189	199	299
Personal care products & services	44	46	47	48	49	51	57	88
Miscellaneous	191	191	191	191	191	191	191	191
Total	**$849**	**$882**	**$927**	**$932**	**$1,031**	**$1,051**	**$1,190**	**$1,530**

Item	less than $833	$833 to $1,249	$1,250 to $1,666	$1,667 to $2,499	$2,500 to $3,333	$3,334 to $4,166	$4,167 to $5,833	$5,834 and over
For each additional person, add to four-person total allowance:	$137	$148	$158	$169	$180	$191	$202	$214

Effective February 1, 2006



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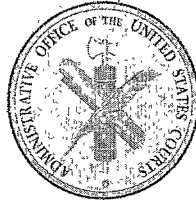


ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 18, 2006

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the Rules Committee Support Office to improve its support service to the rules committees.

Automation Projects

In November 2006, Committee Reporters Capra, Struve, and Coquillette were given a demonstration of Documentum, the office's document-management system, and agreed to participate in a pilot project allowing remote access to the system. The professors will be able to access thousands of rules documents in Documentum, including committee minutes, reports, memoranda, and drafts of proposed rules amendments. The system will, among other things, allow multiple users to prepare, edit, and finalize documents; search for documents in the database using enhanced indexing and search capabilities; and track different versions of documents to ensure the quality and accuracy of work products, which will facilitate the preparation and reformatting of agenda materials, committee minutes and reports, and other rules-related documents. The pilot project is expected to begin in December 2006. Upon successful completion of the project, we hope to expand the program to allow remote access to Documentum by committee members and reporters.

Federal Rulemaking Website

We recently completed a major redesign of the judiciary's Federal Rulemaking internet website (www.uscourts.gov/rules), which will make it easier for users to navigate and find relevant rules committee records. The rules website continues to be one of the most popular sites on the uscourts.gov site, receiving over 641,000 total "visits" from January 1, 2006, to November 1, 2006. (The most common search query was "bankruptcy forms.")

Rules Committees' Records

Last year, the office completed a major project retrieving, scanning, and posting to the Federal Rulemaking website all available rules committees' minutes and reports contained on

microfiche from 1935-present. *See* <http://www.uscourts.gov/rules/newrules7.html>. These primary rules records allow users to conduct comprehensive research on the "legislative history" of rules amendments. We are now working with a number of law libraries across the country to locate missing committee minutes and reports, which we will add to our collection and post on the website. Recently, we retrieved missing rules records from the Universities of Pennsylvania and Texas law school libraries.

Committee and Subcommittee Meetings

For the period from May 27, 2006, to December 1, 2006, the office staffed eight meetings, including one Standing Committee meeting, six advisory rules committee meetings, and a meeting of the informal working group on mass torts. We also arranged and participated in numerous conference calls involving rules subcommittees.

Miscellaneous

Rules Published for Comment - August 2006. In August 2006, we prepared, published, and posted to the rules website the *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Criminal Procedure, and the Federal Rules of Evidence,* seeking public comment on proposed amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009, and new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, 5012, and 6011, and Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24, and new Official Forms 25A, 25B, 25C, and 26, and Exhibit D to Official Form 1; Criminal Rules 1, 12.1, 17, 18, 29, 32, 41, 60, and 61; and new Evidence Rule 502. Comments and requests to testify are also posted on the rules website at <http://www.uscourts.gov/rules/proposed0206-1.htm>. The public comment period ends on February 15, 2007.

Rules Transmitted to the Supreme Court - November 2006. In December 2006, we delivered to the Supreme Court a package of proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, which were approved by the Judicial Conference at its September 2006 session.

James N. Ishida

4

The Federal Judicial Center (Center) is pleased to provide this report on recent and upcoming activities that may be of interest to the committee.

This report reflects Center research activities and education and training programs for federal judges and court unit executives, collaborative efforts with Administrative Office and Sentencing Commission colleagues, and other statutorily mandated assistance to private and international legal institutions.

Highlights

As of late December 2006, the Center, like the rest of the judiciary, is operating under a continuing resolution because Congress has yet to take final action on our FY 2007 appropriation. This summer the House and the Senate Appropriations committee approved increases of 6.2 percent and 5.7 percent, respectively. Even the lower Senate figure would provide somewhat more than a full Adjustment To Base (ATB), i.e., the amount necessary to keep up with inflation and other "uncontrollable" cost growth. If this occurred it would mark only the second time in fifteen years that the Center's appropriation met or exceeded ATB. This erosion in our purchasing power seriously affects the Center's mission, despite several cost-containment measures.

The courtroom usage study is underway. As explained in a previous report, the Court Administration and Case Management Committee (CACM) asked the Center to conduct the study in order to respond to a specific request from Congress for information about courtroom requirements. Twenty-seven courts have been selected

to participate in a detailed examination of courtroom usage. Twenty-four courts were selected randomly; three were selected based on special circumstances in those courts. In addition, all district and magistrate judges will be surveyed as part of the study. The schedule calls for the Center to report to CACM by fall of 2007.

In February 2007, at the request of the Committee on Information Technology's Subcommittee on Training, the Center will host a planning meeting to discuss the identification, evaluation and support of information technology (IT) resources for judges, how to make judges aware of these resources, and how to provide instruction to use the resources effectively. Participants will include approximately 30 appellate, district, bankruptcy, and magistrate judges, many of whom will be representatives from Judicial Conference Committees. The project is being coordinated with the Administrative Office; staff from both agencies will be active participants. The February meeting builds on the IT Awareness sessions developed by the Administrative Office and the Center at the request of the Information Technology Subcommittee on Training.

The Center is in the process of developing programs to implement two recommendations of the Judicial Conduct and Disability Act Study Committee: (1) that the Center seek to ensure that all judges understand the Act and how it operates, and (2) that the Center aid the Judicial Conference Review Committee in helping chief circuit judges, judicial council members, and circuit staff understand and administer the Act.

I. <u>Education</u>

The Center presents most judicial education through in-person workshops and

seminars. Most staff education is offered through distance education programs that facilitate local attendance and give individual court units greater flexibility in selecting topics and requesting in-house training for their staff.

A. Education for Federal Judges

1. Seminars and Workshops

The Center's FY 2007 program plan for judges includes:

- a seminar on Immigration Law for Judges of the U.S. Courts of Appeals with participation by immigration judges and members of the Board of Immigration Appeals;
- circuit workshops for the judges in the Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits;
- a conference for all chief district judges;
- leadership and executive team development workshops for new chief judges and their court unit executives;
- one Phase I and one Phase II orientation for newly appointed district judges (more will be scheduled as needed);
- two national workshops, a mediation workshop, and a Phase II orientation program for bankruptcy judges;
- two national workshops, two Phase I orientations, and one Phase II orientation program for magistrate judges;
- a mediation workshop for district and magistrate judges;
- special-topic seminars to discuss law as it pertains to employment, the environment, genetics, intellectual property, science, and terrorism;

- special-topic seminars to address legal and societal issues involved in recovery from natural disasters, emerging issues in neuroscience, humanities and science, law and society, Section 1983 litigation, and international law and litigation (many special-topic programs are conducted in collaboration with law schools or other educational organizations); and
- a workshop with the AO on managing capital construction projects for teams of judges, their staff, and GSA representatives.

2. In-court Programs

Several in-court programs for judges are available on request. The Center pays for travel for faculty to present an in-court seminar. Program topics in FY 2007 address slavery and the American Revolutionary era; improving the writing and editing of opinions; intellectual property cases with an emphasis on modern patent law; law and the Holocaust; and law and literature.

3. Federal Judicial Television Network (FJTN) and Video Programs

FJTN programs for judges will discuss:

- international law and litigation;
- trying terrorism cases;
- the Sentencing Guidelines Statement of Reasons Form (with the United States Sentencing Commission);
- emerging issues in neuroscience;
- short and long-term challenges confronting the federal courts (a panel discussion videotaped during the Center's 2006 National District Clerks

Conference; panelists were the chairs of the Judicial Conference Committees on the Budget, Court Administration and Case Management, and Information Technology); and

- reviews of the Supreme Court's 2006–2007 term and of key bankruptcy decisions in 2006 by the Fourth, Eighth, and Ninth Circuits.

New video programs for judges will be developed on the following topics:

- judicial ethics (overview of major Code of Conduct, financial disclosure, and private seminar attendance issues; instruction on use of conflict screening software);
- orientation information (appellate);
- evidence fundamentals (district, magistrate, and bankruptcy);
- handling trials, handling motions, and Chapter 13 cases (bankruptcy); and
- budgeting capital and mega criminal cases (requested by the Committee on Defender Services).

4. Manuals, Monographs, and On-line Resources

The Center recently published *The Bail Reform Act of 1984, Third Edition; Copyright Law, Second Edition,* and *Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers, Second Edition.* The Center also published the results of a roundtable on the use of technology to facilitate appearances in bankruptcy proceedings. The Committee on Administration of the Bankruptcy System's Subcommittee on Automation conducted the roundtable with Center assistance.

An update to the *Benchbook for U.S. District Court Judges* and a pocket guide on electronic discovery are in production. Works in progress include a new monograph on the Employment Retirement Income Security Act (ERISA), a monograph on major issues in Immigration Law, and a new edition of the *Chambers Handbook for Judges' Law Clerks and Judicial Assistants.*

Recent additions to the Center's site on the judicial branch's intranet include *Maintaining the Public Trust,* an e-learning program for law clerks developed by court staff under Center tutelage; a page from which viewers can access all available streaming videos of Center programs; and a paper on post-*Booker* sentencing, which was prepared for the Criminal Law Committee's 2006 National Sentencing Policy Institute. A web page explaining Judicial Conference policies and recommendations regarding redaction of sensitive materials from electronically filed documents has been approved by CACM and will be posted on the site.

B. Education for Legal Staff

FY 2007 legal staff programs include:

- national and sentencing seminars for federal defenders;
- an orientation program for assistant federal defenders;
- a seminar for federal defender investigators and paralegals;
- a conference for federal defender administrators; and
- a law and technology workshop for federal defender staff.

C. Education for Court Staff

1. Seminars and Workshops

The Center's FY 2007 program plan for court staff includes:

- two biennial national conferences: for district court clerks, chief deputy clerks, and district court executives and for appellate court clerks, chief deputy clerks, and BAP clerks;
- a workshop for assistant circuit executives;
- three leadership programs: for new court unit executives, for circuit executives and deputy circuit executives, and for chief deputy clerks and deputy probation and pretrial services officers;
- two workshops for new and experienced supervisors and managers in clerk's offices and a communication strategies Web conference for jury administrators;
- two AO-FJC Case Management/Electronic Case Files (CM/ECF) forums for district and bankruptcy court staff and two audio conferences to discuss the 2005 Bankruptcy Act;
- a concluding workshop for the eighth class of the three-year Leadership Development Program for Probation and Pretrial Services Officers (LDP) and a mid-program workshop for the sixth class of the Federal Court Leadership Program, the LDP counterpart for clerks' office personnel;
- two executive team seminars for probation and pretrial chiefs and deputy chiefs, an audio conference series and a web conference for new chiefs, and five regional symposia for experienced supervising officers in the First, Second, Fifth, Eighth, and Ninth Circuits. Each of the Center's workshops for new supervising officers is preceded by a series of web conferences; two workshops and three web conference series are

currently scheduled. The Center will also conduct several programs to help officers reap the full benefits of the Professional Education Institute. Participants at the June 2006 National Conference for Chief Probation and Pretrial Services Officers helped update One Hundred Years of Federal Probation and Pretrial Services, a timeline of the evolution of the system from 1909 through 2006. The timeline is posted on the Center's site on the court's intranet.

2. In-court Programs

The Center's in-court programs for court staff, available on request, include curriculum packages and training guides. *Planning for Fiscal Management, Planning for Strategic Workforce Management,* and *Shared Services for Human Resources* are examples of in-district programs facilitated by FJC staff. Other programs are taught by Center-trained court staff.

Two e-learning programs for clerk's office staff are in development: *Avoiding Ethics Pitfalls* and *Is It Legal Advice?*

An e-learning program for probation and pretrial services officers, *Everyday Ethics: A Matter of Choice,* is in development.

3. FJTN and Video Programs for Court Staff

FJTN programs for all court staff will discuss:

- innovative court practices;
- the Center's Professional Education Institute;
- mentoring relationships;
- leadership and teams; and

- transformational change and innovation.

FJTN programs for probation and pretrial services officers will cover:

- supervision of cyber criminals;
- methamphetamine abuse; and
- updates to the Judicial Conference substance abuse policy. Five weekly web-conference seminars will supplement the cyber crime broadcast.

A grand jury orientation video program will be developed to replace the earlier, outdated version.

II. Research Highlights

A. Selected New Projects

Special Case Management Challenges in Litigation Related to Terrorism. The Center is developing educational materials for judges on special case management challenges posed by terrorism cases, such as dealing with classified evidence and arguments, serving and taking testimony from foreign witnesses, security for witnesses and jurors, and potential obstacles to communications between clients and attorneys. The Center will (1) identify cases that have presented such special case management challenges, (2) interview judges who heard these cases to discover how they handled the challenges, and (3) make available on the Center's intranet website searchable presentations of challenges and solutions.

Implications of the Class Action Fairness Act of 2005 (CAFA) on Federal Court Resources. At the request of the Advisory Committee on Civil Rules the Center is in the midst of a long-term study of the impact of CAFA on federal judiciary

resources. In phase one of the study, the Center is examining the number of cases filed in or removed to the federal courts. The Center's second interim report, submitted in September 2006, found that the Act had a substantial impact on the caseload of the federal courts within the first four and one-half months of its existence. Additional data on filings will be collected during the next two to three years.

In the second and third phases of the study, the Center will examine in depth a sample of class action activity, including appeals, before and after CAFA went into effect. The goal is to measure the impact of CAFA on litigation of class actions at various stages of the process, including remand, ruling on pretrial motions, ruling on class certification, trial, settlement, and appeals. The first report on pre-CAFA litigation will be available in the fall of 2007.

Managing Discovery of Electronic Information. The Center is developing a pocket guide to help federal judges manage the discovery of electronically stored information (ESI). The guide encourages judges to actively manage cases involving electronically stored data, raising points for consideration by the parties, rather than awaiting the parties' identification and argument of the matters. The guide covers issues unique to the discovery of ESI, including its scope, the allocation of costs, the form of production, the waiver of privilege and work product protection, and the preservation of data and spoliation. It draws on case law addressing conventional discovery and ESI-related discovery, the Federal Rules of Civil Procedure, the *Manual for Complex Litigation*, *Fourth,* local rules, the Sedona Principles, and the American Bar Association Civil Discovery Standards. Amendments to the Civil Rules that specifically address the discovery of ESI are expected to go into effect December 1,

2006.

Rule 26, Federal Rules of Civil Procedure: Expert Disclosure. The Advisory Committee on Civil Rules is considering amendments to Rule 26(a)(2) regarding disclosure of expert reports and the "data or other information considered by [an expert] witness in forming the opinions." The Committee will consider drafting proposed rules that will extend the expert witness-reporting requirement to employees not specially hired to provide expert testimony; that will restrict disclosure of draft reports; and that will provide better protection for attorney work product when it is communicated to a testifying expert. The Center will work with a team of researchers from the University of Nevada at Reno to determine if their independent study of expert reports and testimony in the Federal District Court of South Carolina can inform the deliberations of the Advisory Committee.

Rule 56, Federal Rules of Civil Procedure: Summary Judgment. The Center is developing a study to examine summary judgment practices in a sample of recently terminated cases to support the work of the Advisory Committee on Civil Rules as it considers changes to Rule 56. A subcommittee of the Civil Rules Committee will develop proposed changes to the timing standards in Rule 56, requiring moving parties to file a list of undisputed facts, make explicit provision for a motion for partial summary judgment and sua sponte motions, and will consider deleting Rule 56(g), since sanctions are now provided for in Rule 11. The subcommittee will also consider the extent to which orders denying summary judgment involving claims of official immunity, which are immediately appealable, should include an explanation of the reasons the motions was denied. This study will rely largely on an analysis of

CM/ECF data.

Rule 12(e), Federal Rules of Civil Procedure: Motions for More Definite Statement. The Advisory Committee on Civil Rules is considering possible amendments to Rule 12 to require more detailed pleadings. A number of judges have required more detailed pleadings despite the current notice pleading standards of the rule. Some argue that a more demanding pleading requirement would cut discovery costs and allow courts to better manage the litigation. Others note that parties, as a matter of course, often file more detailed pleadings than are required by the rule. The Center will gather and analyze information on the incidence of motions for a more definite statement under Rule 12(e). If such motions tend to cluster around certain types of cases, the Advisory Committee may consider drafting a more rigorous pleading standard for such cases.

Patent Claims Construction Survey. Federal district court judges take various approaches to construing patent terms in cases that raise issues of infringement. Some judges, for example, conduct a separate *Markman* hearing in which the construction of the patent claim is the primary purpose of the hearing. Other judges combine the claim construction with other procedural devices such as summary judgment or pretrial conferences. There are also a variety of sources of advice for judges and attorneys on claims construction procedures, including the Center's *Manual for Complex Litigation, Fourth,* as well as recent reports of the Sedona Conference and the Federal Circuit Bar Association. This project will compare the recommendations contained in these three sources to determine areas of consensus and to highlight conflicting recommendations. This information will then be combined with the results

of the Center's recent survey of judges' actual practices in construing patent terms to present a more comprehensive description of the claims construction process.

B. Selected Research in Progress Since the Last Report

Courtroom Use Study. As mentioned in our last report to the committee, the CACM has asked the Center to design and conduct a study of courtroom use. The study has been designed to collect comprehensive and accurate information about all activity that occurs, or is scheduled to occur, in federal district court courtrooms. The study will also collect information about judges' perspectives on the use and role of courtrooms. Twenty-seven courts will participate in the study. Twenty-four courts were randomly selected, and three case-study courts were selected because of their experience with sharing courtrooms. The Center will collect data in thirteen study courts for a three-month period beginning in mid-January 2007 and in the remaining fourteen courts for the three months from mid-April to mid-July 2007. A pretest of the study's procedures was conducted in two additional courts during September–October 2006. The Center's initial report of the results of the study will be submitted to CACM in fall of 2007.

Bankruptcy Case Weighting Project. Also at the request of the Bankruptcy Committee, the Center is analyzing the data from waves one and two of its bankruptcy court case weighting project. The case weighting study has been interrupted to allow the courts to implement the recently enacted bankruptcy reforms. The Center has been asked to develop some preliminary updates to the current case weights, using data from waves one and two, to inform the Committee of bankruptcy judgeship needs; these weights will be completed this fall.

Capital Habeas Corpus Reform. Center and Administrative Office staff are examining perceived delay and backlog issues in the processing of capital habeas appeals. The research is being conducted in response to a request from a Habeas Corpus Task Force comprised of chairs of Judicial Conference committees with jurisdiction related to Habeas Corpus issues, which includes this committee.

Budgeting in Capital Habeas Cases. Volume I of the Center's *Resource Guide for Managing Capital Cases* is being updated to include information on cost-management issues. The Center has solicited materials from all federal district judges who had handled a federal death penalty case through trial between the time the Spencer Report was published (1998) and spring of 2005. Responses were received from about half of the judges along with cost-management materials. Most of these documents have recently been added to the Center's on-line resource guide. Documents that were sent in hard-copy format are being reviewed to determine which should be scanned and added to the on-line materials. To date, the Center has also conducted interviews with approximately ten judges and other court personnel involved in cost-management issues in specific death penalty cases; interviews with additional judges are being scheduled. The Center will also solicit materials and interviews from judges who handled death penalty cases that did not go all the way to trial during the same time period, and will update the on-line resource materials accordingly. This project is being coordinated with Defender Services staff of the Administrative Office.

III. Federal Judicial History and International Rule of Law Functions

Pursuant to a statutory mandate, the Center provides assistance to federal

courts and others in developing information, and teaching about, the history of the federal judiciary. Six units of its "Federal Trials and Great Debates in United States History" project are available on line, with materials related to key federal trials. This program, supported by grants to the Federal Judicial Center Foundation, can enhance community outreach programs and help educators incorporate federal trial court history into courses at the secondary and college levels.

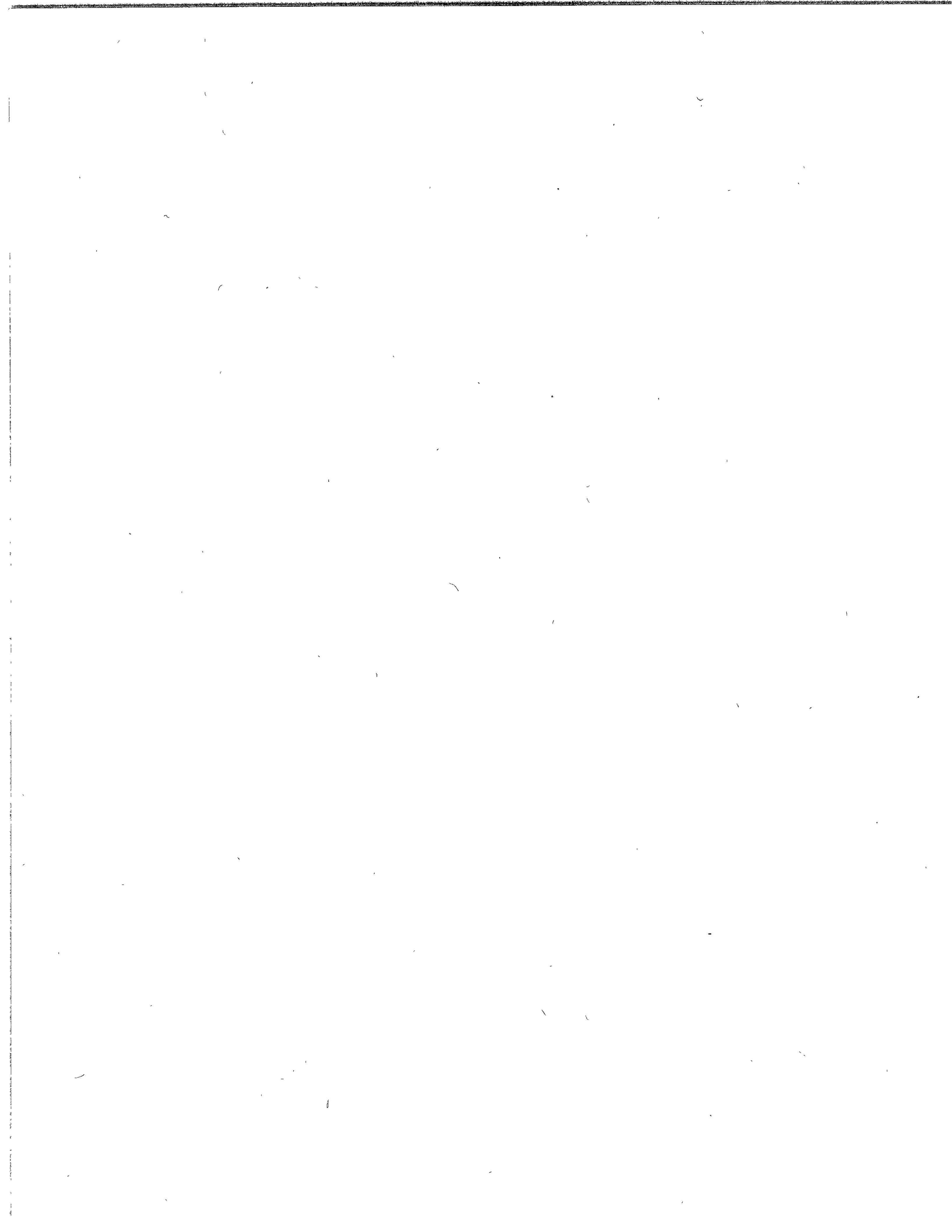
Also available on line is "Constitutional Origins of the Federal Judiciary," the first of several modules designed for judges and court staff who wish to present students and other public audiences with historical information about the federal courts. A module on Judicial Independence will be available in the fall of 2006.

The History of the Federal Judiciary web site remains one of the most frequently consulted government sites, with many links to it from legal education, judicial reform, and news organizations. In the fall of 2006 the site will include more than 600 images of historic federal courthouses.

Pursuant to another statutory mandate, the Center provides information about the federal judiciary to judges and court officials of other nations. Between April 5, 2006 and November 7, 2006, 22 briefings were held for 154 judges, court officials, and scholars from over 19 countries. The Center hosted a delegation from the Supreme Court of Kazakhstan for a program addressing jury trial management and also developed a program on pretrial detention for judges from Ukraine. For the second year, the Center developed a one-week program for Argentine judges who recently completed a Judicial Masters program at Austral University in Buenos Aires. The program addressed a broad range of issues related to judicial administration and

education and included visits to local federal and state courts.

The Center also undertakes a small number of international technical assistance projects, funded by United States government agencies and other donors. The Center's Research Division Director, James Eaglin, traveled to Kazakhstan to consult with the Kazakh Supreme Court about developing a Kazakh Center for Research on the Judiciary. Other technical assistance projects included programs in Kosovo and Algeria.



5-A

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
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SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: December 6, 2006

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on November 15, 2006, in Washington, DC. The Committee approved in principle a proposed amendment to Rule 4(a)(4)(B)(ii) and a proposed new rule requiring disclosures concerning drafting and funding of amicus briefs; the Committee will vote on the text and notes of these amendments at its next meeting. The Committee discussed and retained two additional items on the study agenda, and removed two other items. The Committee also discussed the progress of the time-computation project and discussed correspondence relating to circuit-specific briefing requirements. The Committee will next meet in April 2007.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the November meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Advisory Committee will not be seeking Standing Committee action on any items in January.

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[1] These minutes have not yet been approved by the Committee.

III. Information Items

A. Amendments Approved for Later Submission to the Standing Committee

The Advisory Committee is continuing to consider and approve proposed amendments to the Appellate Rules, although, pursuant to the directive of the Standing Committee, the Advisory Committee will not forward these amendments in piecemeal fashion, but will instead present a package of amendments at a later date. At its November meeting, the Advisory Committee approved the following proposed amendments in principle (some details remain to be worked out and will be the subject of a vote at the Advisory Committee's next meeting):

- An amendment to Rule 4(a)(4)(B)(ii) that would eliminate an ambiguity that resulted from the 1998 restyling. The Rule's current language might be read to require the appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. This ambiguity would be removed by replacing the current reference to challenging "a judgment altered or amended upon" a timely post-trial motion with a reference to challenging "an alteration or amendment of a judgment upon" such a motion.

- An amendment to Rule 29 that would be modeled on Supreme Court Rule 37.6. The amendment would require amicus briefs to indicate whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members and its counsel) who contributed monetarily to the brief's preparation or submission. The provision would exempt from the disclosure requirement amicus filings by various government entities.

B. Time-Computation Issues

The Committee discussed the ongoing Time-Computation Project and received a report from the Committee's Deadlines Subcommittee. Through the Reporter's oral presentation at our meeting, the Time-Computation Subcommittee sought input from our Committee on three questions. First, we were asked to consider whether the text of the template Rule should refer to the possibility of after-hours filing by personal delivery to a court official. Mr. Fulbruge, our liaison from the appellate clerks, expressed strong support for the view that the Rule text should not refer to that possibility, because such a reference could encourage litigants (including pro se litigants) to engage in such after-hours filing and could raise security concerns. No participant disagreed with this view. Second, we were asked to consider whether the template should define what "inaccessibility" of the clerk's office means for the electronic filer. The Committee discussed this issue but did not reach a view on it. Third, we were asked whether it would be useful for the template to include a provision addressing dates certain (rather than only addressing, as the current template does, time periods that require computation). The Committee's consensus was that such a provision is not needed.

Judge Sutton, who chairs our Deadlines Subcommittee, reported on that Subcommittee's deliberations. The Subcommittee has reviewed all the short appellate periods that would be affected by the proposed change in time-computation approach, and has arrived at a set of recommendations concerning whether, and by how much, to lengthen each such period. The Committee did not review the Subcommittee's recommendations in detail at our November meeting, but we are well positioned to do so at our April 2007 meeting.

The Deadlines Subcommittee also reported its views on the project as a whole. Subcommittee members are concerned about the question of statutory deadlines and they note that the two main options for dealing with statutory deadlines – supersession and legislation – seem to have disadvantages. Subcommittee members acknowledge that the set of statutory appellate deadlines that require adjustment appears to be relatively small. However, Subcommittee members believe that the statutory deadlines question is likely to loom larger for deadlines within the purview of other Advisory Committees. If a satisfactory method of resolving the question does not materialize, Subcommittee members question whether it is worth while to shift to a days-are-days time-computation approach. Subcommittee members observe that there does not seem to be a problem with the current time-computation approach, and that it may be better to take a wait-and-see approach to time-computation given the advent of electronic filing. Two Committee members who are not on the Deadlines Subcommittee echoed the Subcommittee's skepticism concerning the overall desirability of the project. On the other hand, Mr. Fulbruge observed that members of his staff, and pro se litigants, have trouble computing time under the current system. Members who expressed skepticism about the project's desirability nonetheless stated that the Appellate Rules should follow the time-computation approach taken in the courts below, and thus that if the other Advisory Committees support the shift to a days-are-days method, the Appellate Rules should also adopt that method.

C. Other Issues

The Committee discussed and retained two items on its study agenda, and also reviewed the responses to my recent letter on the Committee's behalf concerning circuit-specific briefing requirements.

As you know, the Committee has extensively discussed practitioners' concerns about idiosyncratic briefing requirements in the circuits. This fall I wrote to the Chief Judge of each circuit to express the Committee's concern over circuit-specific briefing requirements, to emphasize the need to make each circuit's briefing requirements readily accessible to practitioners, and to urge each circuit to consider whether the circuit's additional briefing requirements are truly necessary. By the time of the Committee's November meeting, six circuits had responded to the letter; the responses from some of the circuits suggest reason to hope that some circuits may consider reducing the number of additional briefing requirements.

A pending proposal by Public Citizen concerns the timing of amicus briefs; because the Time-Computation Project's proposed shift to a days-are-days approach will affect this timing

question, the Committee voted to defer further consideration of the proposal until after the time-computation matter is resolved. Another proposal, by the Virginia State Solicitor General, would amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. Some members voiced support for this proposal, but members noted that the proposal presents a number of issues. One such issue concerns the scope of the proposal; the current proponents would limit the proposed amendments to suits in which the parties include a state, the Commonwealth of Puerto Rico, the Northern Mariana Islands, or the District of Columbia. The Committee intends to consider whether the proposal, if adopted, ought also to encompass suits involving any additional types of government entities. The Committee retained this item on its study agenda and appointed an informal subcommittee to study the relevant issues.

5-B

DRAFT

Minutes of Fall 2006 Meeting of
Advisory Committee on Appellate Rules
November 15, 2006
Washington, DC

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, November 15, 2006, at 8:30 a.m. in the Mecham Conference Center of the Thurgood Marshall Federal Judiciary Building, Washington, DC. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Judge T.S. Ellis III, Dean Stephen R. McAllister, Mr. Mark I. Levy, and Ms. Maureen E. Mahoney. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Mr. Joe S. Cecil from the Federal Judicial Center ("FJC"). Professor Philip A. Pucillo attended as an observer. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants and noted his regret that James Bennett was unable to attend.

II. Approval of Minutes of April 2006 Meeting

The minutes of the April 2006 meeting were approved, subject to the correction of a previously noted typo.

III. Report on June 2006 Meeting of Standing Committee and on Status of Pending Amendments (new FRAP 32.1 and amendments to FRAP 25)

Several parts of the Standing Committee's June 2006 meeting were of particular interest to the Appellate Rules Committee. At the June meeting, Joe Cecil reported on the progress of the FJC's study concerning the use of the 28 U.S.C. § 1292(b) mechanism for interlocutory appeals. The study commenced after concerns were raised that the 1292(b) mechanism was under-used in patent cases. A district judge member explained that these concerns arose from the high rate of appellate reversal of district courts' *Markman* determinations. The member noted that some district judges have pointed out other possibilities for addressing that reversal rate: The

rate would fall if the Patent Office wrote better patents and if the appellate courts treated *Markman* determinations as mixed questions of law and fact so as to trigger deference to the district court's determination. Mr. Cecil reported that the FJC study has broadened beyond the context of patent cases to a general study of the use of Section 1292(b); the study will also provide an opportunity to test out certain proxies for measuring cost and efficiency. Mr. Cecil expects that a draft of the study will become available in roughly another six months.

The Appellate Rules Committee had one item on the agenda for the Standing Committee's June 2006 meeting: proposed new Rule 25(a)(5), concerning privacy protection. The Standing Committee approved the new Rule, as did the Judicial Conference at its September 2006 meeting.

The Civil Rules Committee presented a number of notable items at the June 2006 meeting. One significant item, of course, was the package of restyled Rules, which the Standing Committee approved. The Civil Rules Committee also reported on its proposed new Civil Rule 62.1, which would provide a mechanism for structured dialogue between the district court and the Court of Appeals in cases where a party seeks relief in the district court while an appeal is pending. Proposed Civil Rule 62.1 would authorize the district court to indicate that it would (or might) grant the motion for relief if the Court of Appeals were to remand the case. One obvious application of the Rule would be when a party seeks relief under Civil Rule 60(b), but the Rule is written broadly to encompass other situations, such as an interlocutory appeal under 28 U.S.C. § 1292(a)(1) from the grant or denial of an injunction. The Civil Rules Committee is considering two alternative formulations – one authorizing the district court to indicate that it "would" grant relief in the event of a remand, and one authorizing the district court to indicate that it "might" grant relief. The Committee is also open to considering suggested alternatives for the numbering and placement of the Rule (the Committee chose number 62.1 to place the Rule within the section dealing with judgments). The practice that the Rule would formalize does raise a sensitive issue concerning situations when parties are willing to settle pending appeal if and only if the district court will vacate its judgment; but it was pointed out that the Rule itself would only formalize a practice that already exists.

Judge Stewart had noted at the June 2006 meeting that if Rule 62.1 goes forward the Appellate Rules Committee would likely wish to consider adding a cross-reference in the Appellate Rules. At the Appellate Rules meeting, Mr. Letter seconded that point. Mr. Letter recounted that the proposed Rule 62.1 stems from a proposal that Mr. Letter had initially made to the Appellate Rules Committee, on the ground that the provision seemed most appropriate for inclusion in the Appellate Rules. Mr. Letter noted that if instead the provision is to be included in the Civil Rules, it would be helpful to practitioners to include a cross-reference in the Appellate Rules. Mr. Rabiej reported that the Civil Rules Committee has decided to defer requesting Standing Committee approval to publish proposed Rule 62.1 for comment, because it was felt that the bar deserved a break in the pace of rulemaking.

The Civil Rules Committee had also reported to the Standing Committee its decision to take no further action on a proposal concerning Civil Rules 54(d)(2) and 58(c)(2). The proposal stemmed from the existence of a loophole created by the interplay between the two Rules: Theoretically, a party could make a timely posttrial motion for attorneys' fees, and – long after the time to appeal had otherwise run out – the district court could provide that the attorneys' fee motion extended the time to take an appeal. In 2004, the Appellate Rules Committee had discussed this issue and had referred the matter to the Civil Rules Committee for consideration, with a recommendation that Civil Rule 58(c)(2) be amended to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59. The Civil Rules Committee asked the FJC to study this question, and the FJC study found little evidence that Rule 58(c)(2) is actually used to grant such extensions. In the light of this study, the Civil Rules Committee concluded that it would be better to live with the existing narrow loophole than to proceed with an amendment that might create further unintended consequences.

The final item of particular note to the Appellate Rules Committee was the Standing Committee's discussion concerning the Time-Computation Project. Judge Kravitz reported on the progress of the Project, and the Committee discussed several revisions to the draft template Rule. The Committee also discussed at considerable length the questions surrounding the Project's effect on statutory deadlines. The Civil Rules Committee reported on its progress in reviewing relevant deadlines in the Civil Rules with a view to lengthening those affected by the change to a days-are-days approach. When lengthening affected deadlines, the Civil Rules Committee has adopted a presumption in favor of selecting new deadlines in increments of 7 days so as to minimize instances when a deadline falls on a weekend day. There was consensus on the Standing Committee that such a presumption was useful.

After the discussion of the June 2006 Standing Committee meeting, the Reporter noted the status of the other two pending Appellate Rules items. New Rule 32.1 (concerning unpublished opinions) and amended Rule 25(a)(2)(D) (authorizing local rules to require electronic filing subject to reasonable exceptions) will take effect on December 1, 2006 absent contrary action by Congress. The Reporter noted that Rule 32.1 will take effect December 1 but that subdivision (a) of that Rule would operate on a null set that month because it applies only to the citation of opinions issued on or after January 1, 2007. A judge member asked the reason for the discrepancy; Mr. Rabiej responded that the limitation to opinions issued in 2007 or later was a product of compromise on the floor of the Judicial Conference.

IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

Judge Stewart summarized the genesis of the letter to the Chief Judges of each circuit concerning circuit-specific briefing requirements. The Committee had considered at some length practitioners' concerns about idiosyncratic briefing requirements in the circuits. The FJC

prepared a study summarizing those briefing requirements. The Committee decided not to amend the Appellate Rules in response to those concerns, but instead decided that the Chair of the Committee should write to the Chief Judge of each circuit to express concern over the disparate briefing requirements, to emphasize the need to make each circuit's briefing requirements readily accessible to practitioners, and to urge each circuit to consider whether the circuit's additional briefing requirements are truly necessary. The Committee decided to defer sending the letter until the controversy over Rule 32.1 died down. Accordingly, Judge Stewart sent the letter out this fall. So far, six circuits have responded to the letter. Judge Stewart circulated copies of the responses from the First, Fourth, Tenth, D.C., and Federal Circuits and reported on the oral response from the Fifth Circuit. Judge Stewart observed that the responses spanned a spectrum from the Federal Circuit, which has stated that the likelihood of eliminating any of the listed Federal Circuit rules is "nil," to other circuits that have expressed the intention of considering the matter in the future (for instance, in connection with ongoing local rulemaking efforts or at an upcoming circuit retreat). Judge Stewart wrote a follow-up letter to each of the Chief Judges who responded, thanking them for their response on behalf of their courts and for continuing to consider this issue during future court meetings or retreats as they deemed appropriate.

Professor Coquillette noted the history of the Standing Committee's oversight of local rules. At the time of the 1988 amendments to the Rules Enabling Act, the Judiciary Committee was concerned that local rules had gotten out of hand, and it articulated the principle that such rules were inappropriate unless they could be justified on the basis of variation in relevant local conditions. As to local rules in the district courts, the circuit councils now have responsibility. By contrast, with respect to local rules in the Courts of Appeals, Congress left the task of oversight to the Judicial Conference. Thus, in theory, the Standing Committee has the power to question the propriety of a local appellate rule, to require a response from the relevant Court of Appeals, to hold a hearing on the matter, and, if necessary, to recommend abrogating the rule.

A district judge member stated that he supported the Appellate Rules Committee's decision to take a hortatory approach; local legal cultures vary widely, and forcing nationwide uniformity on all issues would be a Procrustean approach. Mr. Letter observed that as a practical matter an attempt to force the Courts of Appeals to eliminate their briefing requirements would be unsuccessful, and he noted that in a few instances local variation may be appropriate. For example, because the D.C. Circuit deals with so many regulatory issues it makes sense for that court to require a glossary to explain the acronyms used to refer to various agencies. However, Mr. Letter stated that many local appellate briefing requirements do not stem from true variations in local conditions, and he observed that the variation in briefing requirements makes life difficult for national practitioners. A member stated that he agrees with Mr. Letter as a philosophical matter, but he also agrees with Judge Ellis from a pragmatic standpoint. Another member stressed that even if a circuit is unwilling to abandon its idiosyncratic requirements, it would aid practitioners if each circuit were to summarize those requirements; the member also suggested that it might be salutary for a circuit to review other circuits' local requirements with a view to adopting any that merit wider implementation. Judge Stewart noted that the FJC's study

is extremely valuable and could aid the circuits in considering best practices. Professor Coquillette noted that the Standing Committee's main focus has been on local rules that conflict with Rules adopted under the Enabling Act, with statutes, or with the Constitution; apart from such instances of conflict, the Standing Committee has chosen the path of persuasion.

Mr. Letter suggested that Judge Stewart provide closure on this matter by writing a final letter to the Chief Judges of each circuit thanking them for their attention to the briefing requirements, expressing the hope that each circuit will continue to review its additional briefing requirements, and urging each circuit, at a minimum to ensure that practitioners can readily ascertain those requirements. Judge Stewart responded that he would not want to send such a letter before each circuit has had a chance to respond to his initial letter; he observed that some circuits seem likely to take up the question at circuit retreats in the near future. Judge Stewart stated that he would continue to update the Committee about the responses he receives from the circuits and that he would keep the matter on the agenda for the Committee's April 2007 meeting.

V. Discussion Items

A. Item No. 05-05 (FRAP 29(e) — timing of amicus briefs)

Judge Stewart invited Mr. Letter to summarize his research relating to the timing of amicus briefs. At the April 2006 meeting, the Committee had discussed concerns raised by Public Citizen, which points out that when an amicus files a brief in support of an appellee, the interaction of Rules 29(e) and 26(a)(2) may leave the appellant with little or no time to incorporate into its reply brief a response to the amicus's contentions. After that discussion, Mr. Letter had undertaken to consult other entities that frequently file amicus briefs (including state governments), and to report to the Committee at its next meeting.

Mr. Letter summarized the results of his research, which he had also circulated to the Committee by letter dated November 13, 2006. Mr. Letter sought to identify major amicus filers, and his office contacted some 24 appellate practitioners – including three state Solicitors General, other government attorneys, private attorneys, and public interest lawyers – to ask their views on possible amendments to the timing rules in FRAP 29(e). Mr. Letter received ten responses. The respondents unanimously opposed eliminating the "stagger" – i.e., the time lag between the due date for a party's brief and the due date for an amicus who supports that party. Those responding argued that the stagger helps the amicus to avoid duplicating the party's arguments and sometimes helps the amicus decide whether to file at all. Some respondents asserted that briefing tends to be less coordinated in the Courts of Appeals than it is in the Supreme Court, and they also observed that potential amici at the Supreme Court level have less need to see the party's brief because they can see the prior briefing. While no respondents supported eliminating the stagger, some did express concern that the opposing party might

experience a time crunch in preparing its reply brief; accordingly, a few recommended that the Committee extend the deadline for the reply brief.

The Reporter gave a brief overview of the changes in the timing of amicus briefs. Prior to 1998, FRAP 29 required an amicus to file within the time allowed for the brief of the party supported by the amicus. The 1998 amendment to FRAP 29 adopted the 7-day stagger, with the goal of avoiding duplicative arguments. Public Citizen raised concerns about the new timing framework, but after discussion, and investigation by Mr. Letter, the Committee decided not to act on Public Citizen's concerns. FRAP 29 has not been amended since 1998, but the 2002 amendment to FRAP 26(a)'s time-computation provision has affected Rule 29(e)'s operation. Pre-2002, FRAP 29(e)'s 7-day deadlines were computed using a days-are-days approach; post-2002 amendments, those 7-day deadlines are calculated by skipping all intermediate weekends and holidays. In other words, FRAP 29(e)'s deadlines were 7 *calendar* days pre-2002, and are now 7 *business* days. The effective lengthening of those 7-day deadlines has given rise to Public Citizen's current concerns.

The Reporter noted that this question intersects with the issues raised by the Time-Computation Project. If the Project's recommended days-are-days approach is adopted, then short deadlines currently computed as business days will henceforth be computed as calendar days. As discussed later in the meeting, the Appellate Rules Committee's Deadlines Subcommittee has reviewed all such short appellate deadlines to determine whether any of them should be lengthened to offset the change in computation approach. The Deadlines Subcommittee did not take a position on whether FRAP 29(e)'s stagger should be abandoned; but if the stagger is retained, the Deadlines Subcommittee proposes that the stagger remain 7 days (i.e., revert to 7 calendar days).

Mr. Letter noted his impression that Public Citizen would be satisfied if FRAP 29(e)'s deadlines reverted to 7 calendar days. A judge member expressed skepticism about the appellate practitioners' argument that practice in the Courts of Appeals differs significantly from that in the Supreme Court; but the member stated that he would not object to seeing the stagger revert to 7 calendar days. Mr. Letter observed that if timing crunches arise they can be addressed by motion. He also noted that parties should generally be aware ahead of time that an amicus filing is in the offing, because under FRAP 29(a) amici other than certain government entities must obtain party consent or else move for permission to file.

Another member expressed support for eliminating the stagger, because the FRAP should where possible conform to Supreme Court practice; the member stated that it is not that hard for an amicus to coordinate its briefing with that of the party it supports. Mr. Letter noted, however, that this is not the case when the party in question is the Department of Justice: Because the draft usually undergoes revision up until the last minute, the DOJ almost never shares its draft with potential amici in advance. A practitioner member noted that Supreme Court practice differs because the amici have the benefit of a "preview"of the parties' briefs (based on their filings below and regarding certiorari). The member also argued that having adopted the stagger

relatively recently (in 1998), the Committee should follow the principle of "stare decisis" and not alter the rule unless there seems to be a real problem with it. A judge member agreed that the rulemakers should not go back and forth on the issue (though he also found it implausible that the stagger actually eliminates duplicative arguments).

A practitioner member wondered whether it would be worthwhile to consider addressing the "time crunch" by extending the time for the reply brief. Mr. Letter responded that such a solution would be overbroad, because it would prolong the briefing schedule in many cases where it turns out that no amici file briefs. Mr. Fulbruge noted statistics that support this point: During calendar year 2005 in the Fifth Circuit, there were some 125 amicus filings and a total of some 9,000 appeals. Moreover, many of those amicus filings were at the en banc stage rather than during initial briefing.

A judge member proposed that the Committee wait to see what happens with the Time-Computation Project before considering what, if any, changes to make to FRAP 29(e). If the Time-Computation Project goes forward, that will alter the landscape in significant ways. It was proposed that Judge Stewart write to Mr. Wolfman of Public Citizen to state that the Committee, like other advisory committees, is currently considering changes to the time-computation rules, and that the Committee plans to defer further consideration of Public Citizen's proposal until after the time-computation matter is resolved. The proposal was moved and seconded, and carried by voice vote without opposition.

B. Item No. 05-06 (FRAP 4(a)(4)(B)(ii) — amended NOA after favorable or insignificant change to judgment)

The Reporter recapitulated the issue raised by Judge Leval in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). Judge Leval identified ambiguities in FRAP 4(a)(4) as the Rule applies to cases in which a party files a notice of appeal and the district court subsequently alters or amends the judgment. Among other scenarios, Judge Leval raised the possibility that a court might read the Rule to require an appellant to amend a prior notice of appeal after the district court amends the judgment in the appellant's favor. At the April 2006 meeting, the Committee had asked the Reporter to look into the amendment that produced the current language in FRAP 4(a)(4).

The Reporter noted that the current language resulted from the 1998 restyling, but observed that it is useful to go a bit further back, to the 1993 amendments. Prior to 1993, a notice of appeal filed before disposition of a timely post-trial motion had no effect. Lawyers evidently disregarded that fact to their detriment, and the rulemakers decided to address their plight by amending the Rule. The 1993 amendments provided that an initial notice of appeal ripened into effectiveness once the post-trial motions had been resolved. However, if the appellant wished to challenge an alteration or amendment of the judgment, then the appellant had to amend the initial notice of appeal. Specifically, prior to 1998, the Rule provided that "[a]

party intending to challenge *an alteration or amendment of the judgment* shall file a notice, or amended notice, of appeal . . . ." The relevant language was altered during the 1998 restyling, and the current Rule reads in relevant part: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or *a judgment altered or amended* upon such a motion, must file a notice of appeal, or an amended notice of appeal . . . ." It appears that the restyling deliberations did not focus on the fact that the new reference to "a judgment altered or amended" appeared to broaden the scope of the requirement.

With exceptions not relevant here, the 1998 amendments were intended to be stylistic only, so a court ought to conclude that the current language does not require an appellant to amend a prior notice of appeal when all the appellant wishes to do is to challenge aspects of the judgment that are unchanged by the disposition of the post-trial motion. But one might argue that it should not be necessary to research the pre-restyling law in order to determine the meaning of the current Rule. The Reporter noted that the problem introduced by the restyled language could be addressed by amending Rule 4(a)(4)(B)(ii) to read as follows:

> A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or ~~a judgment altered or amended~~ an alteration or amendment of a judgment upon such a motion, must file a notice of appeal, or an amended notice of appeal–in compliance with Rule 3(c)–within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

One judge member noted that cautious litigants would avoid the trap posed by the current rule by taking the precaution of filing an amended notice of appeal after the disposition of the post-trial motions; another questioned whether the scenarios described in the *Sorensen* opinion have ever actually arisen. An attorney member, however, noted that the restyling inadvertently produced what does appear to be a problem in the current Rule. Judge Stewart noted that this inadvertent change provides a cautionary lesson concerning the need for care in adopting changes for reasons of style. A judge member conceded that the proposed fix is a straightforward one, but questioned the need for an amendment when there are other, more pressing, matters to address. An attorney member moved to adopt the amendment described by the Reporter; the motion was seconded, and carried by a vote of five to four.

C. Item No. 06-01 (FRAP 26(a) — time-computation template) & Item No. 06-02 (adjust deadlines to reflect time-computation changes)

Judge Stewart noted that at its June 2006 meeting the Standing Committee had extensively discussed the Time-Computation Project, giving particular attention to the question of statutory deadlines. Judge Stewart noted that at the Appellate Rules Committee's April meeting he had appointed a Deadlines Subcommittee to consider short appellate deadlines that would be affected by the proposed change in time-computation approach. The Deadlines Subcommittee is chaired by Judge Sutton and includes Ms. Mahoney, Mr. Levy and Mr. Letter;

Professor Struve serves as its reporter. Judge Stewart reported that the Time-Computation Project is moving forward. The goal for the present meeting, he stated, was to discuss where the project stands and to consider the report by the Deadlines Subcommittee. This Committee and the other advisory committees will report to the Standing Committee at its January meeting and receive feedback at that time. Assuming that the project goes forward, this Committee should plan to consider formal proposals (concerning the time-computation template and any related changes to appellate deadlines) at the April 2007 meeting, with a view to requesting action by the Standing Committee at its June 2007 meeting.

Judge Stewart invited the Reporter to summarize developments in the overall Time-Computation Project. The Reporter noted that in addition to feedback on the current version of the time-computation template, the Time-Computation Subcommittee is interested in receiving feedback on several issues. One concerns after-hours filing. Subdivision (a)(4) of the current template draft explicitly refers to the possibility of filing after hours by personal delivery to a court official. This possibility arises from cases interpreting 28 U.S.C. § 452, which provides that federal courts "shall be deemed always open" for the purpose, inter alia, of filing papers. The problem with the current draft is that it highlights the possibility of in-person after-hours filing, and thereby increases the likelihood that litigants will seek to avail themselves of that method – a prospect that raises obvious security concerns. The Civil Rules Committee has proposed alternative language that omits any reference to in-person after-hours filing; if this language were adopted, the Note could explain that the Rule text is not meant to alter the caselaw that has developed under Section 452. Mr. Fulbruge expressed strong agreement with the view that the Rule text should not refer to after-hours filing; such a reference could encourage such filings by pro se litigants and could raise security concerns.

The Reporter noted that a second issue is whether the time-computation template should attempt to define what "inaccessibility" of the clerk's office means for the electronic filer. Local rules take a variety of approaches to e-filing untimeliness that results from court-end and user-end technical failures. The template could leave the question to be dealt with by those local rules. Alternatively, the template could define inaccessibility for purposes of electronic filing. It might provide, for example, that the clerk's office is inaccessible in the event of court-end system failure, but not in the event of user-end technical failure; under that approach, court-end technical failure would extend deadlines by operation of subdivision (a), but user-end technical failure would only provide a ground for discretionary relief (if appropriate) under subdivision (b). A judge member broadened the discussion by asking why, in the era of electronic filing, the clerk's office should ever be regarded as closed. A district judge member responded that there will still be those who make paper filings, and serious security concerns would arise if one were to allow members of the public to enter the courthouse on weekends or to use drop boxes. He recalled that his court decided to close its drop box and close to the public on weekends due to security concerns. Mr. Fulbruge noted that the appellate courts that are going to go onto CM/ECF are supposed to do so during 2007; he observed that consideration of the proposed time-computation changes should take account of this fact.

The third issue noted by the Reporter is the question of whether the template should deal with dates certain. Currently the template only addresses deadlines that must be computed, and not deadlines set by picking a certain date. A litigator has pointed out to the Subcommittee that there is a circuit split over whether the current time-computation rules cover the interpretation of date-certain deadlines. It would be relatively straightforward to draft a subdivision addressing date-certain deadlines; the question is whether members feel that such a provision is needed. A member expressed the view that the time-computation rules need not address date-certain deadlines; rather, that question can be left to the courts. A district judge member agreed that there is no need for the rule to address such deadlines.

Mr. Fulbruge noted that the Fifth Circuit recently had to address the 72-hour deadline set by the Justice For All Act, and stated that the deadline had proven problematic in application.

Mr. Fulbruge also raised questions about the inclusion of state holidays in the template definition of legal holiday. Members noted that Rule 26(a)'s definition would differ somewhat from Rule 6(a)'s definition because, in the appellate context, it makes sense to take account of both the state in which the main Court of Appeals Clerk's Office is and also the state within which sits the district court from which the appeal is taken.

Judge Stewart invited Judge Sutton to present the report of the Deadlines Subcommittee. Judge Sutton noted that the report encompassed two main issues: one of mechanics (which short appellate deadlines should be adjusted assuming the time-computation project goes forward) and one of policy (concerning the project's approach to the question of statutory deadlines and the project's overall advisability). Judge Sutton first addressed the Subcommittee's conclusions on the mechanics question. The Deadlines Subcommittee was aware of the Standing Committee's preference for a presumption in favor of 7-day increments, and the Subcommittee did employ that presumption; but Judge Sutton noted that it is a rebuttable presumption and in certain instances the Subcommittee deviated from that presumption.

Judge Sutton next reviewed the question of statutory deadlines; he noted that the problems raised in connection with that issue had prompted the Subcommittee members to wonder whether the project is worth doing. Judge Sutton reported Subcommittee members' views that there doesn't seem to be a problem with the current time-computation approach, and that it may be better to take a wait-and-see approach to time-computation given the advent of electronic filing. Judge Sutton also noted that the two main options for dealing with statutory deadlines – supersession and legislation – seem to have disadvantages. He observed that if legislation is the solution of choice, it will be important to coordinate the adoption and effective dates of the legislative and rules packages.

Professor Coquillette noted that the Standing Committee's working assumption, at this point, is that the rulemakers will present Congress with a package of conforming amendments. An attorney member of the Deadlines Subcommittee expressed the view that the current time-computation system works quite well, but also stated that, in the end, the Appellate Rules should

follow the time-computation approach taken in the courts below. A district judge member of the Committee agreed with both these points. Professor Coquillette recalled that the time-computation project was initiated because the ABA's Litigation Section had expressed the view that the current time-computation system is a mess. Professor Coquillette stated that in his view the main issue facing the Project is whether the rulemakers ought to defer the Project to see how electronic filing plays out. Mr. Letter echoed the views of the other members of the Deadlines Subcommittee; he stated that the proposed days-are-days approach is a terrible idea, but that the Appellate Rules should follow the approach taken in the courts below. Mr. Letter suggested that Judge Stewart relay to Judge Kravitz that the Committee will follow the approach that other advisory committees decide to take but that the Committee views the days-are-days approach as a bad idea. Mr. Fulbruge, however, observed that both members of his staff and pro se litigants have trouble computing time under the current system. Judge Sutton offered two observations: First, he is skeptical whether the current system is really a problem. Second, he questioned whether the rulemakers should undertake at the present time a project that requires so much coordination with Congress, when it is likely that the rulemakers will need to go back to Congress with additional proposals relating to electronic filing. A Committee member seconded the view that the Committee should express skepticism concerning the project; he pointed out that practitioners understand the current system.

Judge Stewart noted that he would provide feedback on the Project at the Standing Committee meeting. Judge Stewart also promised that an update on the time-computation issues would be circulated well in advance of the April 2007 meeting so as to give members an ample opportunity to consider them.

D. Item No. 06-03 (new FRAP 28(g) — pro se filings by represented parties)

Judge Stewart invited Mr. Letter to review the DOJ's proposal concerning "pro se" filings by represented parties. At the April 2006 meeting, Mr. Letter had undertaken to investigate the approach to this question in the Supreme Court; accordingly, he began by reporting the results of that investigation. The Supreme Court sometimes receives both a certiorari petition written by counsel and a "pro se" certiorari petition; the Court's usual practice is to send the "pro se" petition to the attorney and inquire which of the two briefs the Court should file. Once the Court has granted certiorari, the merits brief is always filed by an attorney. Having reported these results, Mr. Letter stated that the DOJ would like to table its proposal. The motion was made to table the proposal; the motion was seconded, and passed by voice vote.

E. Items Awaiting Initial Discussion

1. Item No. 06-04 (FRAP 29 – amicus briefs – disclosure of authorship or monetary contribution)

The Reporter described the proposal by Chief Judge Michel and Judge Dyk of the Federal Circuit to amend the FRAP to add a disclosure requirement for amicus briefs. The proposed provision is based upon Supreme Court Rule 37.6, which requires amicus briefs to indicate whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members and its counsel) who contributed monetarily to the brief's preparation or submission. (Supreme Court Rule 37.6 excludes from its disclosure requirement amicus briefs filed by various government entities.) No circuit currently has such a disclosure rule. The rule might deter the practice of ghost-writing amicus briefs in order to circumvent page limits or present an appearance of broad support for a party's position. In a circuit that takes a restrictive approach to motions for leave to file an amicus brief (i.e., the Seventh Circuit), the disclosures could assist the court in determining whether to grant the motion. In all circuits, the disclosures could help the court to assess what weight to give to amicus filings. And adopting such a rule would promote uniformity by conforming the FRAP to the Supreme Court Rules. On the other hand, the evidence of ghost-writing is anecdotal, so the need for the rule may not be clear-cut. And adopting the rule would raise questions concerning how to apply it in borderline cases. However, it is notable that Supreme Court Rule 37.6 was adopted in 1997 and there appear to be no complaints about its operation.

An attorney member stated that clients often ask whether they can contribute money toward the preparation of an amicus brief; the member tells the clients not to do so, citing Supreme Court Rule 37.6 by analogy. This member noted that the proposed rule would provide an answer to a frequently asked question. Another member said that the proposal is a sensible one, and he noted that the general counsel of a very large trade association has told him that ghost-writing of amicus briefs is a very real problem. A member stated that if the Committee proceeds with this proposal, the new provision should track the text of the Supreme Court rule. Professor Coquillette noted that the disclosure, when it denies any party or other involvement in the amicus' brief, actually helps the brief to seem more persuasive. An attorney member noted that no court of appeals has yet adopted such a disclosure requirement, and he wondered whether the proposal is ripe for adoption in the FRAP. Another member countered that the Committee should not encourage local variations. A judge member responded that the need for a disclosure rule might be greater in the Federal Circuit than in other circuits. He also observed that in some instances a party can evade the disclosure rule by becoming a member of the amicus; this would be the case, for instance, when the amicus is a trade association with a membership formed of companies of the litigant's type. An attorney member responded that this would not always be true, because not all parties would be eligible for membership in the relevant amicus. Judge Stewart observed that judges have varying views of the usefulness of amicus briefs. A district judge member stated that it is very important to require disclosure of whether counsel for a party authored the amicus brief.

Mr. Letter observed that he would be guided, in his view of this proposal, by what *judges* think of it, since judges are the intended audience for amicus briefs. Judge Stewart observed that some judges would probably find the disclosure rule useful. A judge member voiced support for the rule, noting that parties frequently solicit an amicus brief and then try to impart to that brief

an aura of objectivity. Another judge responded that one can discern who is behind an amicus brief by reading it. A member asked whether adoption of the proposed rule could usefully preempt the proliferation of local rules on the subject. A judge member suggested deferring consideration of the proposal; another judge member observed that since the rule may be more useful in the Federal Circuit, it makes sense to let that circuit try out the rule. Judge Stewart expressed reluctance to encourage adoption of a local circuit rule on the topic; and he questioned whether delaying consideration of the proposal would enable the Committee to shed any new light on the proposal.

A member moved to adopt the proposed rule; the motion was seconded, and passed by a vote of seven to one. Mr. Rabiej noted that the Committee can follow the practice of requesting publication of the proposed rule at a deferred date, so that consideration of a number of proposals can be bundled together.

2. Item No. 06-05 (Statement of issues to be raised on appeal)

The Reporter summarized the proposal by Judge Michael Baylson of the Eastern District of Pennsylvania for a rule modeled on Pennsylvania Rule of Appellate Procedure 1925(b). The proposed rule would permit the district judge to require the appellant to file a statement of issues on appeal within a short time after filing the notice of appeal. That, in turn, would enable the district judge to write an opinion responding specifically to the arguments that will be the focus of the appeal. The Pennsylvania provision is enforced by a waiver rule, and has been controversial (especially because of the strictness with which the waiver rule has been applied); a proposal to alter some features of the Pennsylvania rule was recently published for comment. Some attorneys argue that it is hard for the appellate lawyer to formulate the issues so quickly; the appellate lawyer may not have litigated the case below, and the transcript may not yet be available. Supporters of the proposed rule argue that it could enable the district court to point out key issues to the Court of Appeals; that it may avoid the need for remands; and that it enables the district judge to address issues while they are fresh in his or her mind. On the other hand, the rule could pose a hardship for counsel, could make the trial judge seem less neutral, and might blur the transition from trial to appellate jurisdiction. One possible alternative to the proposed rule might be a requirement that briefs on appeal be provided to the district judge as well as the parties and the Court of Appeals.

A judge member reacted against the proposal, noting that district judges are very busy and that such a rule would lead to debates between the district judge and the appellant. Another judge member observed that he could understand the impetus for the rule, in the sense that it can be frustrating for a district judge when the court of appeals seems to have reviewed on appeal an entirely different case from the one that was litigated at the trial level; but the member stated that he nonetheless opposed the proposal. A third judge member stated opposition to the proposal. By consensus, the proposal was removed from the study agenda.

3. Item No. 06-06 (FRAP 4(a)(1)(B) and 40(a)(1) – extend time for NOA and petitions for rehearing in cases involving state-government litigants)

The Reporter described the proposal by William Thro, the Virginia State Solicitor General, to amend FRAP 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. The proposal is supported by Mr. Thro's counterparts in 33 other states, Puerto Rico, and the District of Columbia. The proponents argue that states, like the federal government, need time to review the merits prior to deciding whether to appeal or to request rehearing. These choices may involve complex issues and multiple decisionmakers. It could also be argued that states should enjoy parity with the federal government. However, adopting the new rule would impose some costs. The bench and bar would have to adapt to the amendment; and, in the case of the time to take an appeal, the proposal would require conforming legislation to amend 28 U.S.C. § 2107. In affected cases, the time to take an appeal would double, and the time before the court's mandate issued (once the appeal was decided) would more than double. The universe of cases to which the amendments would apply is a large one. If the Committee pursues these amendments, it will confront a question of scope: Should the amendments extend beyond states, and if so, to what other types of government entities? The proposed amendments would also need to be coordinated with an already-pending proposal to amend FRAP 4(a)(1)(B) and 40(a)(1); the pending proposal clarifies the rules' application to individual-capacity suits against federal officers or employees.

A member stated support for the proposal and noted that in his view the extension of the time to seek rehearing was the more important of the two changes. Mr. Fulbruge noted that he had sent a note to the Clerks of the various Courts of Appeals to seek their views on the proposal. Mr. Fulbruge noted that the figures provided in Mr. Thro's October 31 letter – showing relatively modest numbers of appeals taken by various state-government litigants – failed to give a sense of the likely impact of the proposal: Because the states win the overwhelming majority of habeas and Section 1983 cases, the great majority of appeals in such cases will be taken by the *non-state* party. Marcia Waldron, the Third Circuit Clerk, pointed out that the proposed amendments would raise definitional problems, because they would extend deadlines in cases involving state-government litigants but not local-government litigants, and because the status of the government litigant in a given type of case may vary state-to-state. Thus, for example, the respondent in a state prisoner's habeas case may or may not be a state official.

Professor Coquillette noted that the proposal raises a variety of scope questions, and if the Committee were to proceed with the proposal it would need to justify its decisions concerning scope. A member questioned why the rulemakers should proceed with Mr. Thro's proposal if the appeal time is set by statute. Judge Stewart queried whether a state that needs additional time, under the current system, couldn't seek additional time from the court. A judge member expressed ambivalence concerning the proposal. He could understand why state solicitors general might want states treated equally to federal litigants, and he noted that in some instances

the extra time would assist a state solicitor general in persuading the relevant agencies that it was better not to take an appeal. On the other hand, the member expressed curiosity concerning the fact that the New York and Illinois solicitors general had not joined the proposal; he would want to know their thoughts. Mr. Letter agreed that the extra time would be useful in cases where the state solicitor general wants to persuade the relevant decisionmakers not to take the appeal. As to the extension of the time to seek rehearing, Mr. Letter observed that if the DOJ is unable to decide within the allotted time whether to seek rehearing, it will file the motion as a protective measure – which increases the burden on the court. Another member observed that the symbolism of the proposed amendments would be important, in that they treat states with parity to the federal government.

A member suggested that the proposal might be unripe for a vote. Mr. Letter agreed that it would be useful to take additional time to study the proposal. Mr. Rabiej noted that because legislation would be sought concerning 28 U.S.C. § 2107, it would be important to consider whether there are any groups that would oppose the proposal. Professor Coquillette observed that during the consideration of the proposed legislation, groups excluded from the scope of the Committee's proposal could seek inclusion. A judge member suggested that the Committee consult Richard Ruda, the chief counsel of the State and Local Legal Center. By consensus, the matter was left on the study agenda. Judge Stewart appointed an informal subcommittee to consider the proposal. The subcommittee will be chaired by Dean McAllister and will also include Mr. Letter and Mr. Levy.

VI. New Business

Judge Stewart invited the Reporter and Mr. Rabiej to update the Committee on a proposal that is making its way through the Criminal Rules Committee. The proposal would amend Rule 11 in the sets of rules governing 2254 and 2255 proceedings, and would necessitate conforming changes to the Appellate Rules. The proposal will likely reach a formal vote during the Criminal Rules Committee's spring meeting. The proposed conforming changes will thus come before the Appellate Rules Committee at its spring meeting.

Mr. Levy suggested that it would be useful to consider amending the FRAP to provide a rule governing amicus briefs with respect to rehearing en banc. Mr. Letter noted that the Ninth Circuit is currently considering a proposed local rule on this issue; Mr. Levy noted that the Eleventh Circuit is also considering such a proposal.

Mr. Letter sought input on whether it would be useful for the Committee to consider addressing a problem that the DOJ has encountered in the Ninth Circuit. The problem arose when the government's appeal in a *Bivens* action was dismissed by a motions panel. The government wished to seek rehearing or rehearing en banc, and was told that its only recourse was to seek reconsideration from the motions panel or to persuade the motions panel to submit the matter to the en banc Court. Mr. Fulbruge noted that while a purely procedural matter would

stay with the motions panel, when an appeal is dismissed that is a merits determination and the would-be appellant should be able to seek en banc rehearing.

VII. Date and Location of Spring 2007 Meeting

The spring 2007 meeting will take place on April 26 and 27, 2007 at a location to be announced.

VIII. Adjournment

The Committee adjourned at 1:00 p.m.

Respectfully submitted,

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Catherine T. Struve
Reporter

6A-6B

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

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JERRY E. SMITH
EVIDENCE RULES

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

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **December 18, 2006**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met by teleconference on September 5, 2006 and in person on October 26-27, 2006, on Amelia Island, Florida, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of the September meeting and the Draft Minutes of the October meeting are attached.

This report does not present any action items. It brings to the Standing Committee's attention a number of information items, most notably the Committee's discussion on two matters referred to it by the Standing Committee: the Committee's proposed amendment to Rule 32(h) and Rule 49.1's exemptions from redaction. Also noted are the Committee's discussion of several proposed amendments that will likely come at a later time to the Standing Committee: (1) an amendment to Rule 16 requiring the prosecution to disclose exculpatory and impeachment information; (2) amendments to the rules governing §§ 2254 and 2255 cases and new Rule 37 to regularize collateral review; (3) amendments to the criminal forfeiture rules; and (4) amendments to Rule 41 to adapt it to searches and seizures of electronically stored information. Finally, the Committee heard from Judge Kravitz and from its subcommittee regarding the Time Computation project.

II. Information Items

A. Items Referred by the Standing Committee

At its June 2006 meeting, the Standing Committee referred two matters to the Criminal Rules Committee for additional discussion. The Rules Committee took up these issues at its October meeting.

1. Rule 32(h). Notice Regarding Non-Guideline Sentencing Factors

At its June meeting the Standing Committee voted to return the proposed amendment to Rule 32(h) to the Committee. The amendment was part of the package of rules designed to conform the Criminal Rules to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Currently, Rule 32(h) requires notice that the court is considering departing from the Guidelines on the basis of factors not identified in the presentence report or prehearing submissions. The proposed amendment stated that the court must provide the same notice when considering a non-guideline sentence based upon a factor in 18 U.S.C. § 3553(a) that was not identified in the presentence report or prehearing submissions. The purpose of the proposed amendment was to avoid unfair surprise and give the parties an opportunity to be heard. Some members of the Standing Committee expressed the view that this was an evolving area of the law that was not yet ripe for codification in a rule. Others were concerned that the amendment would inappropriately limit judicial discretion, possibly requiring adjournments and delays in many cases. Finally, members questioned whether *Booker* had undermined the basis for the current notice requirement in Rule 32(h), because there should be no expectation of a guideline sentence absent notice that some other factor will be taken into account.

After extended discussion, the Committee voted 7 to 4 to reexamine the proposed amendment of Rule 32(h). The reexamination will take account of a number of issues. First, the Committee will review the cases defining the relationship between the Guidelines and other sentencing factors. Committee members noted that the circuits were not in accord on this issue, which provides the conceptual foundation for Rule 32's notice requirement. (After the meeting, the Supreme Court granted certiorari in two cases that may resolve some of the issues.) Second, the Committee will consider the lower court decisions on the related questions whether either due process or the current text of Rule 32(h) require notice to be given if the court is considering non guideline sentencing factors that have not already been identified. Although these decisions address the question of whether notice is already required – not whether the rule should be amended to add a notice requirement – their analysis may influence the Committee. Third, the Committee will address the question of what would constitute adequate notice. At both the Standing Committee and the Advisory Committee, concern was expressed that adding a notice requirement would unduly tie the court's hands and prolong sentencing, perhaps requiring many sentencing hearings to be adjourned. The Committee will canvass the cases applying the current notice requirement under Rule 32(h) to determine what has been deemed adequate notice, and under what circumstances sentencing must be adjourned to provide the parties more time to respond to issues raised by the

court. Finally, the Committee will review the cases brought to its attention by the Federal Defenders, who support the amendment to Rule 32(h) and wrote to the Committee asking that it be reconsidered.

2. Rule 49.1. Redaction of the Grand Jury Foreperson's Name on the Indictment; Redaction of Arrest and Search Warrants

When the Standing Committee approved Rule 49.1, which implements the E-Government Act of 2002, it noted two concerns that had been raised by the Court Administration and Case Management Committee (CACM). CACM suggested that the name of the grand jury foreperson should be redacted from indictments filed with the court and that identifying personal information should be redacted from search and arrest warrants filed with the court. The Standing Committee did not wish to delay the implementation of the privacy rules to consider the issues raised by CACM, but it requested that the Committee address these issues.

The Committee first discussed the question whether the grand jury foreperson's name should be redacted from indictments in order to comply with CACM's general policy of protecting jurors' safety and privacy by not disclosing their identities.

A redaction requirement would not fit easily within the current structure of the criminal rules; they provide affirmatively that the defendant has a right to see the indictment, which includes the foreperson's signature:

(1) Rule 6(c) requires that the grand jury foreperson sign each indictment;

(2) Rule 6(f) requires that the indictment be returned in open court; and

(3) Rule 10(a)(1) requires that the defendant be given a copy of the indictment.

The current rules reflect the indictment's character as the charging document that initiates the prosecution, and the grand jury's constitutional role as the charging body.

Given the indictment's special character and the interlocking rules that presently provide defendants with the indictment, including the grand jury foreperson's signature, the Committee sought to determine whether there was any indication that disclosure had resulted in problems for any forepersons. At the Committee's request, the Department of Justice reviewed its own records and surveyed the U.S. Attorneys' Offices and the U.S. Marshal's Service. The information garnered by the Department supports the view that the present rule of disclosure has not led to difficulties. The Marshal's Service, which is responsible for juror security, tracks reports of juror-related "threats or inappropriate contacts," without distinguishing between grand and petit jurors. The Marshal's Service reported only one incident nationwide in FY2003, two in FY 2004, and none in FY2005. There were 18 incidents reported in FY2006, but 16 of them concerned a single case in Nevada.

In light of the fact that it would be difficult to modify current practice to redact the foreperson's name from the indictment, the Advisory Committee voted, with one dissent, not to amend Rule 49.1 to require redaction of the grand jury foreperson's name. There was no indication of a problem under the current rule, and no information suggesting that electronic filing of the indictment would create problems. In general, the main source of threats to jurors is the defendant, who already has access to the foreperson's name under the current rule. In any case in which there is a special concern, Rule 49.1(e) authorizes the court to order redaction not otherwise required by the rule.

The Committee then turned to the question of arrest and search warrants, which are exempt from the redaction requirement under Rule 49.1(b)(8). These documents often contain information such as an individual's home address or a financial-account number that would otherwise be subject to redaction under Rule 49.1(a). CACM expressed the view that the exemption from redaction should be made only on a case-by-case basis by means of a protective order.

The Department of Justice took the position that the personal information in a search warrant is essential to the instrument, and other committee members expressed the view that there is a public interest in awareness of government activity, including who has been arrested and what locations have been searched. Discussion focused on the value of the unredacted information to the defense and the public, and the feasibility of redaction once a warrant has been executed. Additionally, the Committee noted that arrest and search warrants may also be exempt from redaction under another provision of Rule 49.1, subdivision (b)(7), which exempts "a court filing that is related to a criminal matter and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case."

The Committee decided that the issue warranted further research before its next meeting.

A. Other Information Items

1. Consideration of an Amendment to Rule 16 Concerning Disclosure of Exculpatory Evidence

On September 5 the Committee met by teleconference in a specially called meeting to continue its work on a proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. It took the matter up in a teleconference in order to permit two members of the Committee who had taken a leading role in the work on the amendment, and whose terms were ending, to participate in the Advisory Committee's deliberations.

The proposal has a long history running back to 2003. It has been supported by outside groups, such as the American Academy of Trial Lawyers, but strongly opposed by the Department of Justice, which has consistently opposed the proposal, believing it to be unnecessary, and expressing particular concern about pretrial disclosure of the identity of prosecution witnesses.

While participating fully in efforts to draft the language of a proposed amendment, the Department also undertook efforts to develop a revision of the United States Attorneys' Manual (USAM) regarding the government's disclosure obligations that might serve as an alternative to an amendment to Rule 16. The Department presented a first draft of a proposed revision to the Rule 16 subcommittee in early 2006, received comments, and submitted revised drafts for discussion at the Committee's meetings in April and September 2006.

In September the Committee discussed at length the draft amendment to the USAM (which was in nearly final form) and the Department's proposal that it serve as an alternative to a rule change. Members applauded the Department for making substantial improvements in its draft policy, but ultimately concluded that the internal guideline was not a complete substitute for the proposed amendment to the Criminal Rules. Concern focused on the inclusion in the draft policy of subjective language limiting the obligation to disclose impeachment materials to information the prosecutor sees as "significant" or "substantial." There was also concern that the policy was limited to prosecutors, and did not alter or supercede the narrower *Giglio* policy applicable to investigators and other government agencies (though the Department suggested that it intended later to review that policy). Finally, there was a recognition that the USAM provides only internal guidance, and is not judicially enforceable. There was a suggestion that consideration of a rule should be deferred to see if the USAM amendment would be a sufficient prophylactic without any rule change. Supporters of the amendment emphasized that it is, by definition, difficult to identify cases in which the government did not disclose exculpatory or impeachment material. Since such cases ordinarily come to light only when the defense learns of the information by chance, supporters of a rule change felt it would not be possible to determine with any precision how effective the USAM by itself would be.

The Committee voted 8 to 4 during the teleconference to approve the amendment to Rule 16 and forward it to the Standing Committee. Discussion revealed, however, some concerns regarding the draft committee note. At its October meeting the Committee considered adding language to the note discussing the effect of the amendment on direct appeals or collateral motions, issues that had come up repeatedly in discussions of the proposed amendment. Ultimately, the Committee declined to adopt the proposed language.

The Committee plans to submit the proposed amendment to Rule 16 and the accompanying committee note at the June meeting of the Standing Committee, along with a detailed discussion of the history of the amendment's consideration, justifications for the amendment, a review of comparable state provisions and local rules, and other related material. It is anticipated that the Department of Justice will also submit additional material at that time.

2. Other Information Items.

The Committee now has under consideration several issues likely to yield proposals that will be brought to the Standing Committee.

A subcommittee has been reviewing proposals by the Department of Justice to amend the rules of criminal procedure to restrict the use of ancient writs, and to amend the rules governing actions under Sections 2254 and 2255 by prescribing the time for motions for reconsideration in those actions. At the October meeting the subcommittee presented a draft of new Rule 37 as well as parallel amendments to the rules governing actions under sections 2254 and 2255. Draft Rule 37 would (1) provide that the writ of coram nobis is available only to persons not in custody, (2) subject coram nobis to timing limitations similar to those applicable to habeas actions, and (3) abolish all of the other ancient writs (coram vobis, audita querela, bills of review, and bills in the nature of bills of review). Much of the discussion at the Advisory Committee's October meeting focused on the proposal, modeled on Civil Rule 60(b), to abolish the other ancient writs. In response to the question how the Civil or Criminal Rules could abolish the ancient writs, Professor Coquillette observed that this was a major concern of his, since it could shift the balance of powers between the executive and judiciary. Professor Coquillette advised that he and Professor Cooper were researching these issues and would report their findings. The Committee voted 8 to 4 to have the subcommittee continue work on these proposals for reconsideration at the April 2007 meeting. The Committee will coordinate this effort with Professors Coquillette and Cooper.

A subcommittee is reviewing the provisions of Rule 41 dealing with search warrants for electronically stored information. A full-day tutorial program developed by the Department of Justice for this subcommittee was held to enhance the members' understanding of the technical issues. The program was extremely helpful and is serving as the impetus for the development of a shorter program that will be made available to judges through the Federal Judicial Center.

A subcommittee is reviewing proposals from the Department of Justice for amendments to the rules governing criminal forfeiture. Some of the proposals are purely clarifications of the provisions, which were substantially overhauled in 2000; others raise policy issues.

Another subcommittee is working on matters relating to the time computation project, reviewing the deadlines in the Criminal Rules and determining which, if any, should be extended if the new template's "days are days" approach is adopted. These issues were discussed at the October meeting, in which Judge Kravitz participated by telephone.

Two other matters were brought before the Committee for initial discussion and will be on the agenda for future meetings. First, the Department of Justice is seeking to amend Rule 15 in order to permit the deposition of a witness outside the physical presence of the defendant under limited circumstances. Second, the Federal Magistrate Judges Board supports amending the rules to establish a procedure for issuing a warrant or a summons when a defendant violates a condition of probation or supervised release.

6-C

ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

September 5, 2006 - Special Session
Teleconference

I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in special session by teleconference on September 5, 2006. The following members participated:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Professor Sara Sun Beale, Reporter

Also participating were:

Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Benton J. Campbell, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Counsel, United States Department of Justice
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office

Judge Bucklew began by noting that this special session was convened strictly to discuss the Department of Justice's proposed revision to the United States Attorneys' Manual on disclosure of exculpatory and impeaching information and to decide whether, given the proposal, the committee should still forward the draft Rule 16 amendment to the Standing Committee for

publication. She recalled that the advisory committee had voted last April to postpone further consideration of the matter to afford the Department time to finish revising the Manual, but to revisit the issue in a special session sometime before September 30, 2006, to allow two members who had spent considerable time on this issue to participate before the end of their tenures. After describing the written materials distributed electronically in advance of the meeting, Judge Bucklew invited the Department to make an opening oral statement, to be followed by questions, comments, and, finally, a committee vote.

II. DISCUSSION AND VOTE

Ms. Fisher reported that the Department had worked to improve the proposed Manual revision since the April meeting. She said that Mr. Fiske had met with her, Mr. Campbell, and Mr. Wroblewski to explore ways of addressing the concerns raised, and the Department was able to accommodate many, though not all, of them. Ms. Fisher said that the Manual revision had received final approval from all relevant Department officials, including Deputy Attorney General Paul McNulty, and would go into effect. She called the new Manual section real progress, noting that it exceeded the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Section D.4. was added, she said, to require supervisory approval before prosecutors could delay for any reason the disclosure of impeachment or exculpatory information. Also, following such supervisory approval, the defendant had to be notified. Ms. Fisher noted that the policy applied to the sentencing as well as the guilt-innocence phases. Although the Manual revision might not be everything that Mr. Fiske and others wanted, she said, it constituted a substantial step in the right direction.

Judge Wolf requested clarification of the current status of the Manual revision. Ms. Fisher replied that it had been fully approved, would be implemented, and could be added to the Manual as soon as tomorrow. The reason that it had not already been added, she said, was in case some last-minute wording adjustments were needed because of the telephone conference with the Committee. Judge Wolf inquired whether the Department saw any substantive differences between the proposed Manual revision and the draft Rule 16 amendment. Ms. Fisher replied that certain language differences obviously remained, particularly with respect to disclosure of impeachment evidence. Judge Wolf said that, even if the proposed provisions were identical, the fundamental question was whether the policy on disclosure of exculpatory and impeaching information should be solely an internal Department matter or should also be included in a rule.

Mr. Goldberg inquired whether the Manual revision was still being offered strictly as an alternative to the proposed Rule 16 amendment or whether it would go into effect regardless. Ms. Fisher stated that it was both her understanding and the Deputy Attorney General's intention that the Manual revision on exculpatory and impeaching information would go into effect following the current telephone call even if the proposed rule change were voted out of committee. She added, though, that if that occurred, the Department would continue its opposition to the Rule 16 amendment when the issue is taken up by the Standing Committee.

Returning to an earlier topic, Mr. McNamara inquired whether there were not differences between the Manual revision and the draft rule amendment with respect to materiality. Mr. Campbell said that materiality had been "eliminated as the construct," but acknowledged that differences between the two provisions remained. Judge Wolf voiced concern that prosecutors might find the phrase "make the difference between guilt and innocence" in part C of the Manual provision confusing, as it appeared to be stricter than the materiality requirement in *Brady* and *Kyles v. Whitley*, 514 U.S. 419 (1995). Ms. Fisher said that she considered the comment helpful.

Judge Jones inquired whether proposed Manual descriptions of prosecutorial obligations using the term "must" differed in meaning from instances where "should" appeared instead. Ms. Fisher said that this was merely a style issue involving how obligations are described elsewhere in the Manual, but that if this issue proved significant enough to change the committee dynamic, the Department could look at it more closely, because no difference in meaning was intended.

Following the questions period, Judge Bucklew offered each member in turn an opportunity to comment, beginning with either Mr. Fiske or Mr. Goldberg.

Mr. Fiske reported having had several conversations with Ms. Fisher, Mr. Campbell, and Mr. Wroblewski in search of an acceptable solution, and he applauded their conscientious efforts in pursuing what he considered an extremely worthwhile and productive process. The Department had significantly improved the language of the proposed Manual revision, he said, particularly with respect to the obligation to disclose exculpatory information. The revised language would eliminate any subjective analysis by the prosecutor and require prosecutors to disclose any information — bar none — that was inconsistent with any element of a crime. The biggest remaining problem, though, he said, was the proposed inclusion of the qualifier "substantial" and "significant" in the Manual section on disclosure of impeaching information, which creates the same kind of issue as the materiality element by calling for a subjective assessment by the prosecutor. Also, unlike a rule, a Manual provision would be unenforceable, Mr. Fiske noted.

Following the committee's April 2006 meeting, Mr. Fiske said, he had commented to Mr. Campbell that the Manual provision could only serve as an acceptable substitute for a Rule 16 amendment if it were made as effective as a rule. In other words, he explained, it could not allow any subjective assessment by the prosecutor, and it would have to be functionally enforceable by, for instance, possibly requiring prosecutors to affirm to the court at some point during the discovery stage that they had fully complied with their Manual obligations to disclose exculpatory or impeaching information. Mr. Fiske said that the latest draft of the Manual provision fell short of satisfying those two requirements and was therefore not an adequate substitute for the draft Rule 16 amendment. Consequently, he would vote to go ahead with the Rule 16 amendment.

Mr. Goldberg agreed. He characterized the Manual proposal as a noble effort, but said that it would defeat what the draft Rule 16 amendment was designed to achieve. He noted that

the proposed Manual revision disclaims supersession of those sections of the Manual that discuss *Giglio*, thereby retaining the materiality element. He said that prosecutorial subjectivity also lived on in the "substantial doubt" and "significant bearing" phrases used in the Manual revision.

Judge Tallman said that he favored an incremental approach. He applauded the Department's recent changes to the proposed Manual revision. As a former criminal defense attorney, he said, he understood the points made in support of the rule. But he recommended that the committee defer consideration of a Rule 16 amendment until the impact of the Department's proposed revision to the Manual could be assessed. He added that he would not vote for the rule amendment if the Department intended to oppose it at the Standing Committee.

Judge Bartle said he had no comments.

Judge Wolf said that, although the recent changes to the proposed Manual revision represented great progress, he still favored a judicially enforceable rule. He said that he shared the concerns regarding the persistence of the subjective materiality test on disclosing impeaching information, adding that his main concern was that revising the Manual would not alter current practices, at least not for long. Judge Wolf said that he was amazed that only now was a discussion of prosecutors' constitutional duty under *Brady* and *Giglio* being added to a multi-volume policy guide for U.S. Attorneys. Nevertheless, only the rule, he said, would provide an effective remedy for violations and actually reduce the number of problems in this area.

Judge Trager said that he agreed with Judge Tallman. His concern was that convictions might be overturned on appeal under the draft Rule 16 amendment simply because prosecutors or law enforcement agents had mishandled exonerating or impeaching evidence. Judge Jones replied that the rule amendment was never intended to change the substantive requirement for reversing a conviction. As long as the exonerating or impeaching material that should have been disclosed would not have affected the outcome, the conviction would stand, he said. What the rule *would* do, however, is subject the prosecutor to sanctions in the event of an unexplained violation of a rule, thereby promoting compliance with the policy, Judge Jones said. Judge Trager said that he did not recall reading any statement to that effect in the draft committee note.

Judge Jones said that, although he appreciated and applauded the Department's efforts, he continued to believe that it was best to proceed with amending Rule 16.

Judge Battaglia said that he had nothing to add to the points already made.

Justice Edmunds said that he tended to favor Judge Tallman's point of view.

Professor King requested clarification from the Department on the relationship between sections D.2. and D.4. of the Manual revision proposal. She asked whether supervisory approval and notice to the defendant would also be required where information was not promptly disclosed for reasons other than the classified nature of the material, such as witness security.

Ms. Fisher said that yes, both provisions were intended to be parallel and that if a comma had to be moved to make that clear, the Department would do so. Professor King also requested clarification on whether or not the Department had agreed, in response to Judge Jones' inquiry, to change all instances of "should" to "must" and to convert advisory language such as "this policy encourages" in section B.1 to "this policy requires" or a comparable phrase more suggestive of a compulsory policy. Ms. Fisher replied that the Department intended to do so, as it saw no difference in meaning between "should" and "must" in the context of the U.S. Attorney's Manual. Professor King asked what the Department intended to do with respect to the supersession language in section A that caused Mr. Goldberg concern. Ms. Fisher said the Department would change the other Manual provision dealing with *Giglio* to make it consistent with this new provision. Mr. Campbell added that the Department would be reviewing all other provisions in the Manual to see where changes were required to ensure consistency with this new provision. Judge Bartle inquired whether that meant that the Department would be deleting the sentence beginning, "Additionally, this policy does not alter or supersede the *Giglio* policy adopted in 1996[.]" Ms. Fisher said that was correct.

Mr. McNamara said that the failure of prosecutors to disclose exculpatory or impeaching evidence is a daily problem for public defenders. He applauded the proposed Manual revision, but suggested that the policy needed enforcement teeth that only a rule could provide. For that reason, he supported sending the Rule 16 amendment to the Standing Committee.

Mr. Rabiej noted that the committee's decision was subject to review by both the Standing Committee and the Judicial Conference, the latter of which in the past had indicated strong reluctance to making changes in this area. Mr. Fiske responded that he was unaware that either the Standing Committee or the Judicial Conference had ever considered this particular issue. Moreover, Mr. Fiske added, the committee should do whatever it believes is right without concern for whether others further up the line might disagree. Mr. Fiske suggested addressing the concerns regarding conviction reversal by adding a committee note clarifying that the rule is not intended to create a new standard for review of a conviction, but is simply designed to put teeth into the requirement that prosecutors turn over any exculpatory and impeaching information without subjective reflections on whether non-disclosure would alter the outcome. Mr. Fiske expressed concern regarding Judge Tallman's recommendation to postpone consideration of the draft Rule 16 amendment until the committee could determine whether or not the Manual revision had succeeded in improving prosecutorial practices. Given the nature of the problem, Mr. Fiske warned, even two years from now, there would be no data or other means of making such a determination for 90% of cases. He noted that several years of effort had gone into amending Rule 16 and suggested that the rule change was ripe for an up or down vote.

Judge Tallman predicted that, notwithstanding Mr. Fiske's point, at least some jurisdictions would interpret the Rule 16 amendment in a way that would affect the scope of review, particularly in habeas cases, and would affect the sustainability of convictions. Mr. Goldberg disagreed, reporting that he and Professor King had spent a great deal of time studying whether the draft rule amendment would affect the law of reversal and had concluded that it

would not. To prevent any misinterpretation, he said, a statement could be added to the note, as Mr. Fiske had suggested.

Professor King explained that a rule amendment should have no effect on collateral review because it would not change the *constitutional* standard for reversal, which is the only type of issue reviewable in the habeas context. On direct appeal, a rule violation would be reviewed for harmless error and, although some courts of appeals currently place the burden of disproving prejudice on the government, others require the defendant to show prejudice from a rule violation to obtain relief on direct appeal. Consequently, revising the rule should have *no* effect on collateral review, and even on direct appeal it would not necessarily shift the burden in all circuits, she said. Judge Tallman remarked that the appellate standard was already difficult to apply and that a rule change would not ease that task. Judge Wolf commented that the only thing that *would* ease the job of appellate courts would be to reduce the number of these types of cases by promoting greater fairness and integrity at the trial level in what has proven to be a very problematic area. That was why, he added, he supported amending Rule 16 and providing a judicial role. Judge Wolf asked the Department whether it had given any consideration to how the Manual revision would be taught and implemented. Ms. Fisher responded that regular training programs were in place to educate prosecutors on changes to the Manual, but that the Department's focus in recent months had been on getting the new provision approved.

Judge Bucklew invited any final comments from the Department. Ms. Fisher said that the Manual revision represented a significant change and that its provisions were not that different from the draft Rule 16 amendment. She added that the Department was strongly opposed to amending Rule 16 and believed that these changes should be made incrementally.

Justice Edmunds inquired whether the problem prompting the Rule 16 amendment in the federal courts was limited to a few renegade prosecutors or whether it was, as Mr. McNamara suggested, widespread. Mr. McNamara said that the problems were across the board, and he predicted that the Manual revision would result in no appreciable improvement in compliance. Ms. Fisher disagreed, stressing the importance of the proposed Manual revision. The problem, she said, was limited to a few bad actors. Mr. Campbell suggested that bad actors who would violate a Manual provision would also disregard a rule. He stressed the seriousness of violating Manual policy, noting that it would subject a prosecutor to an Office of Professional Responsibility (OPR) investigation, possible dismissal, and even, as occurred in Detroit recently, criminal prosecution. Judge Wolf agreed that someone who wanted to disregard the policy would succeed. But he was skeptical of the effectiveness of OPR investigations, describing an "egregious" non-disclosure case he had in which an OPR investigation has still not concluded more than three years after it was initiated. What is worse, the subject of the investigation was just assigned to prosecution of police corruption cases, generating significant cynicism in Boston, he said. As someone who had worked for the Attorney General and served as a former prosecutor, Judge Wolf said he can appreciate the belief that a Manual revision will make a difference. But he has a principled view that there should be judicial review in this area and that,

in the interest of the administration of justice, a rule was needed to sharply diminish the number of arguable violations of constitutional rights.

Judge Bartle said that he was convinced that the committee should send the draft Rule 16 amendment to the Standing Committee. Having an effective, objective prophylactic rule would be in everyone's long-term best interest, including the Justice Department's. He agreed with Mr. Fiske that now was the time to amend Rule 16 and that no consideration should be paid to what others in the rulemaking process may or may not do.

Judge Trager warned the committee that defense counsel would try to use the draft Rule 16 amendment to try the prosecutor whenever they lacked a true defense, and that it would inevitably have implications for overturning convictions. He therefore recommended against going forward with the amendment. Mr. Goldberg recalled that, when the Rule 16 amendment had first been proposed, the Department denied that failure to disclose exculpatory and impeaching information was a big problem. Subsequent research, though, disclosed hundreds of cases that made clear that this was actually a huge problem, he said, and a "festering sore." Judge Trager said that the cases to which Mr. Goldberg referred were largely state cases and that there was no comparable problem in federal court.

Professor Beale said that she thought that the arguments had been well-stated both for and against proceeding with the Rule 16 amendment. However, she saw an inherent problem in the use of subjective standards and predicted that the inclusion of such qualifiers as "substantial" and "significant" in the Manual provision could lead to problems. She added that, at least in some circuits, the rule amendment could shift the burden to the government.

Judge Bucklew personally thanked Ms. Fisher for having successfully added a *Brady* provision to the Manual, something others before her had tried and failed to do.

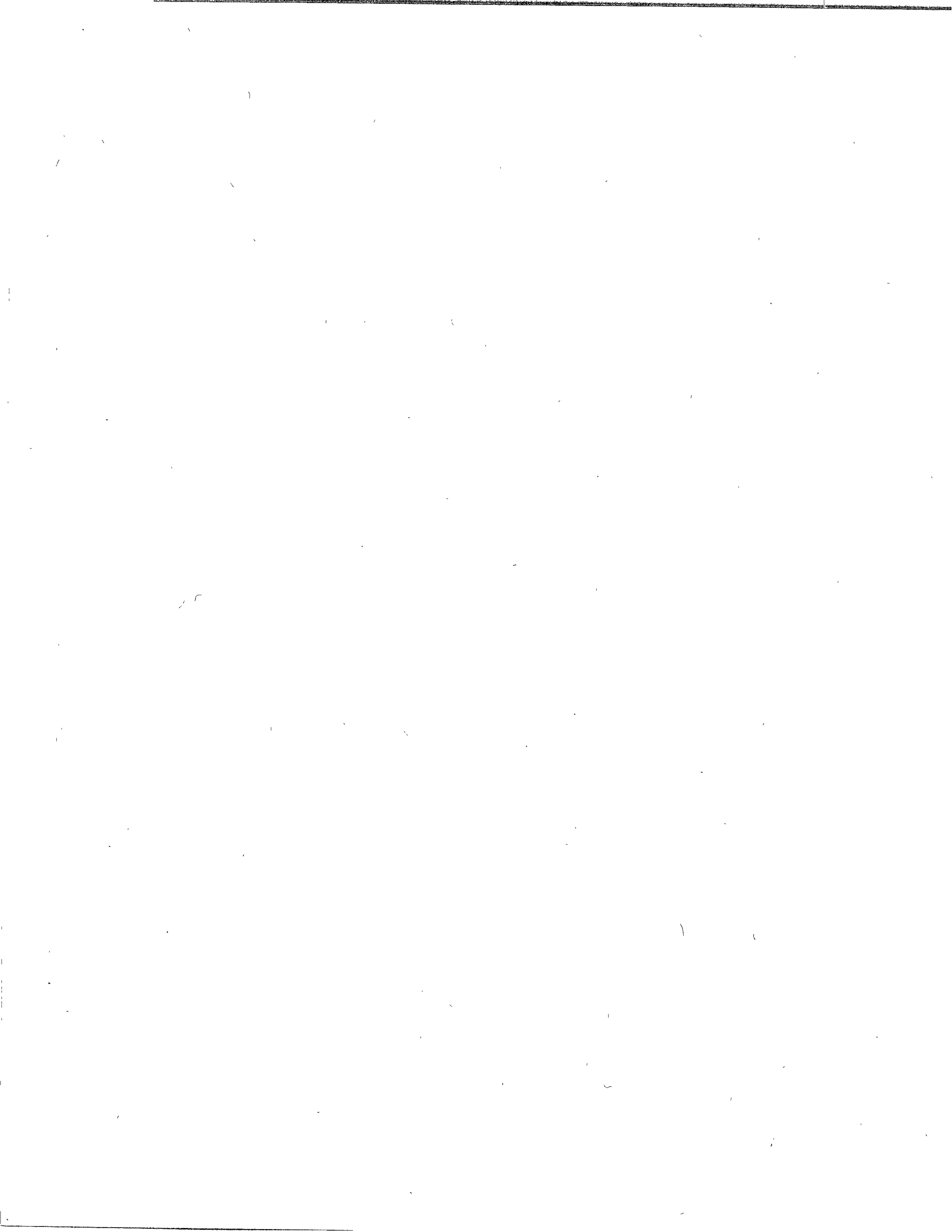
Judge Jones moved to forward the draft Rule 16 amendment to the Standing Committee.

The committee voted 8-4 to forward the proposed Rule 16 amendment to the Standing Committee for publication.

Mr. Fiske noted his support for adding a statement to the committee note clarifying that the rule amendment was not intended to affect the substantive rights of defendants during review of their convictions. The session was adjourned.

Respectfully submitted,

Timothy K. Dole
Attorney Advisor
Administrative Office of the United States Courts



ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 26-27, 2006
Amelia Island, Florida

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Amelia Island, Florida, on October 26-27, 2006. All members were present:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Leo P. Cunningham, Esquire
Rachel Brill, Esquire
Thomas P. McNamara, Esquire
Benton J. Campbell, Acting Chief of Staff and Principal Deputy Assistant Attorney General (ex officio)
Professor Sara Sun Beale, Reporter

Also participating for some or all of the meeting were:

Judge David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules Committee (by telephone)
Judge Harvey E. Schlesinger, Chair of the District Court Forms Working Group
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the Administrative Office
Jonathan J. Wroblewski, Counsel, United States Department of Justice
James N. Ishida, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office

A. Chair's Opening Remarks

Judge Bucklew welcomed the committee to her district, the Middle District of Florida, particularly its two newest members, attorneys Leo P. Cunningham and Rachel Brill. They had been appointed to succeed attorneys Donald Goldberg and Robert Fiske, whose terms had expired. Judge Bucklew reported that Mr. Cunningham had graduated from Stanford University and Harvard Law School, clerked for Judge Eugene Lynch of the Northern District of California, served as an assistant U.S. attorney in the Northern District of California, and is now in private practice in Palo Alto, California, with Wilson Sonsini Goodrich & Rosati. Judge Bucklew reported that Ms. Brill had graduated from the University of Pennsylvania and Harvard Law School, clerked for Judge José Fusté and for Judge Frank Kaufman, served as an assistant federal public defender, and is now in private practice in San Juan, Puerto Rico.

Judge Bucklew noted that Judge Trager's term had been extended and that Judge Jones and Judge Battaglia had been reappointed for another term. Judge Bucklew then introduced her colleague, Judge Harvey Schlesinger, of Jacksonville, Florida, who was invited to attend in his capacity as chair of the District Court Forms Working Group.

B. Review and Approval of Minutes

After certain administrative matters were addressed, a motion was made to approve the minutes of the April 2006 meeting in Washington, D.C. Mr. Campbell requested, without objection, that the phrase "topless guidelines" on page 15 of the draft minutes — a reference to the Department's legislative proposal to reinstate a mandatory sentencing scheme in response to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004) — be changed to "mandatory minimum guidelines."

The committee approved the minutes of the April 2006 meeting.

A motion was made to approve the minutes of the September 2006 teleconference. A typographical error on page 7 of the draft minutes was identified for correction.

The committee approved the minutes of the September 2006 teleconference.

C. Information on Forms Implementing the Criminal Rules

Judge Bucklew invited Judge Schlesinger to describe the work of the District Court Forms Working Group. Judge Schlesinger noted that he had chaired the group since 1983. It meets once a year and includes, in addition to himself, five magistrate judges and six clerks of court. Before each meeting, the Administrative Office (AO) requests input from judges and clerks of court on correcting and improving the forms. At its last meeting, the group had asked the AO to review the national forms to determine whether they were consistent with the federal rules of procedure on privacy, set to take effect next year. Judge Schlesinger said that the group would welcome any assistance or suggestions from the rules committees.

Mr. McCabe said that most of the national forms, including those implementing the criminal rules, were not currently reviewed or formally approved by any committee of the Judicial Conference. Judge Levi noted that other rules committees issued official forms pursuant to the Rules Enabling Act and suggested that there was potential for jurisdictional confusion. Mr. McCabe agreed, noting that this was one of the problems that he hoped to bring to the attention of the new director of the AO.

D. Report of the Rules Committee Support Office

Mr. Rabiej reported that the Rules Committee Support Office was carefully reviewing and proofreading the rules approved by the Judicial Conference in September 2006 for transmittal to the Supreme Court. He said that he would advise the committee once that was accomplished. Judge Bucklew asked whether there were any new developments involving the sentencing guidelines in the wake of *Booker*. Mr. Wroblewski reported that Rep. F. James Sensenbrenner, Jr., chair of the House Committee on the Judiciary, had introduced a "*Booker* fix" bill, but the legislation had little prospect of passage by this Congress, and its fate thereafter would depend on the outcome of the November elections.

II. CRIMINAL RULE CHANGES UNDER CONSIDERATION

A. Proposed Amendments Approved by Standing Committee and Judicial Conference for Transmittal to the Supreme Court

Judge Bucklew noted that the Standing Committee and the Judicial Conference had approved three *Booker*-related amendments, the new criminal privacy rule required by the E-Government Act of 2002, and the Rule 45 amendment:

1. Rule 11. Pleas. The proposed amendment conforms the rule to *Booker* by eliminating the requirement that the court advise a defendant during plea colloquy that it must apply the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms the rule to *Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a).

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms the rule to *Booker* by deleting subparagraph (B), consistent with *Booker*'s holding that the Sentencing Guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to compute the additional three days that a party is given to respond when

service is made by mail, leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).

5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the judiciary to promulgate federal rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

Judge Bucklew reported two areas where the Standing Committee had differed with the recommendations of the advisory committee.

First, the Standing Committee omitted the reference to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), in the committee note accompanying Rule 11. Judge Bucklew noted that the advisory committee had decided to add the reference at the April 2006 meeting simply to make clear that the rule change was not intended to conflict with decisions such as *Crosby* recognizing rare instances when calculating the guidelines would be a futile exercise because of a mandatory minimum or other statutory requirement. Judge Bucklew said that concern had been raised at the Standing Committee that, in some circuits, calculating the guidelines is required in *every* case.

Second, the Standing Committee raised concerns regarding the proposed amendment of Rule 32(h), sending it back to the advisory committee. The proposed change would require the court, in the wake of *Booker*, to notify the parties of an intent to consider any non-guidelines factors not previously identified. The proposed amendment had elicited significant concern during the public comment period among judges who worried that it would force them to continue sentencing hearings. The Standing Committee shared those concerns and, in addition, suggested that this was an evolving area of law not yet ripe for codification in a rule.

Judge Levi suggested that the two committees had focused on somewhat different factual paradigms. The advisory committee focused on a sentencing hearing where the judge decides in advance to rely on a factor not previously identified. In that case, it made abundant sense that the judge provide the parties with prior notice so that everyone could address the factor. By contrast, he said, certain district court judges on the Standing Committee focused on a scenario where victims, the defense, and the government were raising new points during a complex sentencing proceeding. Their concern, Judge Levi explained, was that the proposed amendment might require postponing a sentencing under those circumstances. The Standing Committee, therefore, asked the advisory committee to reexamine the proposed amendment of Rule 32(h), particularly in light of recent case law. Judge Jones agreed, noting that if the post-*Booker* case law ultimately permits downward variances on a wide variety of grounds, it would be nearly impossible for judges to give parties advance notice of every ground that they might ultimately deem relevant in imposing a particular sentence.

Mr. McNamara noted that the federal defenders had just written to Mr. McCabe, asking that the committee reconsider this proposed Rule 32(h) amendment, a position shared by the

Department of Justice ("the Department"). Judge Tallman suggested that Rule 32(h) made sense only when the sentencing guidelines were mandatory. Now that judges are free to consider a range of factors and to impose any sentence within the relevant statutory range, he added, the provision should be abrogated entirely. Judge Bartle agreed, noting that, although judges sometimes have a notion beforehand of what sentence they will impose, he often finds himself changing his mind in the middle of a sentencing hearing based on what the defendant or the government or the victims may say at the hearing. Requiring judges to postpone a sentencing hearing mid-proceeding is difficult, he said, particularly when family members have made special efforts to attend. Judge Wolf said that, although fairness might occasionally require postponing a sentencing hearing, if the judge at the start of the hearing identifies any factor not already raised, that would ordinarily constitute sufficient notice, affording the parties an opportunity to address that factor during the hearing.

Professor Beale suggested that the committee needed to consider three issues raised at the Standing Committee meeting: (1) recent cases holding that due process does not require the advance notice; (2) the circuit split on how the guidelines relate to other sentencing factors; and (3) the case law on what notice is required. Mr. McNamara suggested that the committee needed additional time to study this issue. Judge Wolf pointed out that the committee note accompanying the 2002 amendments to Rule 32 states that "Rule 32(h) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138-39 (1991)." Since Rule 32(h) essentially codifies a Supreme Court decision whose logic arguably extended to variances, he warned against abrogating Rule 32(h), which seemed to be working quite well even after *Booker*. Judge Bartle reported strong opposition in his circuit to both Rule 32(h) and the proposed amendment.

Following further discussion, Mr. McNamara made a motion that the committee take another look at the proposed amendment of Rule 32(h). Judge Trager said that he considered it premature to amend the rule. Instead, he recommended tabling the proposal for reconsideration in another year or two once the relevant case law has become more settled.

The committee voted 7-4 to reexamine the proposed amendment of Rule 32(h).

B. Proposed Amendments Approved by Standing Committee for Publication

Judge Bucklew noted that the following rule amendments had been approved for publication by the Standing Committee and published for public comment:

1. Rule 1. Scope; Definitions. The proposed amendment, designed to implement the Crime Victims' Rights Act (CVRA), defines a "victim."

2. Rule 12.1. Notice of Alibi Defense. The proposed CVRA-related amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant can show a need for the information, the proposed amendment allows the court either

to order its disclosure or to fashion an alternative means of providing the information needed while protecting the victim's interests.

3. Rule 17. Subpoena. The proposed CVRA-related amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

4. Rule 18. Place of Trial. The proposed CVRA-related amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

5. Rule 29. Motion for Judgment of Acquittal. The proposed amendment prohibits a judge from entering a judgment of acquittal before verdict, unless the defendant waives his Double Jeopardy rights.

6. Rule 32. Sentencing and Judgment. The proposed CVRA-related amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when a presentence report should include restitution-related information, clarifies the standard for inclusion of victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

7. Rule 41. Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside of the United States.

8. Rule 60. Victim's Rights. The proposed new CVRA-related rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

9. Rule 61. Conforming Title. The proposed amendment simply renumbers the existing Rule 60.

Only two changes to these amendments were made at the Standing Committee meeting, Judge Bucklew reported. First, a question was raised whether the note accompanying Rule 29 was correct to suggest that the rule also applied to bench trials. Concluding that it was not, Judge Bucklew withdrew that language on behalf of the advisory committee. Second, she reported, the Standing Committee decided to bracket "American Samoa" in the proposed amendment of Rule 41(b)(4) to draw attention to, and invite comment on, whether to exclude American Samoa from the provision.

Judge Bucklew informed the committee that Judge Paul Cassell, chair of the Judicial Conference Committee on Criminal Law, had made a formal request to testify at the committee's scheduled public hearing on January 26, 2007, in Washington. A second hearing was scheduled

to take place on February 2, 2007, in San Francisco. Mr. Rabiej noted that a request to testify must be submitted at least 30 days before the scheduled hearing date. In the event of insufficient public interest, hearings can be canceled, he explained, but there are several ways that requests to testify can be accommodated, including by teleconference. Judge Bucklew noted that, given Judge Cassell's request to testify, the January 26 hearing was likely to take place. Judge Bucklew encouraged any members able to attend to do so. Judge Levi agreed, noting that these hearings typically provided a perspective that one could not obtain from reading the transcript.

Judge Tallman gave a brief report of his conversation with Judge J. Clifford Wallace, chair of the Pacific Islands Committee of the Ninth Circuit, on the proposed Rule 41 amendment. Under current law, only territorial judges in American Samoa can issue search warrants and only territorial officers can execute them. But the issue is politically very sensitive, Judge Tallman reported. There is significant opposition to the notion of a magistrate judge in Washington, D.C., authorizing a search in American Samoa. Giving that power to a magistrate judge in the District of Hawaii or the District of Guam could be a less objectionable option, he suggested.

IV. SUBCOMMITTEE REPORTS

A. Amendments to Rule 11 of the Rules Governing Section 2254 and 2255 Proceedings; Proposed New Rule 37 — Professor Nancy King, Subcommittee Chair

Judge Bucklew invited discussion of the activities of the several subcommittees, starting with the "Writs Subcommittee," which was studying the Department's proposal to abolish most writs. Professor King, chair of the subcommittee, discussed the group's work and explained its recommendations. The two Rule 11 proposals, she said, would restrict efforts to revisit district judge decisions in cases brought pursuant to 28 U.S.C. § 2254 and § 2255, other than moving for reconsideration under subdivision (b). She explained that certain materials had been bracketed to reflect differences between the subcommittee and the Style Subcommittee.

Professor King noted that the Writs Subcommittee had produced two alternative versions of proposed new Rule 37 for the committee's consideration. The first, favored by a majority of the subcommittee, was a scaled-back version of the Department's original proposal to abolish nearly all writs, she said. It would preserve the writ of coram nobis, unlike the Department's original proposal, but restrict the circumstances under which relief could be granted. Its most controversial feature, she said, was the statute of limitations imposed in subdivision (b)(2). The alternative amendment proposal, favored by a minority of the subcommittee, would impose restrictions on coram nobis relief other than a statute of limitations, she noted.

Subdivision (c) of proposed new Rule 37, which purported to abolish all other writs, including the writ of audita querela, also generated some controversy, Professor King reported. Although everyone agreed that the writ of audita querela is not widely understood, infrequently sought, and rarely, if ever, granted, there were differences of opinion over whether these facts supported the writ's preservation or its abolition. Mr. McNamara expressed concern that, unless

Rule 34 and 28 U.S.C. § 2241 were itemized in the "Exclusive Remedy" list in proposed Rule 37(a), the new rule might be misunderstood to bar relief from a judgment under those two provisions. Judge Jones suggested also adding a reference to Rule 58(g)(2), which governs appeals from a magistrate judge's order or judgment.

Justice Edmunds asked whether an ancient writ could be abolished in a rule. Professor Coquillette said that this was also a major concern of his. He said that the prerogative writs were incorporated shortly after the Constitution to give the judiciary flexible ways to curtail executive discretion. Abolishing this arsenal of judicial powers therefore raised serious concerns of substantively shifting the balance of powers between two branches of government, he warned. He recommended further research on whether this proposal was merely procedural or whether it altered important substantial remedies. Professor Beale noted that Civil Rule 60(b) had abolished these same writs, which would suggest that doing so is appropriate under the Rules Enabling Act, 28 U.S.C. § 2071 et seq. Mr. McNamara said that, unlike the Department's current proposal, Civil Rule 60(b) does not implicate fundamental due process rights. Professor Coquillette said that he and Civil Rules Committee reporter Professor Edward H. Cooper are researching this question and would report their findings.

The committee discussed whether writs that are poorly understood and rarely used warrant preservation. Professor King reported being unable to find a single instance where a writ of audita querela had been granted in a criminal case. Mr. McNamara said that preserving the writ of coram nobis was his greatest concern. Judge Tallman asked for an explanation of what a writ of audita querela would do that could not be accomplished by means of a writ of habeas corpus. Mr. Wroblewski said that his understanding was that the former involved efforts to address the *manner* in which a sentence is executed rather than its *substance*. Professor Coquillette agreed. Mr. Wroblewski explained that he thought that Congress had made clear in the Antiterrorism and Effective Death Penalty Act of 1996 that it wanted post-convictions procedures codified and regularized. Although the legislation dealt exclusively with writs of habeas corpus, he said, writs of coram nobis differ only insofar as they grant relief *after* a sentence has been served and the petitioner is out of custody. Mr. McNamara said that he did not think that responding to writs of coram nobis imposed a significant burden on the Department. Mr. Wroblewski said that a Westlaw search reported 284 coram nobis federal cases filed in 2005.

Following an extended discussion of the subcommittee's proposed coram nobis restrictions, Mr. McNamara moved to permanently table the proposal to amend Rule 11 of the Rules Governing Section 2254 and 2255 Proceedings and add a new Rule 37. Initially, the committee voted 8-4 in favor of Mr. McNamara's motion. But Judge Trager then expressed a concern that, by rejecting the proposal outright, the committee was leaving the Department no choice but to go to Congress, which could produce a far worse result. Judge Bartle agreed, but suggested that the proposal to abolish ancient writs exceeded the rules committees' authority.

Judge Wolf, who had voted in favor of Mr. McNamara's motion, moved that the committee reconsider the proposal at its next meeting, following further research of the Rules

Enabling Act concerns and the proposal's possible effect in other factual contexts, including perhaps the detention of suspected terrorists at Guantanamo Bay or elsewhere. Judge Battaglia, who had also supported Mr. McNamara's motion, seconded Judge Wolf's motion, suggesting that further research might be helpful. Judge Jones opposed this "motion for reconsideration" of Mr. McNamara's proposal because, he said, writs of coram nobis have not been shown to be a problem and because amending these rules could result in unintended consequences, including a potential increase in the number of pro se filings. Professor King suggested that amending the rules as the subcommittee had proposed was both within the committee's power and a good idea, but that she could research these issues further for discussion at the April 2007 meeting.

The committee voted 8-4 to have the subcommittee study the Department's proposal further for reconsideration by the full committee at the April 2007 meeting.

B. Rule 41, Warrants for Electronically Stored Information (ESI) — Judge Anthony Battaglia, Subcommittee Chair

The committee discussed the pending proposal to amend Rule 41 to reflect the two distinct stages of executing search warrants involving electronically stored information: the initial search and seizure of an electronic storage device followed, often much later, by the search of the electronic data stored on the device. Judge Battaglia reported that members of the subcommittee had participated in a full-day tutorial held by the Department as a way to improve their understanding of related technical issues. Judge Bucklew praised the presentation as extremely helpful, he said. Mr. Campbell commented that the Department considered preparing a shorter, two-hour presentation for dissemination to a broader audience. Mr. McCabe said that he had spoken with the Federal Judicial Center concerning the potential inclusion of a similar presentation in future judge seminars. Judge Battaglia said that he was particularly impressed by how long it took to image the hard drive of an average computer and by the volatility of certain types of data. He noted that the subcommittee would meet briefly following the committee's meeting to discuss further how Rule 41 could be amended to standardize how warrants for electronically stored data are processed nationwide.

C. Rules 7 and 32.2, Criminal Forfeitures — Judge Mark Wolf, Subcommittee Chair

Judge Wolf provided an update on the work of the Criminal Forfeiture Subcommittee. He noted that the Department had characterized its proposed amendments of Rules 7 and 32.2 as "clarifications." The subcommittee soon realized that they implicated several esoteric legal and procedural issues. Consequently, the subcommittee invited David Smith, a forfeiture law expert representing the National Association of Criminal Defense Lawyers, to participate in the discussions.

Judge Wolf noted that the subcommittee planned first to focus on proposed clarifying changes, then to explore whether consensus can be reached on any substantive policy-level changes. Judge Wolf described a few of the issues with which the subcommittee was wrestling,

including whether the rule should address when a Bill of Particulars is presumptively required, the applicability of the Rules of Evidence to forfeiture proceedings, the question of third-party participation, and the extent, if any, that a jury should be involved in adjudicating forfeiture matters. The committee then discussed some of these issues. Professor Beale mentioned that the subcommittee hoped to have a bifurcated list of proposals for the committee's review at the next meeting, which would distinguish clarifications from policy-level changes.

V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Rule 16. Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information

For the benefit of the committee's two new members, Judge Bucklew briefly recounted the history of the effort to amend Rule 16. In 2003, the American College of Trial Lawyers first proposed requiring disclosure of exculpatory and impeaching evidence without regard to its materiality. The Department had consistently opposed the proposed rule amendment. At its April 2006 meeting, the committee had initially voted to table consideration of the proposed amendment until the next meeting in light of the Department's proposal to amend the U.S. Attorneys' Manual ("Manual") to address a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In response to concerns that the terms of two committee members who had worked hard on the proposal were set to expire on September 30, 2006, though, the committee had decided to convene a special session before then to review the final version of the Manual and to determine whether to proceed with the proposed Rule 16 amendment. In a September 5, 2006 teleconference, the committee voted to send the Rule 16 amendment proposal to the Standing Committee with a recommendation that it be published for public comment.

Mr. Wroblewski reported that Deputy Attorney General Paul J. McNulty had signed the bluesheet approving the Manual amendment on October 19, 2006, and that the amendment had been posted on the internet and sent to all U.S. attorneys, assistant U.S. attorneys, and litigation divisions. Although the new Manual provision did not go as far as the proposed Rule 16 amendment, it did require greater disclosure of material and exculpatory evidence than constitutionally required, he said. Mr. Wroblewski reported receiving numerous phone calls from the field with questions concerning the Manual's new directive, including what was meant by "substantial doubt" and "information . . . that establishes a recognized affirmative defense." Judge Bucklew praised the Department for having followed through with the Manual amendment independent of the committee's decision to amend Rule 16. Mr. Campbell noted that it was unprecedented for the Department to seek input from the Criminal Rules Committee in drafting a new provision for the U.S. Attorneys' Manual, but he said that he thought that the discussions had been very helpful to the Department. Judge Wolf stressed that the committee and the Department had a common interest in the fairness and finality of proceedings, and he encouraged the Department to go beyond formally publishing the new policy and to actively help law enforcement agencies internalize the policy and incorporate it into their practices.

The committee discussed whether the committee note accompanying the proposed Rule 16 amendment should address the provision's effect on direct appeals or collateral motions. Judge Bucklew said that it probably would shift the burden in direct appeals in some circuits, but have no effect on collateral motions. The question, though, was whether a statement to this effect should be added to the committee note. Professor Beale said that the circuit split made it difficult to sum up the amendment's impact on direct appeals. Professor King said that she opposed adding the proposed language on the amendment's impact on collateral proceedings, because § 2255 proceedings do occasionally consider non-constitutional issues such as fundamental statutory provisions. Judge Bucklew commented that, unless there was a desire to change the note, it would be sent to the Standing Committee in its current form.

Judge Trager objected to the reference to "fundamental fairness" in the first line of the committee note, but noted that he had been on the losing side of the vote approving the proposed amendment. Judge Wolf asked, as a procedural matter, whether the committee should be revisiting its September 5 decision to approve the proposed Rule 16 amendment, given that Mr. Fiske and Mr. Goldberg were no longer present. Judge Bucklew agreed that the only issue pending was whether to add language to the note to clarify the amendment's effect on direct appeals or collateral motions. Judge Wolf said that he would consider it a positive development if the amendment made it more difficult at the appellate level for the government to defend inadvertent and intentional prosecutorial violations of their disclosure obligations in district court, because fear of causing a guilty person to go free would foster compliance among prosecutors far more effectively than a provision in the U.S. Attorneys' Manual.

B. Rule 49.1. Redaction of the Grand Jury Foreperson's Name on the Indictment; Redaction of Arrest and Search Warrants

The committee discussed the new criminal privacy rule. Judge Bucklew noted that, during the public comment period, the Judicial Conference Committee on Court Administration and Case Management (CACM) had recommended that proposed Rule 49.1 require redaction of grand jury forepersons' names from case filings. Judge Bucklew said that CACM's suggestion was complicated by the Rule 7 requirement that indictments be returned in open court and by the Rule 10 requirement that the defendant be given a copy. The committee decided not to hold up Rule 49.1, but rather to consider these other issues separately, at a later time.

Since then, Judge Bucklew noted, the Department had reviewed its statistical database and surveyed U.S. attorneys' offices and U.S. marshals offices to ascertain whether public disclosure of jury foreperson signatures was a significant problem. Professor Beale said that the Department's data indicated that threats to jurors' security were not a national problem either in severity or frequency. Specifically, Mr. Wroblewski noted, the U.S. Marshals Service, which has responsibility for juror security, knew of only 18 reports of juror-related "threats or inappropriate contacts" in the entire country in FY 2006, 16 of which were in a single case in Nevada. Moreover, the Marshals knew of only one incident nationwide in FY 2003, two in FY 2004, and none in FY 2005. Judge Jones noted that the main source of threats to jurors was the defendant, whose knowledge of the jury foreperson's identity was in no way enhanced by

posting of the foreperson's signature on the internet. Judge Wolf moved that the committee take no further action.

The committee voted, with one dissent, not to amend the criminal privacy rule to require redaction of jury foreperson signatures.

The committee discussed CACM's recommendation that proposed Rule 49.1 not exempt arrest and search warrants from the redaction requirement. Judge Battaglia reported that warrants in his district are immediately filed under seal, then unsealed when returned. Mr. Campbell said that personal information in a search warrant, such as the full address of the specific home to be searched, was essential to the instrument. Judge Wolf suggested that the fact that a particular place was searched should be public information. Judge Bucklew noted that redaction could be required on a case-by-case basis, as needed, by means of a protective order. Mr. Campbell agreed, adding that there is a general interest in public awareness of government activity, including who was arrested and what locations were searched. Judge Levi said that, at least at one point, the Department had indicated in a letter that it might be amenable to redacting search warrants following execution, but not arrest warrants.

Following additional discussion, Judge Bucklew identified two main questions for the committee: first, whether requiring redaction of search warrants would impose too heavy a burden on the Department, and second, whether there were independent reasons for the public to have access to personal identifiers in search warrants. Mr. Campbell warned of practical difficulties in requiring the redaction of all executed search warrants. He noted that, although *unexecuted* warrants are filed under seal by prosecutors, *executed* warrants are often returned directly to the court by law enforcement agents for filing without prosecutorial involvement. Ms. Brill said that it was often critical for defense attorneys to have ready access to unredacted search warrants. Judge Jones raised concern that, even if the reference to search warrants were removed from the exemption in paragraph (b)(8) of the proposed criminal privacy rule, they might still remain exempted under paragraph (b)(7), which covers any "court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge[.]" Judge Tallman said that he thought knowing the exact subject of an arrest warrant could be important. Ms. Brill agreed, telling of a recent case where a Social Security number mix-up had resulted in the false arrest of the wrong "Juan Perez" in Puerto Rico. The committee decided that the issue warranted further research for consideration at its next meeting.

C.Time Computation Template

The committee turned its attention to the work of the Standing Committee's Time Computation Subcommittee, chaired by Judge Kravitz. Joining the meeting telephonically, Judge Kravitz reported that the subcommittee continued working on the basic time computation template to improve its clarity and to address a few remaining issues, including whether to define "inaccessibility" in the rules. The subcommittee hoped to have a final draft template for consideration by the Standing Committee at its January 2007 meeting. Judge Kravitz reported that the Civil Rules Committee had raised concern that the wording not have the effect of

encouraging lawyers to track down judges in their bathrobes at home at 11:59 p.m. to avoid missing a deadline. A question was also raised regarding whether the rules should address judge-set deadlines that unintentionally fall on a holiday or weekend. The subcommittee was also debating how to handle computation of statutory deadlines and was compiling a list of deadlines that Congress might be asked to amend, he said. Based on the non-reaction his question received at a recent gathering of 100 lawyers in New York, though, he said that this was evidently not an issue of passionate concern to the bar.

Judge Kravitz noted that, in the meantime, each advisory committee was in the process of reviewing the deadlines in each set of rules and, in most but not all cases, converting time periods of less than four weeks under the old system to the next highest multiple of seven under the new framework. He noted that the goal was for all the advisory rules committees to have their work completed for approval at their Spring 2007 meetings. Mr. Wroblewski reported that the Department had initiated an extensive review of statutory deadlines and expected to have the results of that review in another month or two. Judge Battaglia recommended careful scrutiny of the three- and five-day continuance rules in the Bail Reform Act in 18 U.S.C. 3142.[1]

The committee discussed whether seven-day periods under the current system should remain undisturbed or be changed to 10-day or 14-day periods. Professor Beale noted that unless the committee extended the seven-day periods, it would effectively be shortening them under the new "days are days" computation framework. Also, she noted that the subcommittee seemed to have embraced Judge Kravitz's strong recommendation that shorter periods presumptively move to multiples of seven absent a compelling reason not to. Mr. Wroblewski said that the Department had concerns regarding the extension of certain seven-day periods that had already been subject to historical enlargement. For instance, he said, the defendant's seven-day post-trial period under Rule 29(c)(1) to "move for a judgment of acquittal, or renew such a motion" was at one time effectively a five-day period, since it included weekends. The time computation rules later changed that to seven actual days, he added, then the rules changed again, and the seven days became nine actual days, and now there was talk of further increasing the period to 14 days. In other words, Mr. Wroblewski said, these time periods were growing. Judge Wolf asked why this was a problem. Mr. Wroblewski cited concerns regarding finality.

Judge Kravitz noted that, unlike the civil rules, the criminal rules authorize judges to extend deadlines where appropriate. He said that he had long thought that the current deadline for filing a post-trial motion for judgment as a matter of law was too short, because following an intense trial, defense attorneys are often busy addressing the numerous other matters that were placed on hold while they were in trial, because the trial transcript may not yet be available, and because, at least in his district, briefs in support of a motion under Rule 29(c)(1) are often filed

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[1] "Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday)." 18 U.S.C. 3142(f).

later. Giving defense counsel two weeks following a trial to file these motions therefore did not appear unreasonable, he said. Judge Bartle agreed, noting that many criminal defendants, at least in his district, were represented by sole practitioners, not 500-lawyer firms.

Judge Bucklew noted that certain deadlines worked in tandem. The seven-day presentence deadline in Rule 32(g), for instance, needed to be analyzed in conjunction with the 14-day and 35-day deadlines in subdivisions (e) and (f), respectively. Judge Wolf agreed, adding that, although he generally favored giving parties extra time, the seven-day presentencing period in Rule 32(g) should not be increased to 14 days, because doing so would further delay sentencing.

Professor King inquired whether anyone had a thought concerning how the time periods in Rule 41(e)(2)(A) and Rule 46(h)(2) should be handled, as these rules protect interests other than finality. Judge Battaglia said that search warrants were often returned the day after he signed them, suggesting that 10 days was ample time to execute them. Professor Beale and Judge Kravitz noted that the 10-day periods in the cited rules were actually closer to 14 days under present time computation rules. Additional discussion of the topic followed.

D. Rule 12, Challenges to Facial Validity of Indictment, Department of Justice Proposal

Judge Bucklew noted that the Department had requested further postponement of the committee's consideration of the proposed amendment of Rule 12(b), pending the Supreme Court's resolution of *United States v. Resendiz-Ponce*, Docket No. 05-998. The Department's proposal, first discussed in April 2006, would require defendants to raise before trial any claims that the indictment failed to state an offense. The Department noted that, although the case was not directly on point, it could address whether a failure to include an element of an offense in an indictment could ever be excused as "harmless error." The proposal was deferred until the April 2007 meeting.

E. Procedures for Sealed Cases

As an informational matter, Judge Bucklew noted that Judge Levi had received a letter from Seventh Circuit Chief Judge Joel M. Flaum, reporting a vote by that circuit's judicial council to recommend that the Standing Rules Committee study the captioning and docketing of sealed cases and determine whether national guidelines would be appropriate. Judge Levi had referred the matter to the Judicial Conference Committee on Court Administration and Case Management, she said, since it involved matters traditionally within its jurisdiction.

F. Rule 32.1 and Rule 46, Revoking Probation or Supervised Release and Revoking Pretrial Release

The committee discussed Judge Battaglia's recommendation that the rules establish a procedure for issuing warrants when a defendant violates a condition of pretrial release. Judge

Bucklew noted an apparent gap in Rule 32.1, which covers probation and supervised release, and in Rule 46, which deals with pretrial release, in that neither addresses the procedure for issuing a summons due to the violation of a court-imposed condition. Judge Battaglia reported frustration by members of the Federal Magistrate Judges Board with respect to submissions by probation officers in support of a warrant. He said that he had also consulted with the Ninth Circuit Magistrate Judge Executive Board, which recommended that the rules be amended to require probable cause and a sworn statement, thereby incorporating the change in practice prompted by a recent Ninth Circuit ruling. Judge Bucklew noted that the Ninth Circuit decision had also changed the practice in her district, as it did, she believed, around the country. Judge Battaglia said that the Board had also suggested amending the rule to reflect the fact that applications for warrants resulting from pretrial release violations are often submitted by the probation and pretrial services officers rather than by attorneys for the government.

Judge Wolf noted that the statute requires only probable cause. He said that requiring a sworn statement was not the practice in his district. Rather, typically, applications for a warrant are made by a probation officer. Clarifying what is required might therefore be useful, he said. He recommended against restricting affiants to attorneys for the government and probation or pretrial services officers, though, because affidavits occasionally come from law enforcement officials. Judge Battaglia said that the proposed rule was intended not to limit current practices, but to reflect them.

Judge Tallman noted that the statute requires the filing of a "motion," but he added that perhaps the filing of an affidavit could be considered a "motion" under the statute. Judge Jones said that in his district, a combined "Application and Declaration" is filed. Judge Tallman said that the Ninth Circuit had required only a declaration of probable cause — sworn or unsworn — as a way of ending the practice of probation officers whispering in the judge's ear. Judge Wolf questioned whether probable cause is required for defendants under supervised release who are already under the authority of the court. Judge Battaglia noted that he had used the term "may" to safeguard the court's discretion in this area. The term "affidavit," he said, simply tracks the terminology used elsewhere, and, as noted in the footnote, includes *unsworn* declarations.

Judge Levi suggested adding "or other information" following the phrase "affidavit from an attorney for the government, a probation officer or a pretrial services officer," tracking the language on search warrants in Rule 40. He also suggested consulting with chief probation officers regarding this proposed rule amendment. Mr. Wroblewski noted that a warrant is not necessarily required. Professor King suggested importing some of Rule 41's flexibility. Following further discussion, Judge Bucklew requested and received confirmation that the committee wanted work on this amendment proposal to continue.

G. Rule 15, Permitting Deposition of a Witness Without Defendant's Physical Presence, Department of Justice Proposal

The committee discussed the Department's proposal to amend Rule 15 to permit deposition of a witness outside the defendant's *physical* presence under limited circumstances.

Because the proposed amendment had come in relatively late, Judge Bucklew explained, it was only being brought to the committee's attention for informational purposes. She said that John Rabiej had noted that the committee had worked for several years on a similar proposal that would have allowed the court to authorize video testimony from a different location under certain circumstances. That proposed Rule 26 amendment had been approved by the Standing Committee and the Judicial Conference, but rejected by the Supreme Court in 2002. In an opinion criticizing the proposal, Justice Scalia had quipped, "Virtual confrontation might be sufficient to protect virtual constitutional rights." Judge Bucklew advised the committee to bear these concerns in mind as it weighed this new proposed amendment.

Mr. Wroblewski said that the proposed Rule 15 amendment was somewhat different than the early proposal in that it was tailored to address those situations where it is infeasible or inappropriate for a criminal defendant to leave the United States and where an overseas witness is outside the subpoena power of the court, making it impossible for both people to share the same physical space. The Department hoped to address the Supreme Court's concerns as articulated by Justice Scalia, he said, by restricting application of the rule amendment to narrow circumstances based on case-specific findings. Judge Bucklew noted that, in some cases in her district involving boats interdicted in international waters, the defendant has had witnesses present live deposition and even trial testimony from Columbia by video teleconference, but the government has been unable to do so because of the defendant's objection. Mr. Wroblewski said that the Department had sought to draft the proposed amendment narrowly to respect a defendant's confrontation right, but that the Department was open to suggestions on how the proposal could be even further narrowed to avoid any constitutional defect.

Justice Edmunds asked whether the phrase "meaningfully participate" was a term of art in federal law. Mr. Wroblewski said no, explained that, although the proposed rule mentions "video teleconferencing" as the model, it was designed to include "other reasonable means" as long as the court found that they would "permit the defendant to meaningfully participate in the deposition." Ms. Brill suggested that Justice Scalia might consider video teleconferencing more "meaningful participation" than participation via older technologies, such as telephone or facsimile. Professor King noted that the case law on the right to counsel indicated that the defendant had to be afforded the means to communicate confidentially with counsel when physically separated from his or her attorney during these types of proceedings.

The committee discussed why the Supreme Court may have rejected the proposed Rule 26 amendment and whether and how this proposed amendment of Rule 15 might be sufficiently distinguished. Professor Coquillette noted that Justice Scalia believed that the Court should review a proposed rule's constitutionality as part of the rulemaking process. Justice Breyer, by contrast, felt that the Court should conduct this review later, in the context of an actual case or controversy. Mr. Wroblewski noted that, in *Maryland v. Craig*, 497 U.S. 836 (1990), a child witness case, the Supreme Court had acknowledged that, given a strong enough public policy reason to do so, the Constitution would allow an exception to face-to-face confrontation.

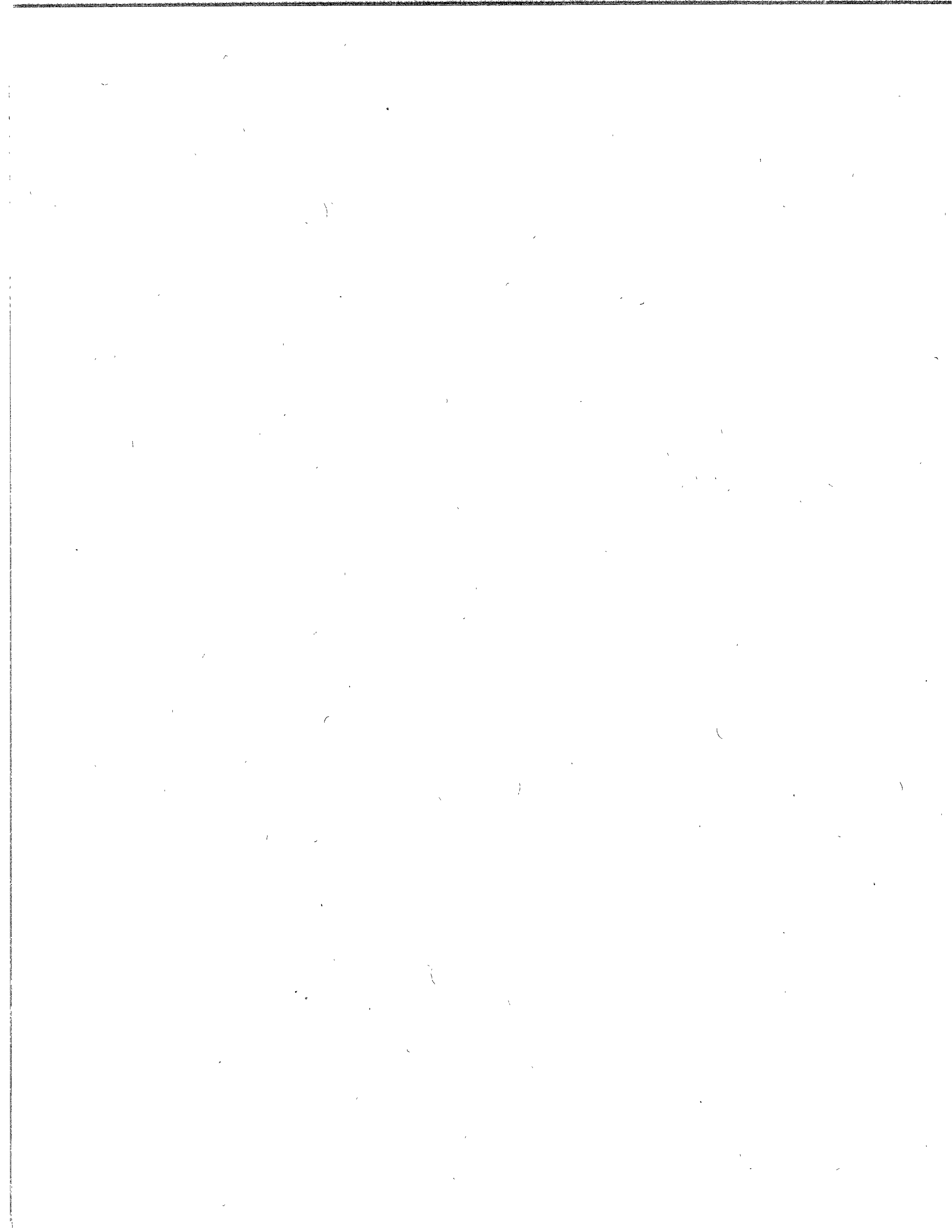
Judge Levi suggested that perhaps Justice Scalia was concerned about preserving the often powerful, *mano a mano* quality of testimony delivered in the presence of others within a shared physical space. He suggested that the Department might want to provide a clearer picture of the nature, scope, and frequency of the problem that the amendment seeks to address. Mr. Campbell said that certain countries, like France, do not allow their citizens to be questioned by foreign courts. Judge Bucklew suggested that the Department needed to provide the committee with more detailed information regarding the actual problems that this rule was intended to address and to explain more clearly how this proposal differs from the proposed rule amendment that the Supreme Court rejected four years ago.

VII. ANNOUNCEMENT OF NEXT MEETING

Before adjourning the meeting, Judge Bucklew reminded committee members that the next meeting was scheduled for April 16 and 17, 2007, at a location to be determined.

Respectfully submitted,

Timothy K. Dole
Attorney Advisor
Administrative Office of the United States Courts



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

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EVIDENCE RULES

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

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 2006**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 16, 2006, in Washington, D.C. At this meeting, the Committee continued its work on a rule to be submitted to Congress on waiver of privileges. It also considered the following matters:

1) a direction from Congress to report on the necessity and desirability of an amendment to the Evidence Rules to codify an exception to the marital privileges where a defendant is charged with harming a child;

2) the possibility of restyling the Evidence Rules;

3) the Standing Committee's time-counting project, and whether the Evidence Rules should be amended to include a rule on time-counting; and

4) developments in the law of confrontation after *Crawford v. Washington,* in order to consider whether any amendments to the Evidence Rules are necessary as a result of that decision.

The above matters do not require action by the Standing Committee at this time.

Part III of this Report provides a summary of the Committee's projects. A complete discussion of these matters can be found in the draft minutes of the Fall 2006 meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product

The Standing Committee has released Proposed Evidence Rule 502 for a period of public comment that ends in Spring 2007. Proposed Rule 502 was drafted in response to a request from the Chair of the House Judiciary Committee, to address two major concerns about the current law on waiver of privilege and work product. First, some courts have held that all disclosures in the course of litigation constitute waiver for all purposes, to parties and non-parties — a rule that requires the parties to spend enormous amounts of time and effort in pre-production privilege review, and to make claims of privilege that they would not otherwise make in order to avoid a finding of waiver. Second, most federal courts hold that if a corporation cooperates with a government investigation by turning over a privileged report, the privilege is waived even as against private parties in subsequent litigation. The expressed concern is that the courts' refusal to provide the protection of "selective waiver" may deter cooperation with the government and lead to increased costs of government investigations.

The Committee drafted Proposed Rule 502 at the suggestion of Congress and with full knowledge that the Rule must be enacted directly by Congress. To the extent that the Committee cannot resolve some of the difficult substantive questions on the merits, the Committee plans to refer these questions to Congress, with suggested language for Congress to use depending on its resolution of the merits.

At its Fall 2006 meeting the Committee tentatively considered some comments and suggestions concerning Proposed Rule 502, recognizing that any final decisions about changing the Rule were to be deferred until public comment was completed. The Committee discussed the following comments concerning Proposed Rule 502 as it was released for public comment:

1. Suggestion to delete the "should have known" language in the selective waiver provision:

Rule 502(b) conditions protection from inadvertent waiver on whether the holder of the privilege took reasonably prompt measures, "once the holder knew or should have known of the disclosure," to rectify the mistaken disclosure. A suggestion has been made that the words "or should have known" be deleted. The stated ground for deletion is that the "should have known" language could give rise to litigation about when, exactly, the producing party should have known about the mistaken disclosure. The suggestion was discussed by the Committee; the sense of the Committee was that the "should have known" language had substantial merit and should be retained pending public comment. Committee members noted that an "actual knowledge" standard would also give rise to litigation, and that if litigation did arise, the "should have known" standard would be easier to apply than a standard based on the producing party's actual knowledge. Committee members also stated that the actual knowledge standard could give rise to gamesmanship, because producing parties might demand the return of the privileged material on the eve of trial, arguing that they did not "know" until then about the mistaken disclosure.

2. Suggestion to extend the inadvertent disclosure provision to regulatory investigations:

The inadvertent disclosure provision (Rule 502(b)) provides protection from waiver when the disclosure is "inadvertent and is made *in connection with federal litigation or federal administrative proceedings*." In contrast, the selective waiver provision (Rule 502(c)) provides protection from waiver to third parties when the disclosure is "made *to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority*." The Committee considered a suggestion that the language of the two provisions be made identical by extending the protection for mistaken disclosures to those made during investigations by regulators.

In discussion of this suggestion, most Committee members concluded that the difference in coverage in the two subdivisions is justified. The Committee made a considered determination to limit the protections of Rule 502(b) to mistaken disclosures made *during proceedings*. The Committee decided not to cover mistaken disclosures outside the context of a proceeding for at least two reasons. First, a rule covering mistaken disclosures outside a proceeding risks overreaching, beyond the interest in limiting the costs of discovery that animates the rule. Second, a rule that would govern disclosures outside a federal proceeding could end up regulating disclosures that are not on a *federal* level, thus raising important concerns about federalism. As Subdivision (b) is currently written, it applies only to disclosures raising a legitimate federal interest. The Committee discussed whether a federal interest could be retained by amending Subdivision (b) to cover mistaken disclosures in federal proceedings *and in response to investigations by federal regulators.* The Committee agreed to consider at its next meeting language that would amend subdivision (b) to cover mistaken disclosures made "to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority."

3. Selective waiver:

The Committee has not decided whether to propose a selective waiver provision in Rule 502, under which disclosure of privileged information to a regulator would not constitute a waiver in favor of third parties. The selective waiver provision in the Rule released for public comment is bracketed, indicating that the Committee is undecided about the merits of a selective waiver provision and is seeking public comment (and especially empirical data) on the merits of such a provision before making a decision.

Selective waiver has raised objections from plaintiffs' counsel, from certain members of the ABA, and from state court judges concerned that a state's waiver rules would be subsumed by a federal provision on selective waiver. Committee members at the Fall meeting suggested that given the controversy (both within and outside the Committee) it might be appropriate for the Committee to draft a rule in which the selective waiver provision remained in brackets if and when it went to Congress. Including a selective waiver provision as a drafting option for Congress (without a suggestion on its merits) may be useful given that in essence the Committee is drafting the rule for Congress and so may wish to provide Congress with all sensible drafting alternatives. Moreover, Congress has shown interest in enacting a selective waiver provision, having done so in the Regulatory Relief Act of 2006, which provides selective waiver protection for disclosures to banking regulators.

Rule 502(c) as released for public comment states that a disclosure to a federal regulator does not operate as a waiver "in favor of non-governmental persons or entities." The Committee tentatively agreed with the proposition that if a selective waiver provision is to be implemented, then a disclosure to a federal regulator should not constitute a waiver to a state regulator. At its next meeting, the Committee will consider a drafting alternative providing that disclosure to a federal regulator does not operate as a waiver in favor of a state regulator.

4. Extending the inadvertent disclosure protection to disclosures made in arbitration proceedings:

Rule 502(b) provides that inadvertent disclosures "made in connection with federal litigation or federal administrative proceedings" are not waivers if the party took reasonable precautions to prevent disclosure and acted diligently in trying to get the material back. The Committee considered a suggestion that the protections against inadvertent waiver should apply to arbitration proceedings. The sense of the Committee was that arbitration proceedings generally should not be covered by the rule, because the rationale for Rule 502(b) is to decrease the cost of pre-production privilege review in federal litigation, so providing for more efficiency in arbitration proceedings is beyond the scope of the rule.

The Committee noted, however, that parties are sometimes required by federal courts to go to arbitration. Committee members agreed that court-annexed or court-mandated arbitration should

receive the protection of the rule, but noted that such protection was already *granted* in Rule 502(b) because it covered "federal litigation." The Committee tentatively agreed to add a sentence to the Committee Note to specify that the term "federal litigation" is intended to cover court-annexed or court-mandated arbitration proceedings.

5. Extending Rule 502(d) to confidentiality orders not based upon the agreement of the parties:

Subdivision (d) of Rule 502 currently provides that confidentiality orders bind non-parties "if the order incorporates the agreement of the parties before the court." The Committee considered whether the protection of the Rule should be extended to *any* confidentiality order entered by the court. If a court finds, for example, that a disclosure of privileged information during discovery was not a waiver, the question is whether that order should be enforceable against third parties even though the parties before the court did not enter into a confidentiality agreement. The Committee tentatively agreed to delete the language of Rule 502(d) that limited its protection to court orders based on agreements by the parties. The Committee determined that a court order on waiver is entitled to the same respect whether it memorializes an agreement between the parties or not. The tentative amendment would provide as follows:

> (d) Controlling effect of court orders. — A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court~~, if the order incorporates the agreement of the parties before the court~~.

6. Choice of law questions when disclosures are made at the state level and the disclosed information is sought to be used in federal court:

Rule 502 as released for public comment does not purport to regulate disclosures made at the state level, i.e., in state court proceedings or before state regulators. The only impact of the Rule on state courts is that those courts must adhere to the federal rule on waiver with respect to disclosures originally made in federal proceedings or before federal regulators. Choice of law questions are raised, however, when a disclosure of privileged information is made at the state level and then the information is offered in a subsequent federal proceeding.

At its Fall 2006 meeting the Committee discussed the complex choice of law questions raised by Rule 502. There are three possible outcomes when a state disclosure is offered in a subsequent federal proceeding, and the question is whether there has been a waiver: 1) waiver could be governed by the substantive standards of Rule 502; 2) waiver could be governed by the substantive standards of the state law in the state in which disclosure was made; or 3) waiver could be governed by federal common law that would be applicable under Rule 501 — which would mean

that the state law of waiver would govern in diversity cases and the federal common law of waiver (distinct from Rule 502) would govern in federal question cases. At the Spring 2007 meeting the Committee will review drafting alternatives that could be added to Rule 502 to cover the three choice of law possibilities.

B. Harm-to-Child Exception to the Marital Privileges

Public Law 109-248, the Adam Walsh Child Protection and Safety Act of 2006, directs the Evidence Rules Committee and the Standing Committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against 1) a child of either spouse; or (2) a child under the custody or control of either spouse."

At its Fall 2006 meeting, the Committee began an assessment of the necessity and desirability of amending the Evidence Rules to provide a "harm-to-child" exception to the marital privileges. The Committee has determined that almost all courts have adopted an exception to the protections provided by the marital privileges for cases in which the defendant is charged with harm to a child in the household. One recent federal case, however, refused to adopt a harm to child exception to the adverse testimonial privilege; that court allowed the defendant's wife to refuse to testify even though the defendant was charged with harming a child in the household. The Committee has concluded that this recent case is dubious authority, because its sole expressed rationale is that no court had yet established a harm-to-child exception, even though reported cases do in fact apply a harm-to-child exception in identical circumstances — including a case in the court's own circuit.

The Committee determined that it would not itself propose an amendment to the Evidence Rules solely to respond to a recent aberrational decision that is not even controlling authority in its own circuit. The Committee also noted that an amendment to establish a harm to child exception would raise at least two other anomalies: 1) piecemeal codification of privilege law; and 2) the codification of an exception to a rule of privilege that is not itself codified. The Committee unanimously agreed, however, that the request from Congress must be given serious consideration and that even if the Committee would not propose an amendment to implement a harm to child exception, its report to Congress should suggest language for an amendment should Congress decide to proceed. The Committee also agreed that any language to be suggested to Congress should cover cases involving harm to any child within the custody or control of either spouse; it should not be limited to cases involving harm to biological children of one or both spouses. At its next meeting the Committee will prepare a report to Congress on the harm-to-child exception, for review by the Standing Committee.

C. Possible Restyling Project

At its Fall 2006 meeting the Committee reviewed examples of what three restyled rules of evidence would look like — Rules 103, 404(b) and 612. The rules were picked as representative of the types of challenges and questions that would be presented by a restyling project. Professor Joseph Kimble, the Standing Committee's consultant on Style, prepared the rules to assist the Committee in determining whether to undertake a project to restyle all of the Evidence Rules. Interest in restyling arose when the Committee considered the possibility of amending the Evidence Rules to take account of technological developments in the presentation of evidence. The Committee is determining whether a restyling project might be used to update the paper-based language currently used throughout the Evidence Rules, and more broadly is considering whether restyling is needed to make the Evidence Rules more user-friendly.

The Committee engaged in an extensive discussion of the costs and benefits of restyling the Evidence Rules. Some reservations were noted. Among other concerns, the Committee does not have its full complement of members, so it might be difficult to complete the project in a timely fashion. But the general sense of the Committee is that a restyling project has merit and is worthy of further consideration, because the Evidence Rules in current form are often hard to read and apply, and a more user-friendly version could especially aid those lawyers who do not use the rules on an everyday basis. The Committee recognizes that before any more work is done on a restyling project, it must be determined whether the Chief Justice would support a restyling of the Evidence Rules. The sense of the Committee was that it would be most helpful if the Standing Committee could inquire into the Chief Justice's views on restyling of the Evidence Rules.

D. Uniform Time-Counting Rules

The Committee reviewed the Time-Counting template prepared by the Standing Committee's Subcommittee, and unanimously approved of the uniform time-counting rules established in the template. The Committee also discussed whether the Evidence Rules should be amended to implement the uniform time-counting rules provided in the template. There are only a handful of Evidence Rules that are subject to time-counting. None of the time periods need to be changed to accommodate the uniform time-counting rule, because all are 14 days or longer; the time-counting template takes a "days are days" approach, and that is the approach currently taken in the rules for time periods of 14 days or longer. Research by the Committee found no reported case, nor any report from any other source, to indicate that there has been any controversy or problem in counting the time periods in the Evidence Rules.

The Committee unanimously determined that there is no need for an amendment to the Evidence Rules that would specify how time is to be counted, because there is no existing problem that would be addressed by such an amendment. The Committee noted, however, that because the Civil and Criminal Rules are going to be amended to change the existing time-counting rules, it would be useful for those new rules to govern any time-counting questions that could possibly arise

under the Evidence Rules in the future. The Committee voted unanimously to request the Time-Counting Subcommittee to consider adding language to the template, stating that the Civil and Criminal time-counting rules would govern time-counting under the Evidence Rules.

E. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant. The Court in *Crawford* declined to define the term "testimonial." It also implied, but did not decide, that the Confrontation Clause imposes no limitations on hearsay that is not testimonial. Subsequently the Court in *Davis v. Washington* held that hearsay statements are not testimonial, even when made to law enforcement personnel, if the primary motivation for making the statements was for some purpose other than for use in a criminal prosecution. The Court in *Davis* also declared, but did not hold, that non-testimonial hearsay is unregulated by the Confrontation Clause.

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Committee is monitoring the case law to determine whether and when it might be necessary to propose amendments to bring the hearsay exceptions into compliance with constitutional requirements. At its Fall 2006 meeting the Committee unanimously resolved that it is not advisable to propose an amendment in response to *Crawford* at this time. It is likely that no amendment will be necessary because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial. The admissibility requirements of the Federal Rules hearsay exceptions are being held to screen out "testimonial" hearsay as that term has been construed in *Davis* and the lower courts. Even if the Federal Rules hearsay exceptions are not coextensive with the Confrontation Clause, an attempt to to codify *Crawford* is unwise at this point, because the Supreme Court's opinion in *Davis* is less than a year old and has not yet been applied or construed by many of the lower courts. The Committee will continue to monitor case law developments under *Crawford* and *Davis*.

IV. Minutes of the Fall 2006 Meeting

The Reporter's draft of the minutes of the Committee's Fall 2006 meeting is attached to this report. These minutes have not yet been approved by the Committee.

7-D

Advisory Committee on Evidence Rules

Minutes of the Meeting of November 16, 2006

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 16, 2006 at the Thurgood Marshall Building in Washington, D.C..

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Joan N. Ericksen.
Hon. Robert L. Hinkle
Hon. Andrew D. Hurwitz
William W. Taylor, III, Esq.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
Ronald J. Tenpas, Esq., Department of Justice

Also present were:

Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Professor Daniel Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure
Thomas W. Hillier II, Esq., outgoing member
Patricia L. Refo, Esq., outgoing member
Timothy Reagan, Esq., Federal Judicial Center
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jeffrey N. Barr, Esq. Rules Committee Support Office
Timothy Dole, Esq., Rules Committee Support Office
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor Joseph Kimble, Consultant on Style

Opening Business

Judge Smith welcomed the two new members of the Committee, William Hangley and Marjorie Meyers. He reported on the June meeting of the Standing Committee, in which that Committee approved proposed Evidence Rule 502 for release for public comment. He also noted that the proposed amendments to Rules 404, 408, 606(b) and 609, are before Congress and are expected to become effective on December 1, 2006.

Judge Smith asked for approval of the minutes of the April 2006 Committee meeting. The minutes were approved.

Possible Restyling Project

At its last meeting the Committee directed the Reporter to prepare restyled versions of a few Evidence Rules, so that the Committee could consider the desirability of undertaking a project to restyle the Evidence Rules. That project would be similar to the restyling projects for Appellate, Criminal and Civil Rules that have been completed. Interest in restyling arose when the Committee considered the possibility of amending the Evidence Rules to take account of technological developments in the presentation of evidence. Many of the Evidence rules are "paper-based"; they refer to evidence in written and hardcopy form. A restyling project could be used to update the paper-based language used throughout the Evidence Rules, and more broadly it might be useful in making the Evidence Rules more user-friendly.

The Reporter asked Professor Joseph Kimble, the Standing Committee's consultant on Style, to restyle three rules of evidence — Rules 103, 404(b) and 612. Professor Kimble graciously agreed to do so. The rules were picked as representative of the types of challenges and questions that would be presented by a restyling project. They raised questions such as: 1) whether updating certain language would be a substantive or stylistic change; 2) whether adding subdivisions within a rule would be unduly disruptive; and 3) whether certain substantive changes that would improve the rule could be proposed for amendment along with the style changes. After Professor Kimble restyled the three rules, the Reporter reviewed the changes and provided suggestions for change, on the ground that some of the proposed style changes would have substantive effect. Professor Kimble incorporated the Reporter's suggestions in a second draft, and it was that draft that was reviewed by the Committee.

The Committee engaged in an extensive discussion of the costs and benefits of restyling the Evidence Rules. Judge Thrash, who is a member of the Style Subcommittee of the Standing Committee, stated that restyling would require extensive time and effort from the Committee and the Reporter. He noted that when the Civil Rules were restyled, dozens of questions arose as to whether a purported style change would change the substance of a rule. Judge Thrash remarked,

however, that the end product of restyled Civil Rules was worth the effort, as those rules are now much more user-friendly, easier to read and apply.

Committee members noted that if the Evidence Rules were reviewed for style, there would inevitably be suggestions that those Rules could be improved substantively as well. Yet those at the meeting who were involved in previous style projects strongly recommended that substantive improvements be put to the side during restyling. Adding substantive changes would complicate and delay the restyling process, and would make it harder for the project to gain approval. The recommendation was that the substantive changes raised in the restyling process should be placed on a separate track and proposed after restyling was completed.

Some Committee members expressed reservations about restyling the Evidence Rules. One member noted that the Committee did not have its full complement of members, and therefore it might be difficult to complete the project in a timely fashion. Another member opined that any difficulty in using the Evidence Rules was not because of their wording and structure, but because of difficult evidentiary concepts such as the difference between hearsay and a statement not offered for its truth. Another member questioned whether the restyling of the Evidence Rules might be problematic because most states use the existing Federal Rules as a model for their own rules of evidence.

Despite these reservations, the general sense of the Committee was that the restyling project had merit and was worthy of further consideration. Members reasoned that the Evidence Rules in current form are often hard to read and apply, and that a more user-friendly version would especially aid those lawyers who do not use the rules on an everyday basis.

The Committee recognized that before any more work was done on a restyling project, the Committee would need to determine whether the Chief Justice supported restyling of the Evidence Rules. The Reporter to the Standing Committee noted that the Chair of the Standing Committee would be meeting with the Chief Justice in the near future. The sense of the Committee was that it would be useful if the Chief Justice's views on restyling of the Evidence Rules could be addressed at that meeting.

Harm-to-Child Exception to the Marital Privileges

Public Law 109-248, the Adam Walsh Child Protection and Safety Act of 2006, Section 214, provides:

> The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--

(1) a child of either spouse; or

(2) a child under the custody or control of either spouse.

* * *

The Reporter and the consultant on privileges prepared a memorandum to assist the Committee in assessing the necessity and desirability of amending the Evidence Rules to provide a harm to child exception to the marital privileges. That memo indicated that almost all courts considering the question had in fact refused to apply either the confidential communications privilege or the adverse testimonial privilege to cases in which the defendant is charged with harm to a child in the household. In other words, a harm to child exception to both marital privileges is already recognized in the federal case law. One recent federal case, however, refused to adopt a harm to child exception to the adverse testimonial privilege. The memorandum concluded that this recent case was dubious authority, because it provided no analysis; relied on a purported lack of case law on the subject, even though other federal cases apply the exception; and failed to cite a previous case in its own circuit that applied a harm to child exception to the adverse testimonial privilege (and accordingly the new case was not even controlling in its own circuit).

The Committee considered the necessity and desirability of an amendment to implement a harm to child exception to the marital privileges. Members generally agreed that if it were the Committee's decision, it would not and should not propose an amendment to implement the harm to child exception. This is because the Committee ordinarily does not propose an amendment unless one of three conditions is established: 1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it; 2) the existing rule is simply unworkable for courts and litigants; or 3) the rule is subject to an unconstitutional application. With respect to the existence of a harm to child exception, there is no risk of unconstitutional application, and there is no problem of workability, because the exception either applies or it does not. With respect to a split in the circuits, the courts are in fact uniform about the existence of a harm to child exception to the privilege for confidential communications. It is true that there is a split of sorts on the application of the harm to child exception to the adverse testimonial privilege, but that split was only recently created, and by a single case — a case that ignores the fact that its own circuit had previously established the exception. Thus, the Evidence Rules Committee would not propose an amendment to the Evidence Rules solely to respond to a recent aberrational decision that is not even controlling authority in its own circuit.

Committee members also noted that an amendment to establish a harm to child exception would raise at least two other anomalies: 1) piecemeal codification of privilege law; and 2) codification of an exception to a rule of privilege that is not itself codified.

The Department of Justice representative noted, however, that the question for the Committee was not whether it would propose an amendment, but rather how to respond to Congress's request for input on the necessity and desirability of such an amendment. Because privilege rules must be

enacted by Congress, the standard for proposing a rule of privilege might be different from that used by the Evidence Rules Committee for other rules.

The Committee unanimously agreed that it was important to consider the request from Congress seriously and that, even if the Committee would not propose an amendment to implement a harm to child exception, it should in its report to Congress suggest language for an amendment should Congress decide to proceed. The Committee also agreed that any language to be suggested to Congress should cover cases involving harm to any child within the custody or control of either spouse; it should not be limited to cases involving harm to biological children of one or both spouses.

The Committee directed the Reporter to prepare a draft report to Congress that would set forth: 1) the reasons why the costs of an amendment are not warranted when the only benefit is to address the results of an aberrational case; 2) concerns about piecemeal adoption of privilege rules; 3) concerns about drafting an amendment that would provide an exception to privileges that are not themselves codified; and 4) proposed language for Congress to consider should it decide to promulgate an amendment that would codify a harm to child exception to the marital privileges. The Committee will consider the draft report at its next meeting.

Time-Counting Project

The Standing Committee has appointed a Subcommittee to prepare rules that would provide for uniform treatment for counting time-periods under the national rules. The Subcommittee has prepared a template and has solicited comments and suggestions from the Advisory Committees. That template takes a "days are days" approach to time-counting, meaning that weekend days and holidays are counted for all time periods measured in days or longer periods. It also provides for uniform treatment on when to begin and end counting, and a uniform method of counting when the end of the period is a weekend or holiday.

The Committee reviewed the Time-Counting template and unanimously approved of the approach taken by the Time Counting subcommittee. It had no suggestions for improvement to the template.

The Committee then discussed whether the Evidence Rules should be amended to implement the uniform time-counting rules provided in the Template. The Committee noted that there are only a handful of Evidence Rules that are subject to time-counting: 1) Under Rule 412, a defendant must file written notice at least 14 days before trial of intent to use evidence offered under an exception to the rape shield, unless good cause is shown; 2) Under Rules 413-415, notice of intent to offer evidence of the defendant's prior sexual misconduct must be given at least 15 days before the scheduled date of trial, unless good cause is shown; 3) Rule 609(b) provides a different balancing test for convictions offered for impeachment when the conviction is over 10 years old; and 4) Rules 803(16) and 901(b)(8) provide for admissibility of documents over 20 years old.

The Committee reviewed a memorandum from the Reporter which indicated that 1) the day-based time periods in the Evidence Rules will not be shortened or otherwise affected by the time-counting template, because they are all 14 days or longer — the time-counting template takes a "days are days" approach, and that is the approach currently taken in the rules for time periods 14 days or longer; and 2) there appears to be no reported case, nor any report from any other source, to indicate that there has been any controversy or problem in counting the time periods in the Evidence Rules. Perhaps this is because the day-based time periods are all subject to being excused for good cause, and if there is any close question as to when to begin and end counting days, the court has the authority to excuse the time limitations. And as to the year-based time periods, it would be extremely unlikely for a situation to arise in which the timespan is so close to the limitation that it would make a difference to count one day or another. For example, how likely is it that a document will be 20 years old, depending on how one counts the first or last day of the period? Any dispute on time-counting could be handled by the court or the proponent of the evidence by simply waiting a day to admit the evidence.

The Committee unanimously determined that there is no need for an amendment to the Evidence Rules that would specify how time is to be counted, because there is no existing problem that would be addressed by such an amendment. The Committee noted, however, that because the Civil and Criminal Rules are going to be amended to change the existing time-counting rules, it would be useful for those new rules to govern any time-counting questions that could possibly arise under the Evidence Rules in the future. The Committee voted unanimously to request the Time-Counting Subcommittee to consider adding language to the Template to provide that the Civil and Criminal time-counting rules would govern time-counting under the Evidence Rules.

Crawford v. Washington and the Hearsay Exceptions

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court in *Crawford* declined to define the term "testimonial." It also implied, but did not decide, that the Confrontation Clause imposes no limitations on hearsay that is not testimonial. Subsequently the Court in *Davis v. Washington* held that statements are not testimonial, even when made to law enforcement personnel, if the primary motivation for making the statements was for some purpose other than for use in a criminal prosecution. The Court in *Davis* also declared, but did not hold, that non-testimonial hearsay is unregulated by the Confrontation Clause.

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has therefore resolved to monitor federal case law developments after *Crawford*, in order to determine whether and when it might be necessary to propose amendments that would be necessary to bring a hearsay exception into compliance with constitutional requirements. The memorandum prepared by the Reporter

indicated that the federal courts are in substantial agreement that certain hearsay statements are always testimonial and certain others are not. Those considered testimonial include grand jury statements, statements made during police interrogations, prior testimony, and guilty plea allocutions. Statements uniformly considered nontestimonial include informal statements made to friends, statements made for purposes of medical treatment, and garden-variety statements made during the course and in furtherance of a conspiracy. Federal courts have also held that certifications of a record or the non-existence of a record may be admitted despite *Crawford*, even if those certifications are prepared specifically for litigation.

The Committee discussed whether any amendment should be proposed in order to bring any of the hearsay exceptions into compliance with the Confrontation Clause after *Crawford* and its progeny. Some members were of the opinion that no amendment was necessary because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial, i.e., that the admissibility requirements of the Federal Rules hearsay exceptions screen out testimonial hearsay as that term has been construed in *Davis* and the lower courts. Others were less confident that the Federal Rules hearsay exceptions were coextensive with the Confrontation Clause, but these members nonetheless agreed that it would be unwise at this point to propose amendments that would attempt to codify *Crawford* and its progeny. These members concluded that the case law remained in flux, and noted that the Supreme Court's opinion in *Davis* was less than a year old and had yet been applied or construed by many of the lower courts.

The Committee unanimously resolved that it was not advisable to propose an amendment in response to *Crawford* at this time. It directed the Reporter to continue to monitor case law developments under *Crawford* and *Davis*.

Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product

At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members observed that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made less expensive. Other concerns include the problem that arises if a corporation cooperates with a government investigation by turning over a report protected as privileged or work product. Most federal courts have held that this disclosure constitutes a waiver

of the privilege, i.e., the courts generally reject the concept that a selective waiver is enforceable. This may be a problem if it deters corporations from cooperating in the first place.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Chairman recognized that while any rule prepared by the Advisory Committee could proceed through the rulemaking process, it would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b). In response to that letter, the Committee prepared a proposed Rule 502 that would protect against waiver of privilege or work product under certain circumstances. The first draft of that rule was the subject of a hearing conducted at Fordham Law School in April 2006. In response to comments at that hearing and discussion at the subsequent Committee meeting, the draft rule was substantially revised. The Committee unanimously approved the redrafted proposal for release for public comment, and the Standing Committee voted unanimously to issue the revised proposed Rule 502 for public comment.

For the Fall 2006 meeting, the Reporter prepared a discussion memorandum that highlighted some comments and suggestions concerning Rule 502 that were made outside the formal public comment process, which was still in an early stage. The Committee discussed these comments and suggestions at the meeting, with the recognition that no immediate action could or should be taken on any proposal for change to Rule 502 until the end of the formal comment period. The Committee did, however, reach some tentative conclusions on some issues raised by the informal comments.

The comments considered by the Committee, and the Committee's tentative position on each of the comments, was as follows:

1. Suggestion to delete the "should have known" language in the selective waiver provision:

Rule 502(b) conditions protection from inadvertent waiver on whether the holder of the privilege took reasonably prompt measures, "once the holder knew or should have known of the disclosure," to rectify the mistaken disclosure. The Reporter received an informal comment suggesting that the words "or should have known" be deleted. The stated ground for deletion is that the "should have known" language could give rise to litigation about when, exactly, the producing party should have known about the mistaken disclosure. It is also argued that the "should have known" language would be difficult to apply in electronic discovery cases, in which mistaken disclosures are all but inevitable and so one could argue that the holder "should have known" about mistaken disclosure at the very time that *any* production of electronic material was made.

The suggestion was discussed by the Committee. The sense of the Committee was that the "should have known" language had substantial merit. Committee members noted that an "actual

knowledge" standard would also give rise to litigation. Questions would be raised on the exact point at which a producing party "knew" about a mistaken disclosure. One Committee member remarked that if litigation did arise, the "should have known" standard would be easier to apply than a standard based on the producing party's actual knowledge. Committee members also stated that the actual knowledge standard could give rise to gamesmanship. Producing parties might demand the return of the privileged material on the eve of trial, arguing that they did not "know" until then about the mistaken disclosure.

The Committee recognized that in many cases actual knowledge will be relatively easy to determine, because in most jurisdictions a lawyer who receives the information has an ethical obligation to notify the producing party of its receipt. But that ethical proscription would not apply, for example, where the recipient is a pro se litigant. And actual knowledge arguments might still be made for the period between the time of disclosure and the time that the recipient recognizes that the material is protected and notifies the producing party. For all these reasons, the Committee tentatively determined to retain the "should have known" language in Rule 502(b).

2. Suggestion to extend the inadvertent disclosure provision to regulatory investigations:

An informal comment suggested that Rule 502 contains an inconsistency when the inadvertent disclosure provision is compared to the selective waiver provision. The inadvertent disclosure provision (Rule 502(b)) provides protection from waiver when the disclosure is "inadvertent and is made *in connection with federal litigation or federal administrative proceedings*." In contrast, the selective waiver provision (Rule 502(c)) provides protection from waiver to third parties when the disclosure is "made *to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority*." The comment questioned whether there was a rationale for applying the protection of selective waiver to regulatory investigations, while not extending the protection of inadvertent disclosure to those same investigations.

In discussion of this comment, most Committee members concluded that the difference in coverage in the two subdivisions is not anomalous at all. First, the Committee made a considered determination to limit the protections of subdivision (b) to mistaken disclosures made *during proceedings*. Of course, mistaken disclosures can occur in other contexts — such as a letter mistakenly sent from counsel to a potential adversary before litigation has even begun, or a privileged document mistakenly sent to a third party in the mail. But the Committee decided not to cover mistaken disclosures outside the context of a proceeding, for at least two reasons. First, a rule covering mistaken disclosures outside a proceeding risks overreaching, beyond the interest in limiting the costs of discovery that animates the rule. Second, a rule that would govern disclosures outside a federal proceeding could end up regulating disclosures that are not on a *federal* level, thus raising important concerns about federalism. Outside the context of a proceeding, how is it to be determined that a mistaken disclosure is made at the federal level? As Subdivision (b) is currently written, it applies only to disclosures raising a legitimate federal interest. Extending its protection

would raise questions about whether a particular disclosure raised a sufficient federal interest to warrant protection under the Rule.

One Committee member argued in response that a federal interest could be retained by amending Subdivision (b) to cover mistaken disclosures in federal proceedings *and in response to investigations by federal regulators.* Extending the protection for mistaken disclosures to those made to regulators outside a proceeding might be justified on the ground that mistaken disclosures of privileged information are likely to occur much more frequently in response to investigations by regulators than in other non-litigation contexts.

The Committee agreed to consider at its next meeting language that would amend subdivision (b) to cover mistaken disclosures made "to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority."

3. Selective waiver:

The comment received on the relationship between the inadvertent disclosure provision and the selective waiver provision led the Committee to a preliminary discussion of the merits of the selective waiver provision. The Committee has not decided whether to propose a selective waiver provision in Rule 502, i.e., a provision that disclosure of privileged information to a regulator does not constitute a waiver in favor of third parties. The selective waiver provision in the Rule released for public comment is bracketed, indicating that the Committee is undecided about the merits of a selective waiver provision and is seeking public comment (and especially empirical data) on the merits of such a provision before making a decision.

It is clear that the selective waiver provision is the most controversial part of proposed Rule 502. Selective waiver has raised objections from plaintiffs' counsel, from certain members of the ABA, and from state court judges concerned that a state's waiver rules would be subsumed by a federal provision on selective waiver. Committee members at the Fall meeting suggested that given the controversy (both within and outside the Committee) it might be appropriate for the Committee to draft a rule in which the selective waiver provision remained in brackets if and when it went to Congress. Leaving the decision on the merits to Congress could be appropriate because rules of privilege must be directly enacted by Congress in any case. And including a selective waiver provision as a drafting option for Congress (without a suggestion on its merits) is probably appropriate given that in essence the Committee is drafting the rule for Congress and so should provide Congress with all sensible drafting alternatives. Moreover, Congress has shown interest in enacting a selective waiver provision, having done so in the Regulatory Relief Act of 2006, which provides selective waiver protection for disclosures to banking regulators.

Other than on the merits of the proposal per se, a number of comments at the Committee meeting suggested changes to the language of Rule 502(c). One member suggested that the Rule should set forth procedures by which the producing party could prevent a regulator from disclosing

privileged information to third parties. That member was concerned that a regulator, once receiving privileged information, might distribute it widely. But most Committee members noted that the Evidence Rules are not the place for establishing procedures for preventing disclosure of privileged material outside the context of a proceeding. Procedures for retrieving, or preventing disclosure of, privileged material are already set forth in the Civil Rules.

A Committee member noted that under the Rule as issued for public comment, a disclosure to a federal regulator would operate as a waiver to a state regulator. This is because Rule 502(c) states that a disclosure to a federal regulator does not operate as a waiver "in favor of non-governmental persons or entities." The Committee tentatively agreed with the proposition that if a selective waiver rule were to be adopted, then a disclosure to a federal regulator should not constitute a waiver to a state regulator. The Reporter was directed to provide a drafting alternative, for consideration at the next meeting, providing that disclosure to a federal regulator does not operate as a waiver in favor of a state regulator.

4. Extending the inadvertent disclosure protection to disclosures made in arbitration proceedings:

Rule 502(b) provides that inadvertent disclosures "made in connection with federal litigation or federal administrative proceedings" are not waivers if the party took reasonable precautions to prevent disclosure and acted diligently in trying to get the material back. The Reporter received a private comment asking whether this rule would protect an inadvertent disclosure made in the context of a federal arbitration proceeding. The sense of the Committee was that arbitration proceedings generally should not be covered by the rule, because the rationale for Rule 502(b) is to decrease the cost of pre-production privilege review in federal litigation. In that sense, providing for more efficiency in arbitration proceedings is beyond the scope of the rule.

One Committee member noted, however, that parties are sometimes required by federal courts to go to arbitration. Committee members agreed that court-annexed or court-mandated arbitration should receive the protection of the rule, but noted that the protection was already *granted* in Rule 502(b) because it covered "federal litigation." The Committee tentatively agreed to add a sentence to the Committee Note to specify that the term "federal litigation" is intended to cover court-annexed or court-mandated arbitration proceedings.

5. Extending Rule 502(d) to confidentiality orders not based upon the agreement of the parties:

Subdivision (d) of Rule 502 currently provides that confidentiality orders bind non-parties "if the order incorporates the agreement of the parties before the court." The Reporter received an informal comment from a federal judge, suggesting that the protection of the Rule should be extended to *any* confidentiality order entered by the court. That judge pointed out that if a court finds, for example, that a disclosure of privileged information during discovery was not a waiver,

then that order should be enforceable against third parties even though the parties before the court did not enter into a confidentiality agreement.

The Committee unanimously agreed with the comment. Members thought it anomalous that a court order memorializing an agreement between the parties would be entitled to more respect than other court orders on waiver generally. The Committee tentatively agreed to delete the language of Rule 502(d) that limited its protection to court orders based on agreements by the parties. That tentative amendment would provide as follows:

> (d) Controlling effect of court orders. — A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court~~, if the order incorporates the agreement of the parties before the court~~.

6. Choice of law questions when disclosures are made at the state level and the disclosed information is sought to be used in federal court:

At its Spring 2006 meeting, the Committee unanimously determined that Rule 502 should not purport to regulate disclosures made at the state level, i.e., in state court proceedings or before state regulators. The only impact of the Rule on state courts is that those courts must adhere to the federal rule on waiver with respect to disclosures originally made in federal proceedings or before federal regulators. Choice of law questions are raised, however, when a disclosure of privileged information is made at the state level and then the information is offered in a subsequent federal proceeding. If there is a conflict between the waiver rules of the state and those provided under Rule 502, which law of waiver controls?

The Reporter submitted a memorandum to the Committee on the complex choice of law questions raised by Rule 502. There are three possible outcomes when a state disclosure is offered in a subsequent federal proceeding, and the question is whether there has been a waiver: 1) waiver could be governed by the substantive standards of Rule 502; 2) waiver could be governed by the substantive standards of the state law in the state in which disclosure was made; or 3) waiver could be governed by federal common law that would be applicable under Rule 501 — which would mean that the state law of waiver would govern in diversity cases and the federal common law of waiver (and distinct from Rule 502) would govern in federal question cases.

After discussion, the Committee directed the Reporter to provide the Committee with three drafting alternatives to cover the three choice of law possibilities. The Committee will consider the drafting alternatives at its next meeting.

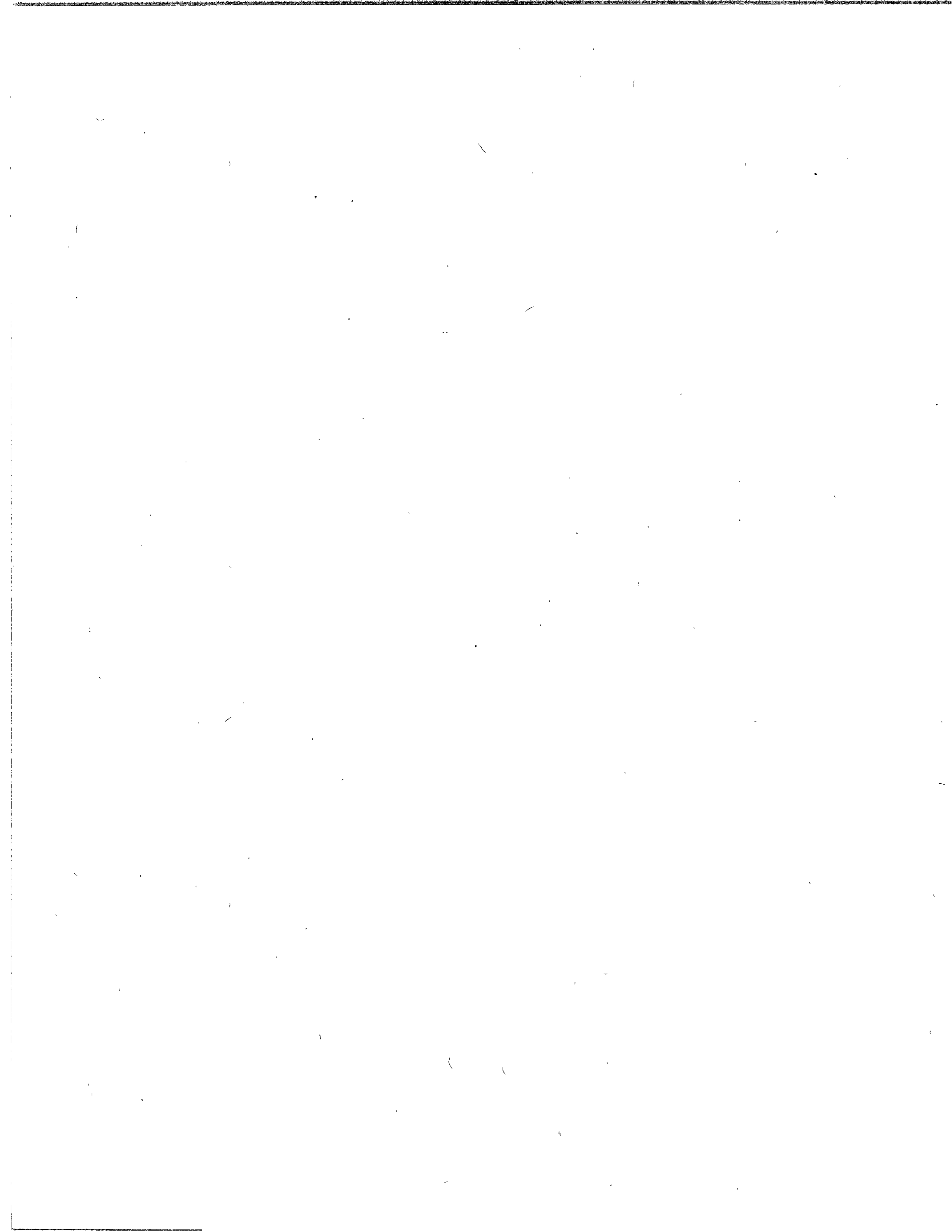
Closing Business

Judge Smith expressed the Committee's deep gratitude and appreciation to departing members Tom Hillier and Trish Refo. He noted that both had served with great distinction, and that each had been a tremendous help and resource to the Committee.

The meeting was adjourned on November 16, 2006, with the time and place of the Spring 2007 meeting to be announced.

Respectfully submitted,

Daniel J. Capra
Reporter



8-A

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
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CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: Hon. David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Thomas S. Zilly, Chair
Advisory Committee on Bankruptcy Rules

DATE: November 30, 2006

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 14-15, 2006, in Seattle, Washington. The Committee considered a number of issues as more fully set out in the draft of the minutes of that meeting which are attached to this report.

II. Action Items

A. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 7052 and 9021, and Preliminary Draft of Proposed New Bankruptcy Rule 7058.

The Advisory Committee recommends that the Standing Committee approve the following draft of proposed amendments and additions to the Bankruptcy Rules for publication for comment.

1. Synopsis of Preliminary Draft of Proposed New Rules and Amendments to Bankruptcy Rules.

The following amendments are recommended as a package of amendments to implement changes to the Bankruptcy Rules regarding the application of the "separate document"

requirement for judgments. In 2002, Rule 58 F. R. Civ. P. was amended to provide that if the court did not issue a judgment on a separate document, then appeal of the judgment must be taken not later than 150 days after the docketing of the judgment or order being appealed. Bankruptcy Rules 9021 and 5003 have governed the entry of judgments in the bankruptcy case as well as in adversary proceedings and contested matters. The amendment to Civil Rule 58 provided an impetus for the Bankruptcy Rules Committee to study the issue anew. The potential for a 150 day appeal period, particularly in matters other than adversary proceedings which closely parallel civil actions, could be very disruptive in bankruptcy cases, so the Advisory Committee concluded that the rules governing adversary proceedings should explicitly adopt Civil Rule 58 through the promulgation of new Bankruptcy Rule 7058. The amendments to Rule 7052 makes explicit that the entry of judgment in adversary proceedings means the entry of judgment under the Bankruptcy Rules, and Rule 9021 was amended to restrict its reach as to judgments to matters other than adversary proceedings.

a. **Rule 7052** is amended to clarify that entry of judgment in an adversary proceeding means the entry of a judgment or order under the Bankruptcy Rules rather than under the Federal Rules of Civil Procedure.

b. **Rule 7058** is new, and it makes Rule 58 of the Federal Rules of Civil Procedure applicable in adversary proceedings.

c. **Rule 9021** is amended in connection with the addition of Rule 7058. Since that rule governs in adversary proceedings, Rule 9021 no longer needs to make Rule 58 of the Federal Rules of Civil Procedure applicable in those actions. This amendment and the addition of Rule 7058 results in the explicit adoption of the separate document requirement for judgments in adversary proceedings, while the effectiveness of an order or judgment in other actions within the case is determined under Rule 5003 which does not include the separate document requirement.

2. *Text of Preliminary Draft of Proposed New Rules and Amendments to Bankruptcy Rules and Official Forms.*

RULE 7052. Findings by the Court

1 Rule 52 F. R. Civ. P. applies in adversary proceedings. The

2 reference in Rule 52 F. R. Civ. P. to the entry of judgment under

3 Rule 58 F. R. Civ. P. means the entry of a judgment or order under

4 Rule 5003(a).

COMMITTEE NOTE

The rule is amended to clarify that the reference in Rule 52 F. R. Civ. P. to Rule 58 F. R. Civ. P. and its provisions is construed as a reference to the entry of a judgment or order under Rule 5003(a).

RULE 7058. Entry of Judgment

Rule 58 F. R. Civ. P. applies in adversary proceedings. The reference in Rule 58 F. R. Civ. P. to the civil docket means the docket maintained by the clerk under Rule 5003(a).

COMMITTEE NOTE

This rule makes Rule 58 F. R. Civ. P. applicable in adversary proceedings and is added in connection with the amendments to Rule 9021.

Rule 9021. Entry of Judgment

~~Except as otherwise provided herein, Rule 58 F. R. Civ. P. applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document.~~ A judgment or order is effective when entered ~~as provided in~~ under Rule 5003. ~~The reference in Rule 58 F. R. Civ. P. to Rule 79(a) F. R. Civ. P. shall be read as a reference to Rule 5003 of these rules.~~

COMMITTEE NOTE

The rule is amended in connection with the amendment that adds Rule 7058. The entry of judgment in adversary proceedings is governed by Rule 7058, and the entry of a judgment or order in all other proceedings is governed by this rule.

III. Information Items

A. Publication of Proposed Amendments to Bankruptcy Rules and Official Forms

At the June 2006 meeting, the Standing Committee authorized the publication of a preliminary draft of amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009 and the preliminary draft of proposed new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, 5012, and 6011. The Standing Committee also authorized the publication of proposed amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24; and proposed new Official Forms 25A, 25B, 25C, and 26, and Exhibit D to Official Form 1. The deadline for the submission of comments on these proposals is February 15, 2007. Thus far, we have received six comments on the proposals. A public hearing on the proposals is scheduled for January 22, 2007.

The Advisory Committee will consider all of the comments submitted on these proposals, whether in writing, or at the public hearing, during its March, 2007 meeting. The Advisory Committee anticipates that it will present these amendments, with appropriate changes, if any, to the Standing Committee at its June, 2007 meeting for approval and transmittal to the Judicial Conference.

B. Time Computation Project.

The Advisory Committee has considered the drafts of the proposed template for time computation under the Bankruptcy Rules. The Committee, through an ad hoc subcommittee, is also conducting a review of the other Bankruptcy Rules to implement the recommendations of the Time Computation Committee regarding the adoption of deadlines of less than 30 days being set out in multiples of seven days. The Ad Hoc Subcommittee will be evaluating the rules to determine whether the deadlines set out in the Bankruptcy Rules should follow that standard or whether some of the rules present issues unique to bankruptcy law and practice that justify the retention of the current deadlines that are not set out in multiples of seven days. The Ad Hoc Subcommittee hopes to make its recommendations for amendments to the Bankruptcy Rules to the Advisory Committee

for its consideration at the March, 2007 meeting. To the extent that the Advisory Committee finds that these amendments should be adopted, they will be recommended to the Standing Committee thereafter.

C. Attorney Conduct

At its Seattle meeting in September 2006, the Advisory Committee agreed to revise Official Form 1, the Voluntary Petition, to include a warning under the attorney's signature that would track the language in section 707(b)(4)(D) of the Bankruptcy Code. That section provides that an attorney's signature on the bankruptcy petition constitutes a certification that the attorney has no knowledge, after an inquiry, that the information in the schedules filed with the debtor's petition is incorrect.

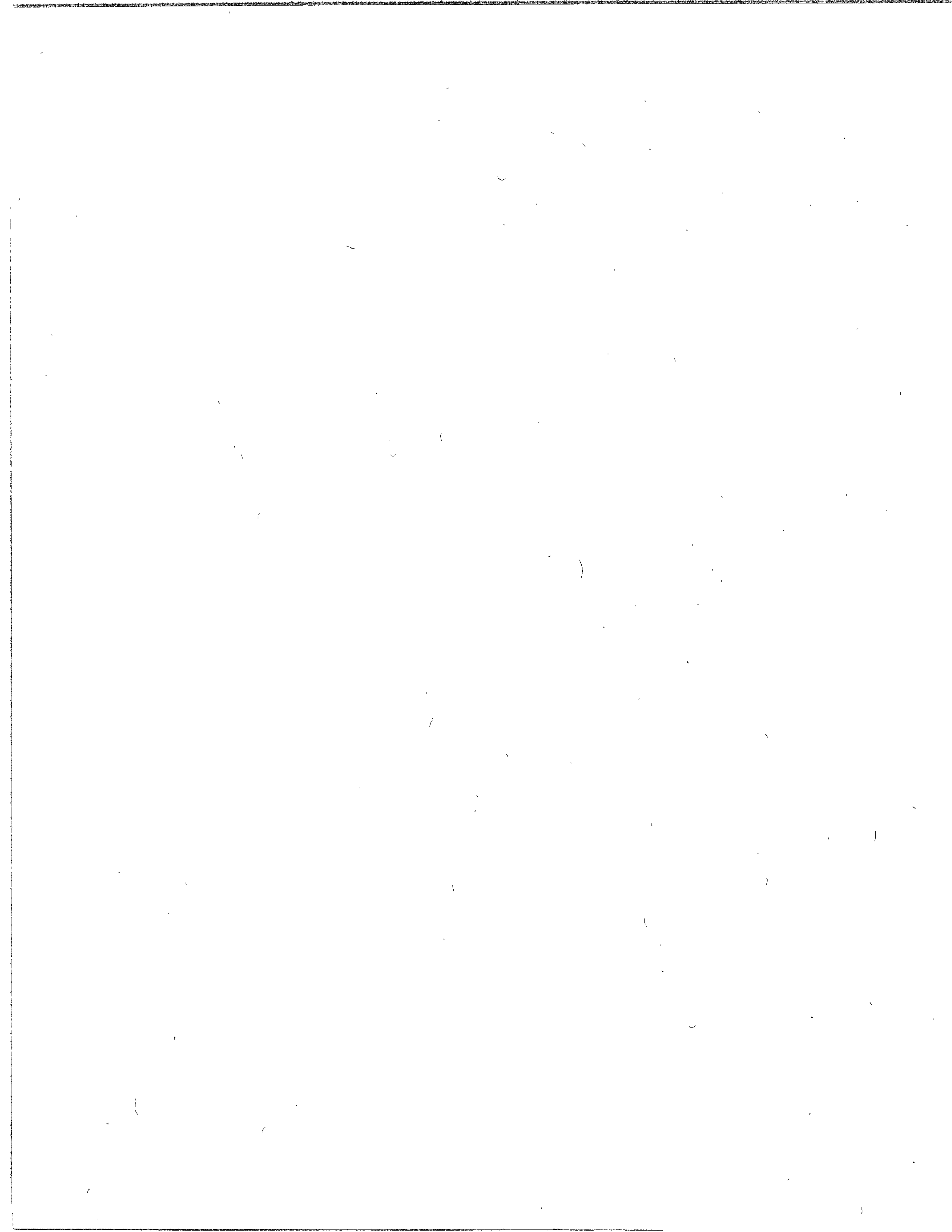
The Advisory Committee referred to its Subcommittee on Attorney Conduct and Health Care the task of drafting alternative amendments to Rule 9011 to address the concerns of Congress as expressed in section 319 of BAPCPA. One alternative would make the requirements of section 707(b)(4)(D) generally applicable in all chapters for cases filed by individuals whose debts are primarily consumer debts. The other proposal would incorporate section 707(b)(4)(D) into Rule 9011 only for chapter 7 cases.

The Advisory Committee decided not to amend Rule 9011 to incorporate section 707(b)(4)(C) or the language of section 319 because those standards differ from the current standards in Rule 9011, which parallel the language of Civil Rule 11.

D. Committee Membership

The Chief Justice has appointed two new members of the Advisory Committee. Bankruptcy Judge Kenneth J. Meyers of the Southern District of Illinois, and John Rao, an attorney at the National Consumer Law Center in Boston, were appointed to three-year terms. They replace Bankruptcy Judge James D. Walker, Jr., of the Middle District of Georgia, and K. John Shaffer, an attorney at Stutman, Treister & Glatt, P.C., in Los Angeles, whose terms have expired.

Attachments: Draft of Minutes of the Advisory Committee Meeting of September 13-14, 2006
Bankruptcy Rules Tracking Docket



8-B

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 14-15, 2006
Seattle, WA

Draft Minutes

The following members attended the meeting:

District Judge Thomas S. Zilly, Chairman
District Judge Irene M. Keeley
District Judge Richard A. Schell
District Judge William H. Pauley, III
Bankruptcy Judge Mark B. McFeeley
Bankruptcy Judge Eugene R. Wedoff
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Dean Lawrence Ponoroff
K. John Shaffer, Esquire
J. Michael Lamberth, Esquire
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, Reporter
Circuit Judge Harris L. Hartz, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Bankruptcy Judge Karen Overstreet, as liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)
Peter G. McCabe, secretary of the Standing Committee
Clifford J. White, III, Acting Director, Executive Office for U.S. Trustees (EOUST)
Donald F. Walton, Acting Deputy Director, EOUST
Mark A. Redmiles, National Civil Enforcement Coordinator, EOUST
Monique Bourque, Chief Information Officer, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Matthew I. Hall, Rules Clerk for Judge David F. Levi
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Rules Committee Support Office, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen "Scott" Myers, Bankruptcy Judges Division, Administrative Office
Robert J. Niemic, Federal Judicial Center (FJC)
Philip S. Corwin, Butera & Andrews, Washington, D.C.
Matthew R. Goldman, Baker & Hostetler LLP, Cleveland, OH

The following persons were unable to attend the meeting:

Circuit Judge R. Guy Cole, Jr., member
District Judge Laura Taylor Swain, member
Bankruptcy Judge Dennis Montali, liaison from the Bankruptcy Administration Committee
Patricia S. Ketchum, advisor to the Committee

The following summary of matters discussed at the meeting should be read in conjunction with the memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold**.

Introductory Matters

The Chairman welcomed the members, liaisons, advisers, staff, and guests to the meeting. He expressed the regrets of Judge Cole, Judge Swain, Judge Montali and Ms. Ketchum who were unable to attend the meeting.

Agenda Item 1; Approval of Minutes for Chapel Hill Meeting

The Chairman directed the Committee's attention to the draft minutes of the March 9-10, 2006 meeting in Chapel Hill (*Agenda Item 1*). Judge Wedoff moved that language be inserted in the minutes to reflect that in approving the Small Business Disclosure Statement form recommended by the Business Subcommittee, the Committee discussed and acknowledged that its recommendation *did not* preclude the adoption of a similar form prepared by the EOUST as an alternative. **The Committee approved the Chapel Hill minutes as revised by Judge Wedoff's suggestion without objection.**

Agenda Item 2; Oral Reports on Meetings of other Rules Committees

The Chairman and Mr. McCabe briefed the Committee on the June 2006 meeting of the Standing Committee. Copies of the Standing Committee minutes were included in the materials at Agenda Item 2.

In Judge Montali's absence, the Chairman asked Judge Overstreet to report on the most recent meeting of the Bankruptcy Administration Committee (the "Bankruptcy Committee"). The Chairman asked that the minutes reflect Judge Montali's strong contributions to the Committee over the years.

Judge Overstreet described a number of issues considered by the Bankruptcy Committee including budget issues related to the low level of case filings post-BAPCPA. She also recapped recent fee increases, and fee increases under consideration.

Judge Walker reported on the most recent meeting of the Advisory Committee on Civil Rules. He said the Civil Rules Committee discussed Rule 12 notice pleading, and the need for particularity in summary judgment motions. He said there was also a lot of discussion about Rule 26 with respect to the admissibility of expert work product. Finally, he said the Civil Rules Committee had also been busy with the time computation project.

Judge Klein reported on most recent meeting of the Advisory Committee on Evidence Rules. He said the primary issue before the Evidence Committee concerned waivers, and that it had published a new proposed Rule 502, dealing with waiver of attorney-client privilege and work product.

Action Items

Agenda Item 3A; Rule 9011 Amendment Proposals

The Chairman and the Reporter recapped a letter sent by Senators Grassley and Sessions suggesting that the rules be amended to ensure that attorneys comply with the addition of §707(b)(4)(C) and (D) to the Bankruptcy Code.

By way of background, the Chairman reminded the Committee that it had previously considered a similar suggestion from Senator Grassley made shortly after the Interim Rules were published, and had concluded that it was not necessary to amend Rule 9011 to simply restate the statute. Despite this conclusion, however, the Committee asked the Subcommittee on Attorney Conduct to consider, in light of the amendments to § 707, as well as the sense of Congress provision set forth at § 319 of the 2005 Act, whether the forms or Rule 9011 should be amended.

Although the subcommittee believed that the statement of Congressional intent at § 319 was sufficiently strong to consider a change to Rule 9011, it was unable to recommend specific language. Further, it identified a number of drafting problems that would impact the current reach of Rule 9011. For example, Rule 9011 already contains language *similar*, but not identical to the language found in § 707(b)(4)(C). However, while Rule 9011 applies to all attorneys in all chapters, § 707(b)(4)(C) only applies in chapter 7. Repeating the § 707(b)(4)(C) statutory language in Rule 9011, and limiting its effect to chapter 7 cases, might infer that that there is different standard for the applicability of Rule 9011 outside of chapter 7. And the standard could change in cases that convert from chapter 11 or 13 to chapter 7. Ultimately, the subcommittee drafted alternative proposed changes to Rule 9011 for the Committee to consider. The subcommittee also recommended including language from § 707(b)(4)(D) in the debtor attorney certification at Exhibit B on Form 1.

Mr. Lamberth , a member of the subcommittee, elaborated on the subcommittee's proposal to enhance the debtor attorney certification on the petition. He thought adding the language from § 707(b)(4)(D) would reinforce the notion (new under the 2005 Act) that in signing the petition the attorney was representing that he or she "has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."

Judge Wedoff agreed that a "Miranda type" warning in the Chapter 7 version of the petition would probably benefit attorneys and remind them of their obligations under the statute. He noted, however, that § 704(b)(4)(D) only applies in chapter 7 consumer cases, and he wondered whether the Committee should consider expanding the reach of the warning to all petitions. A majority of members agreed in concept with a warning of some sort on the petition, but thought it should be limited to chapter 7 consumer cases. And Mr. Brunstad suggested that the problem of creating a special petition form for use only in chapter 7 consumer cases could be avoided by using the underlined language at the top of page 94 of the materials, but changing the first clause from ~~In a chapter 7 case~~ to "In a case in which § 707(b)(4)(D) applies, ...".

The Chairman asked whether the rule could or should be amended to parrot the language in § 704(b)(4)(C) and (D) and § 319 of the 2005 Act. Mr. Lamberth, said he thought that Rule 9011(a) *already* implements § 707(b)(4)(C), although with slightly different wording. He noted that the subcommittee recommended *against* expanding Rule 9011 to cover papers submitted to the trustee because it would dramatically expand the scope of the rule and could create situations that might actually delay delivery of documents requested by the trustee while the debtor's counsel undertook steps to verify the information in the requested documents. Instead, he recommended that if a change was made to Rule 9011 that it be limited to papers submitted to the court, similar to Alternative A of the Reporter's memo (at pages 85-86 of the Agenda book).

On behalf of the EOUST, Mr. White agreed with member comments that putting a notice in the petition would likely help educate the bar and would generally improve the accuracy of the schedules. He disagreed with the subcommittee's limited suggested change to the rule, however and instead supported expanding any change to include papers submitted to the trustee, as suggested by the § 319 sense of Congress, and also expanding the reach of any change to all attorneys, not just consumer debtor attorneys in chapter 7. In response, a number of committee members reiterated concerns that attorney fees in "Enron style cases" would skyrocket and case progress could grind to a halt if every paper submitted to the trustee in a case was "submitted only after ... debtors' attorneys ... made reasonable inquiry to verify ..." the information in the papers.

Judge Klein identified a new issue of sanctions he thought the Committee should consider before recommending any change to Rule 9011. He noted that §704(b)(4)(A) and (B), which are new in the 2005 Act, give the bankruptcy judge the ability to shift fees "on its own initiative" if it finds a violation of §707(b) or Rule 9011. Because Rule 9011 currently requires that motion requesting sanctions be filed before fees can be awarded, Judge Klein wondered whether there could be any change to the rule without incorporating all of the language in § 707(b)(4), as opposed to just that set out in § 707(b)(4)(C) and/or (D).

After additional discussion, the Committee considered the following motions:

- Should the attorney certification on the petition be modified to include § 707(b)(4)(D) language "in any case where § 707(b)(4)(D) applies"? **The motion carried without opposition.**
- Should the Consumer Subcommittee be directed to draft a change to Rule 9011 to apply the § 707(b)(4)(D) language in all consumer cases? **Six members voted for the motion and six voted against the motion.**

- Should any change to the rule be limited to incorporating language from § 707 (as opposed to § 319)? **Eight members voted in favor of limiting any change in the rule to incorporating language from § 707.**
- Should the Consumer Subcommittee be directed to draft a change in the rule to incorporate the statutory language "in a case where § 707(b)(4)(D) applies?" **Seven members voted in favor, four against.**
- Judge Schell moved that the Committee consider incorporating § 707(b)(4)(C) language in Rule 9011 as well. Mr. Brunstad said that the issue should be returned to the subcommittee to consider along with the sanctions issue identified by Judge Klein. **The Committee voted against incorporating § 707(b)(4)(C) language in the rule at this time.**

In light of the alternative votes, the Chairman asked the subcommittee to draft an amendment to Rule 9011 incorporating the statutory language "in a case where § 707(b)(4)(D) applies;" to consider whether the change should be made applicable to all consumer cases regardless of chapter; to consider incorporating § 707(b)(4)(C) language in the rule; and to consider the applicability of the court's sanctioning power under § 707(b)(4)(A) and (B) in light of the various proposed changes to Rule 9011.

Agenda Item 3B; Judge Mannes's Corporate Representation Proposal

The Reporter summarized the Subcommittee on Attorney Conduct's review of a renewed request from Judge Paul Mannes to allow non-lawyer representation of corporations in matters involving less that $5,000. In his proposal, Judge Mannes noted that many states now allow such representation in small claims courts. He suggested a rule change that would allow the court to authorize non-attorney corporate appearance in small matters if such representation would be permitted under state law.

The subcommittee was spilt in its recommendation and ultimately recommended that no action be taken. No subcommittee member was in favor of changing the national rules; however two members were in favor of suggesting to Judge Mannes that a local rule might be adopted. And one subcommittee member voted against recommending either a national or local rule on the basis that actual practice may already reflect Judge Mannes's proposal. **After discussion, the Committee agreed with the subcommittee that no action should be taken.**

Agenda Item 4A; Chapter 15 Rules

The Reporter provided an overview of the work by the Subcommittee on Technology and Cross Border Insolvency regarding several new rules recommended by Judge Samuel Bufford for use in chapter 15 cases. He stated that after deliberation, the subcommittee suggested three new chapter 15 specific rules for the Committee's consideration: (i) a new Rule 15001 that would require the debtor to identify its center of main interests on the petition, and that would establish a procedure for challenging the debtor characterization; (ii) a new Rule 15002 that would make all Part 7 rules of the Federal Rules of Bankruptcy Procedure applicable in chapter 15 cases; and (iii) a new Rule 15003 that would govern the establishment of protocols concerning coordination of the case with an ancillary of cross-border case. The Reporter said

that the subcommittee recommended adoption of the new Rules 15001 and 15003, but that it was split over the need for proposed Rule 15002.

After discussion, the Committee decided that proposed Rule 15002 was unnecessary because Rule 7001 already sets out the scope of the Part 7 rules, and nothing in Rule 7001 suggests that the Part 7 rules would not apply in a chapter 15 case.

With respect to proposed Rule 15003, Mr. Brunstad thought that 10 days notice of a hearing on a protocols motion was too short. Judge Klein agreed that 10 days notice was too short and suggested 20 days instead. He also suggested putting the proposed 15003 language in place of the existing language in Interim Rule 5012. Judge Overstreet suggested extending notice to parties who had made filings in the case requesting special notice, and Judge Klein suggested changing the title of the new Rule 5012.

In light of Judge Klein's suggestion that proposed 15003 be redesignated as Rule 5012 (to replace existing Interim Rule 5012 as the national rule in 2008), the Committee asked the Reporter to redesignate proposed Rule 15001 as a new proposed rule within the current rules numbering scheme.

The Reporter said the subcommittee also reviewed chapter 15 related comments to existing rules (as modified by the Interim Rules) received from the Commercial Law League of America ("CLLA") (comments at tab 18 of the materials), and from Daniel Glosband, the principal drafter of the model law that became chapter 15 (Mr. Glosband's comments are described in the Reporter memo at tab 4A).

The CLLA suggested changes to existing interim rules so that language would more closely track the terms used in chapter 15. The Reporter said that the CLLA suggestions were stylistic and would be considered at the March meeting along with other comments on the published rules.

Mr. Glosband suggested a change to Rule 1010 to prevent gamesmanship by eliminating any differences in service based on whether the petition designated the proceeding as a "foreign main" or a "foreign nonmain" proceeding. The Reporter recommended Mr. Glosband's suggested change.

And Mr. McCabe suggested a technical change to Rule 9001 to add 11 U.S.C. § 1502 to the list of definitional sections in that rule that govern the meaning of statutorily defined words and phrases when the same phrases are used in the rules.

The Committee approved all subcommittee suggested changes to the "chapter 15 rules" as modified by the member suggestions at the meeting. The Reporter compiled and distributed the changes in a handout the next day and the Committee approved proposed new Rules 1004.2 (in place of proposed Rule 15001 in the agenda materials), Rule 5012 (in place of proposed Rule 15003 and Interim Rule 5012), and also approved changes to Rules 5009, 1010, 9001 and 2002. The Chairman referred all changes to the Style Subcommittee for final revisions.

Agenda Item 4B; Smart Forms

The Chairman provided the Committee with an overview of the efforts by the AO and the EOUST to implement a voluntary standard for data-enabled forms, also known as "smart forms." He explained that smart forms, a subset of "fillable forms," use a programming code to "tag" and store the data entered in the form in a manner that makes the tagged information easily retrievable.

The Chairman said that the EOUST and the AO had held several meetings with forms vendors seeking voluntary adoption of a smart forms standard to facilitate the capture of certain statistical data required under BAPCPA. So far, however, only one of the software vendors appeared able or willing to implement smart forms unless such forms were mandatory. He said that because of the lack of vendor interest in a voluntary standard, the EOUST had recently approached him and staff at the AO and requested that the Committee consider amending the rules to *require* the use of smart forms.

The Chairman said that he, the Reporter, and AO staff discussed the EOUST's request and concluded that it was probably not necessary propose a new rule requiring the use of smart forms because Rule 5005 (as amended effective December 1, 2006) allows courts to *require* that documents filed electronically conform to technical standards established by the Judicial Conference. They also thought that the EOUST's request raised policy issues and should be considered by the Bankruptcy Committee, the Information Technology Committee, and the Court Administration Case Management Committee instead of the Rules Committee.

The Chairman said the EOUST was actively pursuing a smart forms agenda item with the appropriate committees, but was attempting to "fast track" its efforts as much as possible, and that it was seeking this Committee's endorsement of its effort to change the technical standard.

Mr. White, acting director of EOUST, distributed a letter he recently sent to James Duff, the Director of the Administrative Office, regarding the need for smart forms. He said that the technical standards were set, but that he did not think vendors would implement smart forms unless they were mandatory. He said that the EOUST needs smart forms to facilitate new statutory duties including: automatic sorting of cases above and below state income medians; establishing asset and liability norms – and deviations from such norms – so that debtor audits can be done; and to facilitate studies on such things as household goods valuations and identification of domestic support orders.

Mr. White said that earlier in the week he had spoken with Mr. McCabe and received a commitment from the AO to put this matter before the Bankruptcy Administration Committee and the IT Committee with the purpose of getting the issue in front of the Judicial Conference as soon as possible. He said that although he did not believe there was significant opposition to smart forms, he thought some sort of endorsement from this Committee would facilitate their adoption. He asked that the Committee either endorse the letter he had just sent to the Director, authorize the Chairman to endorse the letter, or possibly send its own letter to the Director recommending smart forms.

Mr. McCabe said from the AO's perspective, adoption of smart forms was more of a long-term solution to its statutory data-gathering obligations, and that it had already made changes to CM/ECF to address its current obligations under BAPCPA. He reported that the AO was working with the EOUST, and was trying to get the smart forms agenda item in front of the appropriate committees as soon as possible. Although Mr. McCabe thought there were still some problems with the current technical standards, he did not think there was significant opposition to the concept of smart forms.

Judge Walker suggested that the Committee make a "Sense of Committee" motion that smart forms should be mandatory. And Mr. Waldron suggested that the Committee should also consider whether smart forms would be mandatory just for vendors, or for all parties. **After additional discussion, the Committee unanimously passed a motion establishing that it was the Sense of the Committee that the Committee and others take all necessary steps to advance the cause of data enabled forms in conjunction with the efforts of the AO and the Bankruptcy Administrator Committee.**

Agenda Item 5A; Separate Document Rule

The Chairman said that the Subcommittee on Privacy, Public Access, and Appeals had met be teleconference to discuss whether to recommend amending the bankruptcy rules that require a separate document for every judgment in a contested matter or adversary proceeding. He said that subcommittee recommended that the separate document rule continue to be applied in adversary proceedings, but that it was split on whether it should be applied in contested matters.

Committee members expressed strong opinions on both sides of the issue. Judges Klein and Walker thought that entry of a separate document for the judgment (distinct from the opinion) clarifies when a judgment takes effect and when time for an appeal begins to run. Mr. Waldron said that from the clerk's perspective, a separate document was very helpful because it eliminated guesswork by deputy clerks who might otherwise have to review orders and decisions in detail to determine whether a judgment had been made.

Judge Wedoff, and Mr. Brunstad argued against a separate document rule in contested matters. Judge Wedoff pointed out that unlike district court, there are many instances in contested matters where a separate document doesn't make sense, and there are lots of courts that do not enforce the requirement in some contested matters, such as a lift stay that is settled through a consent order. He said that in such courts the separate document rule merely creates a trap for the unwary. Mr. Brunstad added that even in district court practice, Rule 58 carves out a number of situations where a separate document is not required. And although it might be possible to carve out similar "bankruptcy specific" contested matters that don't require a separate document, Mr. Brunstad thought the better approach would be eliminate the requirement in contested matters altogether.

There were several comments about how the separate document requirement currently in Rule 9021 is being interpreted. One member believed that a strict reading of Rule 9021 requires

the judge to essentially sign two pieces of paper (the decision, and then the judgment) before an appeal could be taken. Even if such a reading were inaccurate, the member thought it would create unnecessary litigation. Other members (who supported the separate document rule) thought the "separate document" requirement in Rule 9021could be satisfied with a minute entry from the bench which could be docketed separately from the decision, or that the clerk's entry itself could satisfy the requirement.

After additional discussion, the Committee voted to eliminate the separate document rule in contested matters by a vote of 7-6.

The Committee then discussed how to amend Rule 9021 to eliminate the requirement for a separate document in contest matters, while leaving it in effect for adversary proceedings. **After discussion, the Committee voted 6-2 in favor of creating a new Rule 7058 that would make Rule 58 applicable in adversary proceedings. The Committee then voted, without dissent, in favor of: (i) amending Rule 9021 to say "A judgment or order is effective when entered under Rule 5003", and (ii) amending Rule 7052 to clarify that the reference in Civil Rule 52 to Civil Rule 58 should be construed in bankruptcy cases as a reference to Rule 5003.**

The Reporter provided a draft of new Rule 7058 and the changes to Rules 7052 and 9021 in a handout the next day. After reviewing drafts, the Committee approved the changes and directed that they be submitted to the Style Subcommittee.

Agenda Item 5B; Disclosure Statements and Modified Plans Under Rule 3019

Tabled.

Agenda Item 6; Report of the Forms Subcommittee

The Reporter said that the Forms Subcommittee had met by teleconference to consider possible amendments to Official Forms 10, 19A and 19B, and to consider whether to recommend that Director's Form 240 be revised and promulgated as an official form.

Form 240. Judge Walker reviewed suggested changes to Form 240 described at Agenda Item 6. He noted that the form was completely rewritten in 2005 to incorporate changes required by BAPCPA and that there had been several modifications to the form over the past year. He said that the AO was now asking the Committee to review and comment on a reorganization of the boxes on page one of the form, and changes to the attached order.

Judge Walker said the Forms Subcommittee approved all the described changes to Form 240, but that it did not recommend making the form an official form at this time because it would be harder to modify in the future. Judge Wedoff thought making the form an official form would be a good idea. **After additional discussion the Committee approved all the changes set forth at Agenda Item 6, and decided to table the issue of whether the form should be an official form until the fall meeting of 2007.**

Form 10. The Reporter described an issue in Form 10 with respect to the hanging paragraph at § 1325(a)(9) of the Bankruptcy Code. He said that there was a concern by some creditors that if they correctly described that value of their collateral as being less than the amount of their claim (as required by the form) that they might waive the right to "hanging paragraph" treatment of the claim as fully secured when the claim was based on purchase money security interest created in a motor vehicle within 910 days of the petition date.

Some subcommittee members suggested that a box could be put on Form 10 that would allow the creditor to identify its claim as a "910 claim." But the majority of the subcommittee thought such a box would likely be confusing and that the information was not really useful. **After discussion, the Committee agreed with the subcommittee and voted against making any change to Form 10 with respect to the 910 claim issue.**

Forms 19A and 19B. The Reporter said § 110(b) of the Bankruptcy Code requires bankruptcy petition preparers to sign the documents prepared for filing in bankruptcy cases and to list their name and address on the document as well. He said that Form 19A was designed to meet that statutory requirement. However § 110(b)(2) places additional requirements on bankruptcy petition preparers including the requirement that "before preparing any document for filing ..., the bankruptcy petition preparer shall provide to the debtor a written notice ...". Official Form 19B was designed to address the § 110(b)(2) requirement. Because all of the information in Official Form 19A is also in Official From 19B, and because 19B must be filed along with any document petition preparer prepares for filing in the case, the AO has been asked whether Form 19A could be abrogated and Form 19B be redesignated as Form 19. **A motion to combine both forms into a redesignated Form 19 (as described in the agenda materials) carried without opposition.**

Agenda Item 7; Review of Possible Change to Interim Rule 1007(c)

Judge Klein provided an overview of a problem with Interim Rule 1007. He said that some debtors fail to file the required statement concerning completion of a personal financial management course before the Rule 1007(c) deadline and the case is closed without a discharge. The debtor then attempts to reopen and the court is required to find cause to allow reopening. The Reporter suggested a change to 1007(c) that would allow the debtor to reopen the case without a showing of cause.

Some members thought getting rid of the deadline would be a better idea. But Judge Klein said that one reason to maintain the deadline is so the clerk has a date certain to close the case. The Chairman moved to table the matter until the spring meeting so that the consumer subcommittee could draft a fix. **The motion to table carried without opposition.**

Agenda Item 8; Review of Time Computation Template

Judge Klein reported on the efforts of the Time-Computation Subcommittee to establish a uniform method of counting time throughout all federal rules. He said a template has already been created (proposed Civil Rule 6 at page 232 of the agenda materials), and that the Committee has been asked to review the template and determine its applicability to the bankruptcy rules. Mr. Kohn suggested that there would be a need to ensure that the proposed

changes did not override a proscribed statutory period. And there was an extensive discussion among Committee members about whether the proposed changes adequately addressed many of counting problems that occur in bankruptcy cases. The Reporter suggested that a committee note to a bankruptcy version of proposed Civil Rule 6 could address certain counting problems by adding examples.

After additional discussion, the Chairman said he would divide up the list of deadlines complied by the Reporter among several committee members and ask for reports at the spring meeting.

Information and Discussion Matters

Agenda Item 9; Civil Rules Restyling Project.

The Chairman said that only a few bankruptcy rules would be impacted by the civil rules restyling project. He said that he and the Reporter would address changes and would report back to the Committee at the spring meeting.

Agenda Item 10; Oral Report on Joint Subcommittee on Venue and Chapter 11 Matters.

The Chairman and John Shaffer provided an oral report of the joint subcommittee's work.

Agenda Item 11 – Judge Walker Letter Regarding Future Format of Forms

The Chairman said Judge Walker's letter was a long range look at how information currently collected through forms could be collected and utilized more efficiently. Judge Walker added that one problem with the form format in the electronic era is fitting information into a particular box. He thought that developing an input system that allowed the filer to enter the information once so that the court or a program could develop produce forms as needed would be much less cumbersome.

Mr. McCabe suggested creating a working group that would develop a prototype to illustrate the concept, and then bring in vendors to develop how it could be implemented. In his view, a change in the way forms information was collected raised issues beyond the scope of the rules process and he thought that the working group should include members from outside the rules committees. And Mr. Shaffer said the project would likely require as much thought about how information comes out of the system as to how it gets into the system.

Agenda Item 12; Rules Tracking Docket.

The Chairman asked to Committee to review the rules tracking docket for any needed changes.

Agenda Item 13; Oral Report on Electronic Submission of Agenda Materials.

The Chairman told the Committee that there would likely be a shift in the future toward distributing agenda materials in electronic from only.

Agenda Item 14; Report on "fillable PDF" Forms on the U.S. Courts Website.

The Chairman said that this item was addressed in the context of the EOUST's report on smart forms.

Agenda item 15; Report on Pending Legislation to Increase Chapter 7 Filing Fees.

Mr. Wannamaker reported on proposed changes to filing fees that are currently being considered in Congress. If implemented, the changes would require some changes to Form 3B (the existing in forma pauperis form) and possibly to some Director's Forms.

Agenda Item 16; Report on Director's Forms 104 and 281.

Mr. Wannamaker reported on recent changes to Director's Forms 104 and 281. He explained that the change to Form 104, the adversary proceeding coversheet, was timed to coincide with the implementation of CM/ECF 3.1. He said that the primary change was to increase and regroup the nature of suit codes to correspond with the subdivisions of Rule 7001. The changes to Form 281, Appearance of Child Support Creditor, dealt with privacy matters. **All members voted in favor the changes.**

Agenda Item 17; Comment by Judge Geraldine Mund.

The Chairman reviewed Judge Mund's comment that the rules currently do not provide for any restriction on payment to a bankruptcy petition preparer in situations where the debtor subsequently seeks a waiver of the filing fee. The effect of granting the waiver would be that the petition preparer would be paid, but the chapter 7 trustee would not. Judge Mund doubted that Congress intended such a result. There was a split of opinion on the Committee as to whether a change was needed. **The Chairman referred the matter to the Consumer Subcommittee.**

Agenda Item 18; Commercial Law League Position Paper on Chapter 15.

The Reporter indicated that the suggested stylistic changes were in the nature of comments and would be considered along with any other comments to the affected rules.

Agenda Item 19; Request from CM/ECF Working Group to Review Rules 8006 and 8007 Concerning Transmission of the Record on Appeal.

The Chairman referred the matter to the Appeals Subcommittee.

Agenda Item 20; Next Meeting Reminder

The Spring Meeting will be March 29 and 30, 2007 in Marco Island, Florida. The Chairman asked members to e-mail suggested locations for the Fall 2007 meeting. He said the current dates under consideration were September 6 and 7, 10 and 11, or 12 and 13.

Supplemental Agenda Item A; ABA Attorney Discipline Proposal.

The Chairman reviewed an ABA proposal to amend the rules to clarify the authority of the bankruptcy courts to discipline attorneys. He said he was not sure the proposal was really a rules issue, and suggested referring it to the Attorney Conduct Subcommittee.

Mr. Brunstad provided background for the proposal stating that he thought ABA was attempting to head-off a legislative response. Mr. Rabiej said that the Judicial Conference first addressed this issue about 25 years ago and came up with model local rules. He said that Standing Committee also attempted to address the issue about 15 years ago but that it turned into a quagmire because so many players were involved.

Several members were in favor of the Chairman's suggestion that the matter should considered by a subcommittee. And Mr. Walton said that a representative of the EOUST should participate in any subcommittee meetings on the matter. **After additional discussion, the Chairman referred the matter to the Attorney Conduct Subcommittee and requested a report in the spring.**

Supplemental Agenda Item B; Possible Rule 4004 Amendment

Judge Wedoff described a need to amend Rule 4004. He said that § 1328(f) provides a limitation on a chapter 13 discharges that did not exist before, which raises several issues. For example, does the 2 or 4 year limitation period begin on the filing date of the prior case, or on the date of the prior discharge? And how will the change be enforced?

In anticipation of this agenda item, Mr. Waldron surveyed the court clerks and found that most courts will deny a discharge in a chapter 7 case (which has historically had time-related discharge limitations) only if someone initiates an objection to discharge complaint. He said that many courts, however, will close the case without a discharge if no complaint is filed.

Judge Wedoff suggested revising Rule 4004 to require an objection to deny the discharge in chapter 13, as most courts already require in chapter 7. Mr. Brunstad suggested sending the matter to a subcommittee. Judge Overstreet agreed the issue should be considered by a subcommittee, and she suggested that the complaint procedure is too cumbersome to deal with this matter, and that a motion procedure might be better. **The Chairman referred the matter to the Consumer Subcommittee.**

Supplemental C; Proposed Revision to Form 8

The Reporter reviewed a suggestion from Bankruptcy Judge Elizabeth L. Perris to revise Form 8, Debtor's Statement of Intention, to clarify that debtors must indicate both whether the property is claimed as exempt, and whether the debtor intends to surrender, reaffirm, or redeem the property. **The Chairman referred the matter to the Consumer Subcommittee.**

Supplemental D; Recommendation to Adopt Rule Expanding Methods to Invest Estate Funds

The Reporter reviewed a suggestion from the law firm of Baker & Hostetler that the rules be amended to allow for the investment of estate funds in certain approved accounts without the need to post a bond. Providing background, the Reporter said that 11 U.S.C. §345 generally requires the trustee or DIP to seek a court order to invest estate funds in a non-FDIC insured account without posting a bond or collateral for the investment. Baker & Hostetler suggested rule that would provide investment safe harbors that the trustee could use without providing a bond or collateral. The Reporter identified at least two problems with the proposal: first, it was unclear whether a rule could be drafted that does not conflict with the statutory language in § 345; second, because the issue seemed to address policy, he thought it might more appropriately be considered by Bankruptcy Administration Committee.

Mr. Walton advocated giving the matter to a subcommittee to determine whether an appropriate rule could be drafted. But Judge Wedoff questioned whether any rule could be drafted that would comply with § 345. Both Judge Wedoff and Judge Overstreet thought that it might make more sense for the EOUST to create a proposed general order that could be adopted by courts locally.

Judge Hartz indicated that the standing committee is currently looking at the limits of a standing order vs. a local rule. Mr. Shaffer thought that this was not rules issue. And Mr. Brunstad thought it should be considered by a subcommittee.

The Chairman referred the matter to the Business Subcommittee and indicated that he would send a copy to the chair of the Bankruptcy Administration Committee, Circuit Judge Marjorie O. Rendell. Judge Overstreet said she would present the matter to Judge Rendell.

Potential Changes to Schedules I and J and the IFP Waiver Form.

Mr. Wannamaker said he thought there would be a need to make certain technical changes to schedules I and J and the IFP notice with respect to net income. He said he would prepare something for review by the Forms Subcommittee.

Administrative Matters

The Chairman informed the Committee that a hearing on the rules published for comment in August, 2006 is tentatively scheduled for January 22, 2007. He requested that members keep their calendars clear in case hearings were held.

Judge Walker moved that the meeting be adjourned. Judge Wedoff seconded the motion. The Chairman commented that this would be Judge Walker's last meeting, as his second term on the Committee was expiring. And he thanked Judge Walker for his service. He then asked that the minutes reflect that for the first time in six years, Judge Walker made a motion that was seconded by Judge Wedoff. The meeting was adjourned.

Respectfully submitted,

Stephen "Scott" Myers

9-A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

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CIVIL RULES

SUSAN C. BUCKLEW
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: December 12, 2006

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Vanderbilt Law School in Nashville, Tennessee, on September 7 and 8, 2006. Draft Minutes of the meeting are attached.

Part I presents a technical amendment to Supplemental Rule C(6)(a) with a recommendation that it be approved without publication for comment, because it is a technical amendment.

Part II of this report presents items recommended for approval for publication next summer. These items are proposed amendments to Rules 13(f) and 15(a) on amending pleadings and to Rule 48 on jury polling, along with a proposed new Rule 62.1 on "indicative rulings"that addresses the authority of a district court to act on certain requests for relief after notice of appeal is filed. These were introduced in summary form as information items at the June 2006 meeting but with the recommendation that in light of other recent and anticipated amendments, publication would be in August 2007.

Part III briefly summarizes the Advisory Committee's discussion of the intercommittee time-computation template rule. This part also summarizes the Advisory Committee's considerable progress in the intracommittee work of reviewing the time periods and deadlines within the Civil Rules and recommending amendments to be consistent with the template and to be sure the periods and deadlines are reasonable. These amendments will be recommended for publication in tandem with the template rule.

Part IV presents several items for information. These include projects being developed by subcommittees, one focusing on discovery and the other focusing on summary judgment and the possibility of developing a court-controlled procedure for requiring more specific pleading on an individual-case basis. Another project that has been less developed arises from a Second Circuit suggestion for amending Rule 68 on offers of judgment. Finally, submission of the Style Project to the Supreme Court is noted.

I. Action Item: Recommendation For Adoption Without Publication

The Advisory Committee recommends approval for adoption without publication of a technical amendment to Supplemental Rule C(6)(a)(I).

Adoption of Supplemental Rule G, which took effect on December 1, 2006, required conforming amendments that withdrew portions of other Supplemental Rules that dealt with civil forfeiture proceedings. An unintended omission failed to capitalize "A" as the first word of subparagraph C(6)(a)(i). The omission might be cured by simply capitalizing "A," but a better parallel with subdivisions C(1), (2), and (5) can be achieved by these changes:

(6) Responsive Pleading; Interrogatories.

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

(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:

* * * * *

9-B

II. Action Items: Recommendations for Publication

A. Rules 13(f) and 15(a): Amending Pleadings

Related amendments of Rules 13(f) and 15(a) are recommended for publication with other proposals in August 2007. The changes are shown in the Style Rule.

Rule 13. Counterclaim and Crossclaim

* * * * *

1 ~~**(f) Omitted Counterclaim.** The court may permit a party to~~
2 ~~amend a pleading to add a counterclaim if it was omitted~~
3 ~~through oversight, inadvertence, or excusable neglect or~~
4 ~~if justice so requires.~~

Committee Note

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim is governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See *6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430*. Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

Rule 15. Amended and Supplemental Pleadings

1 **(a) Amendments Before Trial.**
2 **(1) Amending as a Matter of Course.** A party may
3 amend its pleading once as a matter of course
4 within:
5 **(A)** ~~before being served with a responsive~~
6 ~~pleading;~~ 21 days after serving it, or

1 **(B)** ~~within 20 days after serving the pleading if a~~
2 ~~responsive pleading is not allowed and the~~
3 ~~action is not yet on the trial calendar~~ <u>if the</u>
4 <u>pleading is one to which a responsive pleading</u>
5 <u>is required, 21 days after service of a</u>
6 <u>responsive pleading or 21 days after service of</u>
7 <u>a motion under Rule 12(b), (e), or (f),</u>
8 <u>whichever is earlier</u>.
9 * * * * *

Committee Note

Rule 15(a) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived throughout the time required to decide the motion and indeed survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or at least reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cut off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,[1] and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Discussion

Rule 13(f) now provides that the court may permit a party to "amend a pleading to add a counterclaim." The Style Project considered deleting this rule as redundant with Rule 15, but concluded that the change might be challenged as substantive. Despite the different language, however, there is no apparent reason to believe that courts apply different standards when an amendment seeks to add a counterclaim than when an amendment seeks to add a claim or crossclaim, or to make other changes. Nor is there any apparent reason to apply different standards. The existence of this provision, moreover, generates uncertainty whether a Rule 13(f) amendment is eligible for relation back under Rule 15(c). Abrogation will bring all pleading amendments within Rule 15.

Rule 15 has been on the Committee agenda for several years. Several possible amendments have been considered by two subcommittees. The current recommendations result from careful work by a subcommittee chaired by Judge Michael Baylson. The proposed Committee Notes provide most of the discussion needed to explain the proposed amendments.[2]

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[1] This statement anticipates adoption of Style-Substance Rule 40 on December 1, 2007.

[2]After years of off-and-on debate over whether to pursue proposals to amend to Rule 15(c), the Committee decided not to do so. Close textual analysis reveals problems with the rule, but there is no indication in the reported cases that these problems have caused significant difficulties in practice. Work on Rule 15(c), further, would reopen serious questions. The first provision allows an amendment to relate back to the date of the pleading being amended when applicable limitations law allows relation back. The following provisions allow relation back despite the fact that applicable limitations law does not allow relation back. Relation back still can be justified to cure errors that are fairly characterized as procedural, but the line between providing ameliorative procedure and creating new limitations rules is thin. After exploring both narrow and broad proposals to amend the provisions that now appear in Rule 15(c)(2) and (3) (Style Rule 15(c)(1)(B) and (C)), the Committee decided to decline further work on Rule 15. The discussion is elaborated in the draft Minutes.

Present Rule 15(a) presents a clear distinction between the events that cut off the right to amend once as a matter of course a pleading to which a responsive pleading is required. Service of a responsive pleading terminates the right to amend. Service of a motion that attacks the pleading does not. Instead the right to amend survives the motion, argument of the motion, deliberation by the court, and — on terms that vary somewhat among the courts — even a decision granting the motion. Only a judgment dismissing the action cuts off the right to amend. Neither the rule nor the cases that apply it identify clear reasons justifying this distinction and the proposed amendment eliminates it.

Two significant changes are made. First, the distinction between a motion and a responsive pleading in present Rule 15(a) is eliminated. Instead of providing a right to amend once as a matter of course if the pleading is challenged by a motion – most commonly a motion to dismiss for failure to state a claim – the proposal to amend Rule 15(a) would cut off the right to amend 21 days after the motion is filed. Second, present Rule 15(a) cuts off the right to amend immediately on service of a responsive pleading. The proposed amendment would carry the right to amend forward for 21 days after the responsive pleading is served.

When this proposal was briefly discussed at the June 2006 Standing Committee meeting, one member noted that it may be important for defendants to have the ability to cut off a plaintiff's ability to amend a complaint without leave. Present Rule 15(a) ensures that a defendant can do that by serving an answer. Since that meeting, the member very helpfully provided further thoughts on the concerns he voiced and the Civil Rules Subcommittee had the opportunity to respond. This exchange was very helpful and we are grateful to the Standing Committee member for taking the time to give us the benefit of his thoughts in advance. The following exchange sets out the Standing Committee member's concerns and the Subcommittee's response. Both are set out below.

1. The Concerns

Here is the email from the Standing Committee member:

. . . my concern is based upon my experience as a practitioner who primarily represents defendants. Obviously, the judicial members of the Committee see far more cases than I do, and thus may have different insights. But I believe that the current rule has two important, inter-related benefits in the commercial litigation context that would be lost under the proposed rule change.

As you note, the proposed change to Rule 15 would allow an answer to be amended once as a matter of course within 21 days after a responsive pleading is filed or within 21 days after service of a motion under Rule 12(b), (e) or (f), whichever is earlier. In essence, the proposal does two things: (1) it sets a 21-day cut-off on the present right to amend after a motion to dismiss is served, and (2) it allows plaintiffs to amend a complaint as a matter of right after an answer has been filed.

The first change should be quite beneficial. The second change, however, would alter the balance between plaintiffs and defendants under the current rule, to the disadvantage of defendants and of the judicial system.

1. Some significant percentage of federal commercial litigation is initiated by badly drafted, badly conceived complaints. Despite the requirements of Rule 11, even sophisticated law firms often file weak, cut-and-paste complaints or complaints that omit elements of the claims asserted, even in matters that purportedly involve significant sums of money. Such weak complaints are an obvious abuse of the system, and should be discouraged.

Under the current rule, such weak complaints are discouraged, at least minimally. A plaintiff relying on a weak complaint faces the risk that the defendant may cut off the ability to amend as of right by filing an answer followed by a motion to dismiss. The plaintiff is thus exposed to the cost and risk of a motion for leave to amend – a motion that, even in a system that permits liberal amendment, may be costly to prepare and may not be granted.

That cost and risk should lead at least some plaintiffs to prepare more thoughtful, better researched initial complaints – a benefit to judges and defendants alike. That is the first benefit under current Rule 15 that would be lost under the proposed change.

2. Much commercial litigation is driven by cost and the advantage to be gained by shifting costs onto the opposing party. A plaintiff wants to threaten the defendant with litigation costs such as discovery to compel settlement, while incurring as few costs as possible – costs such as researching the law. The plaintiff knows that the defendant will most likely file a motion to dismiss, which will educate the plaintiff about the law, and that – after imposing on the defendant the cost of preparing the motion to dismiss – the plaintiff can take that "free" legal learning and craft a better complaint, one which may withstand a motion to dismiss and open the gates to discovery. This is obviously a situation that is very frustrating for defendants.

A defendant, however, *currently* has the ability to deny the plaintiff the benefit of a free ride on the defendant's legal research, by answering and then filing a motion to dismiss. Faced with a compelling motion to dismiss, the plaintiff may decide that the cost of preparing an amended complaint and the now-necessary motion for leave to amend is too great, and the plaintiff may decide not to invest further in the lawsuit. The lawsuit will either be abandoned or the initial, badly drafted complaint will be readily dismissed.

Moreover, some complaints are so flawed that leave to amend – if it must be sought – will be denied, for any of a number of well-settled reasons including futility. If amendment remains automatic, then even the "futile" amendment will impose on the defendant the cost of another motion to dismiss.

The proposed rule change gives a plaintiff the perverse incentive to file a weak complaint, as the plaintiff not only minimizes the up-front costs to prepare the complaint but can then, without any risk, impose on the defendant the cost of preparing a motion to dismiss that will never be heard, as plaintiff will learn from the motion to dismiss and then submit an amended complaint.

If a defendant can never cut off the plaintiff's ability to amend as of right, a defendant can be compelled *in every case* to file two motions to dismiss: one directed at the first complaint, and the second directed at the amended complaint – even if the amended complaint is itself fatally flawed and amendment would not be permitted under the current rule. That result is burdensome to the system and unfair to defendants.

The ability to cut off amendment as of right is the second benefit that the proposed rule change would eliminate. Indeed, to the extent that your comments are predicated in part on the notion that answers are beneficial because they "may point out issues that the [plaintiff] had not considered," it is notable that the proposed rule seems to remove any incentive for a defendant to answer in any case in which a motion to dismiss will be filed.

3. I see three arguments in opposition to this analysis.

First, it can be argued that few defendants avail themselves of the opportunity to combine answers with motions to dismiss. That may be so, but well-advised defendants choose to do so in

the right cases – e.g., where the cost of answering is itself low, and where there is some reason to believe that the motion for leave to amend will not be filed, or if filed will not be granted.

Second, as you note, it can be argued that the proposed change will save judges from having to decide motions to dismiss addressed to "raw" complaints. But under the current rule that is also true in most cases: a plaintiff faced with a compelling motion to dismiss will amend the complaint as of right (if the defendant has not taken the precaution of filing an answer), and the defendant will be forced to file another motion to dismiss the "improved" complaint – the same advantage purportedly carried by the proposed change. As this benefit is already a feature of the current rule, it should not be invoked to justify a change.

Third, it can be argued that because motions for leave to amend should be freely granted, all the current rule does is impose on judges the necessity of ruling on motions for leave to amend, and the proposed change would alleviate that burden. This concern undervalues the benefit to the system of increasing plaintiffs' incentives to craft well-designed complaints from the outset. It also overlooks the unfairness to a defendant of incurring the cost to educate the plaintiff about the governing law and pleading standards. It also undervalues the set of outcomes in which the plaintiff, faced with the necessity of preparing both a motion for leave to amend and a fresh complaint, decides to abandon the suit. These benefits, I believe, outweigh the costs imposed by motions for leave to amend under the current rule; and even under the proposed change, plaintiffs could still file motions for leave to amend.

4. To be sure, if Rule 15 were to be changed, the balance between plaintiffs and defendants could be restored in other ways. One approach would be a more generous fee-shifting regime that punished plaintiffs for obviously flawed first complaints; but presumably the courts do not want to invite more fee litigation.

I understand my concern may strike the Committee as a relatively small or hypertechnical point, predicated on a cynical view of commercial litigation. But because the current rule in practice offers important benefits in at least some cases that would be lost under the proposed rule, I wanted to flag the issue for the Committee.

2. *The Subcommittee's Response*

The response sent to the Standing Committee member from the Civil Rules Subcommittee stated as follows:

On behalf of the Advisory Committee on Civil Rules, I wish to respond to your very thoughtful critique of the proposed amendment to Rule 15(a), F. R. Civ. P. Your letter has been seriously considered by our Rule 15(a) Subcommittee, which developed the proposed amendment, and recommended it to the full Advisory Committee, which as you know has recommended it, in turn, to the Standing Committee.

The Subcommittee considered amending Rule 15(a) so as to require that <u>all</u> amendments must be made with leave of court. However, the consensus of the Subcommittee, and the full Committee, was to the effect that, because the Supreme Court mandates liberal allowance of amendments, particularly early in the litigation, requiring that every amendment be made with leave of court would put an undue burden on district judges.

Our discussions started with the belief that, as presently drafted, Rule 15(a) has resulted, in the usual context of a plaintiff desiring to amend the complaint, in both an unnecessary burden on district judges, and undue advantage to the plaintiff. We have received complaints from district judges over many years that plaintiffs, faced with a motion to dismiss, would frequently wait until

after briefing was completed, and sometimes even wait until after the district judge had issued an opinion and order, (as long as the complaint was not dismissed with prejudice), to file an amended complaint. Many judges felt that this resulted in their having wasted a great deal of time deciding a motion, only to have the plaintiff amend the complaint as of right – something the plaintiff could have done promptly upon service of the motion to dismiss. A further consequence was to delay progress of the litigation. The amended rule will require the plaintiff to "fish or cut bait" about amending the complaint within twenty-one days after service of the motion to dismiss, rather than waiting. The Subcommittee considered the scenario you described, in which the defendant answers the complaint and also files a motion to dismiss. In the experience of Subcommittee members, a motion to dismiss is most often filed before an answer. Cutting off the right to amend once without leave of court does carry a price that seems high given that leave to amend once is likely to be granted.

As to your point that the defendant who files a motion to dismiss is "educating" the plaintiff about defects in the plaintiff's complaint, our Subcommittee believes that the twin concepts, of notice pleading and liberal allowance of complaints early in the litigation, outweigh requiring the plaintiff to secure leave of court to file an amended complaint once an answer has been filed. We think that such an amendment will almost always be allowed if requested properly and that requiring leave of court for an amendment in that context would unnecessarily burden district judges.

We also think that the court system will benefit from the revised rule for the reasons stated above, by encouraging prompt revision of pleadings early in the case, without the necessity of the judge ruling on a motion to dismiss.

I hope this is responsive to some of your concerns. Because the Committee's recommendation is to publish the amendment for public comment, the opportunity to hear from bench and bar will allow us to continue to explore the problems and test the proposed solution. We look forward to continuing to work with you and other members of the Standing Committee on these issues.

/s/ Judge Michael Baylson

In response, the Standing Committee member emphasizes his agreement with that portion of the proposed rule change that would require a plaintiff to amend within 21 days after service of a motion to dismiss, agreeing with the Subcommittee's observation that this particular proposed change will avoid the situation in which a judge wastes time addressing a motion to dismiss, only to have the plaintiff thereafter come forward with an amended complaint. The member continues to be concerned with the other aspect of the proposed amendment, even recognizing that most defendants file a motion to dismiss before an answer. The member is concerned that in the rare instances in which defendants do file a motion to dismiss after an answer, allowing a plaintiff to amend as of right after the answer is filed removes two benefits of the current rule:

First, the current rule signals to the court in the rare instances in which it is used, and plaintiff thereafter seeks leave to amend, that the motion for leave to amend needs particular scrutiny; and second, in all of the other cases in which this mechanism is not used (and thus no burden is imposed on the judge), the mechanism still operates as a useful deterrent, because a plaintiff cannot know in advance whether a defendant will use this mechanism and thus must devote more time to the preparation of the initial complaint.

3. *Further Discussion*

The Subcommittee and Committee believed that the proposed Rule 15(a) amendment brings the rule text closer to the desirable reality of contemporary practice. There is a cost to extending the opportunity to inflict real burdens by maintaining, at least for longer than should be, ill-founded litigation that is not filtered out by Rule 11. This cost is eloquently presented by the message from the Standing Committee member.

It is useful to point out that before recommending the proposed amendment for publication for comment, the Subcommittee and full Committee considered several alternatives, including the following: (1) there should not be a right to amend once as a matter of course in any circumstance; (2) the right to amend once as a matter of course should be cut off after a brief interval — perhaps 21 days — whether or not the opposing party has responded; (3) the right to amend once as a matter of course should be cut off once the opposing party has responded, no matter whether the response takes the form of a motion to dismiss or a responsive pleading; and (4) as under the present rule, a responsive pleading should cut off the right to amend once as a matter of course, while a responsive motion does not.

The reasons for the present rule, allowing one amendment as a matter of course after a responsive motion, reflected in part the general spirit of notice pleading. Not only should a short and plain statement suffice; the failure to achieve even a short and plain statement on the first effort should not doom a claim or defense that may yet be capable of sufficient statement. In choosing among the risks, the risk that a pleading misadventure will defeat a viable claim is more to be feared than the risk that an opposing party will be put to too much work, whether the work is only at the pleading stage or extends to all the work of discovery needed to establish that there is nothing to support the adequate pleading made possible only after the education provided by a motion to dismiss or an answer.

Views about common practice reflected the sense that courts have fully absorbed the general spirit of notice pleading. Early Advisory Committee discussions, and later Subcommittee deliberations, concluded that little is gained by cutting off the right to amend once as a matter of course during a brief period after an opposing party has pointed out defects in a pleading. The pleader may recognize the cogency of the challenge and be encouraged to amend promptly. Prompt amendment also might be sought if leave is required, but the temptation to stand on the initial pleading for a while may be harder to resist, particularly if the pleader would rather not have to plead and then prove the matters omitted from the initial pleading. The pleader, moreover, is likely to be careful about framing the amended pleading whether the amendment is made as a matter of right or after winning leave. A motion for leave to file a second amended pleading will not be received with anything like the warm notice-pleading spirit that may greet a motion for leave to file a first amended pleading.

Even if the pleader is forced to seek leave to amend, the Subcommittee and Advisory Committee believed that leave is quite likely to be granted. This belief does not reflect hard empirical research. But experience seems to be that leave will be granted if there is any plausible prospect that a potentially sustainable claim or defense lies under an inept pleading. Indeed it is quite common to grant leave to amend as a routine, almost reflexive, part of an order granting a motion to dismiss for failure to state a claim. And that happens only after the pleader has chosen to persist with the initial and inadequate pleading through to the point of forcing actual decision of the motion.

Finally, it is worth emphasizing that the proposal is to publish for comment. The exchange presented in this report foreshadows the benefits of the public comment period that will result if this proposal is published for comment in August 2007.

B. RULE 48: JURY POLLING

Rule 48(c) is recommended for publication at the same time as the amendments proposed for Rule 13(f) and 15, and as new Rule 62.1.

Rule 48. Number of Jurors; Verdict; Polling

1 **(a) Number of Jurors.** A jury must begin with at least 6 and
2 no more than 12 members, and each juror must
3 participate in the verdict unless excused under Rule
4 47(c).
5 **(b) Verdict.** Unless the parties stipulate otherwise, the
6 verdict must be unanimous and must be returned by a
7 jury of at least 6 members.
8 **(c) Polling.** After a verdict is returned but before the jury is
9 discharged, the court must on a party's request, or may
10 on its own, poll the jurors individually. If the poll
11 reveals a lack of unanimity or assent by the number of
12 jurors required by the parties' stipulation, the court may
13 direct the jury to deliberate further or may order a new
14 trial.

Committee Note

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

Discussion

Consideration of adding a provision for jury polling was suggested during Standing Committee discussion a few meetings ago. Criminal Rule 31(d) provides a good model that is adopted for this recommendation. One departure is required to account for the parties' opportunity to stipulate to a nonunanimous verdict. And a style departure was made by referring to ordering a new trial rather than declaring a mistrial and discharging the jury. The Civil Rules consistently refer to a new trial; the closest illustration in rules sequence is Rule 49(b), which deals with the similar problem of inconsistencies when a general verdict is supplemented by interrogatories.

Jury polling is occasionally resisted on the ground that it may lead to frequent retrials. The Federal Judicial Center gathered figures on more than 100,000 jury trials over the 25 years from 1980 to 2004. Fewer than 1% of these trials resulted in a hung jury. This figure suggests that the likely risk is not great.

C. RULE 62.1: "INDICATIVE RULINGS"

New Rule 62.1 is recommended for publication for comment.

Rule 62.1 Indicative Rulings

1 **(a) Motion For Relief Pending Appeal.** If a timely motion
2 is made for relief that the court lacks authority to grant
3 because of an appeal that has been docketed and is
4 pending, the court may:
5 **(1)** defer consideration of the motion;
6 **(2)** deny the motion; or
7 **(3)** indicate that it [might][would] grant the motion if
8 the appellate court should remand for that purpose.
9 **(b) Notice to Appellate Court.** The movant must notify the
10 clerk of the appellate court when the motion is filed and
11 when the district court acts on the motion.
12 **(c) Remand.** If the district court indicates that it
13 [might][would] grant the motion, the appellate court may
14 remand the action to the district court.

Committee Note

This new rule adopts and generalizes the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and either deny it or indicate that it [might] [would] grant the motion if the action is remanded.

This clear procedure is helpful whenever relief is sought from an order that the court cannot revise because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's

authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the "indicative ruling" procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court when the motion is filed in the district court and again when the district court rules on the motion. If the district court indicates that it might grant the motion, the movant may ask the appellate court to remand the action so that the district court can make its final ruling on the motion. Remand is in the appellate court's discretion. The appellate court may remand all proceedings, or may remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed. [The district court is not bound to grant the motion after indicating that it might do so; further proceedings on remand may show that the motion ought not be granted.]

Discussion

New Rule 62.1 responds to a suggestion made by the Solicitor General to the Appellate Rules Committee. The Appellate Rules Committee concluded that any new rule provision would be better included in the Civil Rules because the underlying question involves district court authority to act while an appeal is pending.

The basic approach recommended in this proposal is borrowed from the procedure followed when a Rule 60(b) motion is made for relief from a judgment while an appeal from the judgment is pending. The courts of appeals recognize that the appeal defeats district-court "jurisdiction" to grant the motion. But they all rule that the district court can consider the motion. Most agree that the district court retains jurisdiction to deny the motion. But all agree that the district court lacks "jurisdiction" to grant the motion. If the district court concludes that the motion should be granted, it can indicate that it would do so if the case is remanded for that purpose. (At least one circuit also requires a remand to establish authority to deny the motion after the district court indicates that it would deny if the case is remanded. And another court at times chooses to vacate the judgment with leave to reinstate the appeal after the district court acts on remand.)

The common Rule 60(b) procedure is satisfactory. It honors the wisdom of the rule that only one court should have control of a case at one time. It recognizes that the time to move under Rule 60(b) is not suspended by a pending appeal, so that the motion often must be made or lost before the appeal is decided. The refusal to suspend the time to move in turn rests on the importance of prompt inquiry into many of the issues that may be raised by such motions.

Although it is well established, the procedure incident to a Rule 60(b) motion made pending appeal is often overlooked by lawyers. Some district judges have been unaware of its existence. It would be useful to write this procedure into Rule 60(b) to make it well known, to make it consistent across all courts, and to provide some useful procedural incidents such as the movant's duty to

inform the court of appeals both when the motion is made and again when the district court acts on the motion.

The proposal goes beyond Rule 60(b) motions, generalizing the procedure to embrace any order that the district court lacks authority to revise because of a pending appeal. The orders most likely to be caught up in the broader rule will be interlocutory orders with respect to injunctions. Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish district-court authority to act despite a pending appeal, and indeed seem to indicate that relief should be sought first in the district court. Several courts of appeals, however, do not read those rules as they seem to be written. See 16 Federal Practice & Procedure: Jurisdiction 2d, § 3921.2, pp. 59-64. Rule 62.1 will provide an alternative path to district-court action in those circuits. And it will provide a clear source of authority for more exotic combinations of appeals taken while the district court continues to proceed with respect to matters not subject to the appeal.

Rule 62.1 does not attempt the difficult task of defining the circumstances in which a pending appeal ousts district-court power to act on a motion. It is drafted to apply only when an independent source of authority establishes the district court's lack of power.

The recommendation contemplates publication in a form that seeks comment on alternative wording. The question is whether the district court should be able to indicate that it believes the case should be remanded without committing itself to revise the order. One rule text version allows the district court to indicate that it "might" grant relief. The other version requires the district court to indicate that it "would" grant relief. The argument for insisting that the district court indicate that it "would" grant relief is that a case should be remanded, interrupting the progress of the appeal, only after the district court has invested the time and energy — and imposed the burden on the parties — required to reach final decision on the motion. The argument for recognizing authority to indicate that the district court "might" grant relief is that this approach better integrates the resources of both courts. Initial consideration may persuade the district court that the motion raises important questions, but that final resolution will require a heavy investment that should not be made without assurance that the court of appeals will not decide the appeal — perhaps mooting or changing the inquiry — before the inquiry is complete, or else refuse to remand after the district court indicates that it would grant the motion. Once the district court indicates that it might grant the motion, and explains the reasons why the issues seem important but too difficult to pursue to completion without a remand, the court of appeals has control. The court of appeals can balance the district court's statement of the reasons that support remand against the progress of the appeal and its own deliberations. These arguments would be summarized in the message transmitting the proposal for publication, with a request for comment on the choice.

Two questions were addressed to this proposal at the June 2006 Standing Committee meeting. One asked why this new rule should be located between Rules 62 and 63. The other asked whether it is possible to find a better caption than "indicative rulings."

Further consideration of location reconfirmed the recommendation that the new rule be designated as Rule 62.1. Title VII, Rules 54 to 63, covers "Judgment." There is a logical progression from Rule 59 to Rule 62. Rule 59 covers new trials and alteration or amendment of a judgment immediately after the judgment is entered. Rule 60 covers relief from a judgment or order after the time for relief under Rule 59 expires. Rule 61 expresses a harmless error rule that governs relief under both Rule 59 and Rule 60. Rule 62 addresses staying execution pending appeal from the judgment, a common problem. Rule 63 addresses the quite different questions that arise when a district-court judge is unable to proceed. The new provisions were originally drafted as an addition to Rule 60, addressing only relief under Rule 60 pending appeal. When the proposal was broadened to include all circumstances in which a pending appeal ousts district-court authority to grant relief, the designation as a new Rule 62.1 became the most attractive choice.

The choice of caption proved more difficult. No firm conclusion was reached on an alternative caption. Instead, the Advisory Committee is willing to adopt the title most satisfactory to the Standing Committee. "Indicative rulings" was adopted initially because it is a term familiar to frequent appellate litigators. Under present practice, reflected in proposed Rule 62.1(a)(3), a district court that lacks authority to grant relief pending appeal may "indicate" that it would grant relief — or at least seriously consider granting relief — if the case is remanded for that purpose. The difficulty is that lawyers whose practice is not centered on appeals may not recognize the new rule by this caption. The choice of caption affects the tag line for subdivision (a).

62.1 Indicative Ruling on Motion for Relief Barred by Pending Appeal

This caption avoids the limitations from the word "judgment," which is not in the body of Rule 62.1. This caption also avoids any implication that Rule 62.1 creates a new motion. Finally, this caption refers to "indicative rulings," the term used by appellate specialists, but also describes the rulings in a way that nonspecialists will recognize. The reference to "indicative rulings" also helps invoke the limited role of Rule 62.1, which does not begin to address all forms of trial-court action pending appeal.

D. RULE 8(C): DISCHARGE IN BANKRUPTCY

In January 2006, the Standing Committee approved publication of a proposal to amend Rule 8(c) to delete the reference to "discharge in bankruptcy" as an affirmative defense. This suggestion emerged from the Style Project but was too substantive to be accomplished within that work. Approval was for publication with the next set of Civil Rules amendments to be published. Rule 8(c) will be added to any of the foregoing proposals that may be approved for publication in August 2007.

III. Information Item: Time-Computation Project

The Advisory Committee discussion of the template rule being developed by the Time-Computation Subcommittee is summarized in the draft Minutes. The Time-Computation Subcommittee has considered this discussion along with the deliberations of the other Advisory Committees that are working on the Time-Computation Project. The results are reflected in the Subcommittee's Report.

The Advisory Committee, aided by the diligent work of two subcommittees over the summer, also considered all of the time periods and deadlines included in the Civil Rules. The results of these deliberations will be presented to the Standing Committee as a recommendation to approve for publication in conjunction with presentation of the template time-computation rule. Barring unexpected difficulties, the proposals should be presented at the June 2007 meeting.

One additional time rule deserves mention. Rule 6(b) generally authorizes a court to enlarge a time period or to permit an act to be done after expiration of a specified time period on showing excusable neglect. But Rule 6(b) prohibits an extension of time to act under Rules 50(b) and (c)(2); 52(b); 59(b), (d), and (e); and 60(b). Rules 50, 52, and 59 set the time for post-judgment motions at 10 days. Rule 60(b) sets an outer limit of one year for motions under paragraphs (1), (2), and (3). The one-year limit does not seem to present a problem. The 10-day limits, however, present at least two problems. One is that often the 10-day period is too brief to prepare a well-crafted motion, particularly after a long or complex trial. Judges react to this difficulty in various ways, indirectly circumventing the 10-day limit. The other problem is that motions continue to be filed too late. The consequences are loss of the opportunity for post-judgment relief and, often enough, loss of any opportunity to appeal because of a mistaken belief that the untimely motion has suspended appeal time. The Advisory Committee concluded that these problems should be addressed by replacing the 10-day period in Rules 50, 52, and 59 with a 30-day period. Rule 6(b) then would remain unchanged, prohibiting any extension of the more generous period. The 30-day proposal will be among those submitted for approval for publication with the time-computation package.

The Civil Rules Committee is also reviewing statutes that affect civil cases to identify time periods and deadlines that the template might shorten. Professor Struve has already done considerable work to identify these statutes. This work will enable the Committee to recommend rule changes that would supersede inconsistent statutory provisions or changes to the statutes. Professor Cooper will be reporting on likely candidates for such changes shortly. The results of the Committee's review of Professor Struve's and Cooper's work will also be presented to the Standing Committee in June 2007.

IV. Other Information Items

A. DISCOVERY: RULE 30(b)(6)

The Discovery Subcommittee has made a careful study of a number of questions surrounding deposition of an organization under Rule 30(b)(6). The Advisory Committee determined at its May 2006 meeting that only three of these questions deserved further study. At the September meeting it concluded that two more of these questions can be put aside without further present action. One set of questions is presented by conflicting assertions that the deposition testimony of a person designated by an organization to testify for the organization is given too much effect in "binding" the organization, or instead is not given enough binding effect. The Subcommittee recommended, and the Advisory Committee agreed, that the courts generally are approaching these issues in the right way. Ordinarily the designated witness's testimony is treated the same way as any other deposition testimony of a party. Greater "binding" effect seems to be given only as a sanction for

failure to properly prepare the witness as required by Rule 30(b)(6). The second set of questions is whether express provision should be made for "supplementing" the deposition testimony when the organization uncovers information that was not provided to the designated witness. These questions seem to be incidents of the "binding effect" questions, and were put aside for that reason.

The remaining Rule 30(b)(6) question arises from the role of the organization's lawyers in preparing a designated witness to testify to matters known or reasonably available to the organization. It may be the lawyer who tracks down the organization's information and who educates the witness in this information. The process may threaten to impinge on work-product protection. The Advisory Committee accepted the Subcommittee recommendation that this work-product question deserves further study in conjunction with the similar questions being studied with the disclosure of expert trial-witness reports and discovery of expert trial witnesses.

B. DISCOVERY: EXPERT TRIAL WITNESSES

The Discovery Subcommittee continues to study several questions that relate to disclosure and discovery of expert trial witnesses. Three sets of questions deserve mention now.

The first set of questions relates to identifying the expert trial witnesses that should fall within the disclosure report provisions of Rule 26(a)(2)(B). Two categories of these witnesses are being studied. The first involves interpretation of the express text of Rule 26(a)(2)(B). The Rule requires a disclosure report by an expert trial witness "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." A majority of reported opinions have effectively read out of the rule the limit that excuses a disclosure report if the witness is an employee whose duties do not regularly involve giving expert testimony. The question is whether the Rule is wrong because a disclosure report is important in this setting, or whether the Rule is right because there may be distinctive reasons for excusing the report requirement. The other category of witness causing concern is the witness who is not retained or specially employed. The Committee Note to the amendments adding Rule 26(a)(2)(B) offers treating physicians as an example of such witnesses. Experience, however, shows that it can be difficult to determine whether a treating physician has crossed over the line to become a witness retained or specially employed. The questions are whether treating physicians or other expert trial witnesses properly should be exempt from the disclosure requirement, and whether any desirable exemption can be expressed more clearly in Rule text.

The second set of questions arises from the "maximum disclosure" effects of the disclosure report requirement in Rule 26(a)(2)(B) and the discovery provisions of 26(b)(4). Prompted in part by the 1993 Committee Note, most courts rule that an expert must disclose communications with counsel that otherwise would be protected by privilege or work-product protection. A 2000 recommendation by the New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section urged that this approach be embedded in the rules. A 2006 resolution of the American Bar Association recommends that this approach be retrenched substantially. Other organized bar groups are also examining this issue. The questions raised by these competing recommendations go to the heart of expert witness testimony as it has developed in our adversary system. The bearing on attorney-client privilege and waiver rules is manifest and troubling. The relationship to Rule 26(b)(3) work-product protection also is manifest, and may prove troubling as well. The Subcommittee continues to study these problems, and plans to meet with a small group of experienced litigators for further discussions.

The third set of questions arises from the common practice of allowing discovery of draft expert-witness reports. The American Bar Association Resolution says that discovery of draft reports has encouraged many expert witnesses to take steps to ensure that there are no drafts to discover. These measures can interfere with the effective and orderly development of expert

testimony. At least three states, Massachusetts, New Jersey, and Texas bar such discovery; the result is better expert testimony. Denying discovery of draft reports can even mean that the best qualified experts may be more willing to serve as trial witnesses because they are free to explore competing ideas before forming an opinion. The Subcommittee continues to explore these questions in addition to those described above.

C. PLEADING: RULE 12(e)

The Supreme Court has ruled that the "notice pleading" practice instituted by Civil Rule 8 forecloses any exaction of heightened pleading in circumstances not covered by a specific provision such as Rule 9(b). For more than a decade, the Advisory Committee agenda has included the question whether some provision should be made for more particularized pleading standards, at least for some cases. The general concern ties directly to summary judgment, the topic described next. It may be that some actions persist longer, at greater cost, than should be. Some combination of increased pleading standards and invigorated summary-judgment practice might reduce cost and delay in such actions.

Pleading has been the subject of active study at several recent meetings. Several possible approaches have been deferred, at least for the time being. The possibility that some form of fact pleading might replace notice pleading for all purposes has not commended itself for present action. Adopting specific pleading standards for specific substantive theories would require detailed knowledge of the real workings of present practice, and might raise questions whether substance-specific pleading requirements somehow abridge or modify the underlying substantive rights.

Attention has turned to the Rule 12(e) motion for a more definite statement. Rule 12(e) originally provided for a bill of particulars as well as for a more definite statement, but the bill of particulars was abolished in 1948. There is no thought of restoring bill-of-particulars practice. The standard for a more definite statement is that a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. But the rule might be expanded to provide a new case management tool that allows a court to order a more definite statement when that would better enable the parties and court to conduct and manage discovery and to present and resolve dispositive motions. The possible advantages must be weighed against the risks of misuse and overuse. Concerns have been expressed that an amended rule would be used to throw up "roadblocks." Rule 12(e) motions might be used — as they may be now — as a shortcut discovery device or as disguised motions for summary judgment. These concerns may not be fatal. One thought has been that the new tool could be designed for initiation by the court, perhaps tied to Rule 16. Other thoughts may emerge.

These topics continue to command attention. The goal continues to be some development of notice-pleading practice that will support early identification of some cases that can properly be resolved on the pleadings or by summary judgment without all-encompassing discovery.

D. SUMMARY JUDGMENT

An attempt to revise Rule 56 in the wake of the 1986 Supreme Court decisions restating summary-judgment burdens ultimately failed in 1992. Practice, however, continues to move beyond the procedures described in Rule 56. Local rules have proliferated and expanded. Some of the local rules seem flatly inconsistent with Rule 56, but have been bypassed in the Local Rules Projects because they seem better than Rule 56. Enough time has gone by to take up Rule 56 again. A subcommittee has begun work, and has added Rule 12(e) to its charge in order to support integrated consideration of both pleading and summary judgment.

The purpose of the present project is to restate and revise the procedures that surround summary judgment. There is no purpose to change the standard for summary judgment. The tie to the standard for judgment as a matter of law is direct and important. The familiar words — "no genuine issue as to any material fact" — were considered sacred in the Style Project and almost certainly will be carried forward unchanged.

It is a closer choice whether to attempt to express in Rule 56 the distinction between the moving burden of a party who does not have the trial burdens on an issue and the moving burden of a party who does have the trial burdens. First rough drafts have been considered and rejected, in part because it is difficult to express the distinction clearly. But a clear provision might give useful direction to lawyers who do not quite grasp the distinction.

Apart from these basic issues, the draft addresses a number of Rule 56 procedures.

The provisions governing the time for Rule 56 motions are completely revised. A motion may be made at any time, subject to a cutoff tied to the conclusion of discovery or the time set for trial.

Many local rules provide, in differing terms, that a motion and response must identify the issues claimed to warrant summary judgment and must refer specifically to the record materials that support or defeat the motion. Those provisions can be amalgamated into a uniform national practice.

The court's duty when a motion is not opposed — or is opposed in a way that does not comply with local rule requirements — is a central question. Different local rules address this question in different ways. It would be possible to grant the motion without further consideration as if on default. But that may be inappropriate when a party has not defaulted on the pleadings. The current draft, subject to further consideration, directs the court to determine whether the movant has carried the burden of justifying summary judgment.

It is settled that a court can initiate summary judgment on its own, so long as the parties are given notice and an opportunity to show why summary judgment should not be granted. This practice could be included in Rule 56, and perhaps tied to related issues such as granting a summary judgment motion on grounds not advanced in the motion.

Rule 56 does not require that a court explain a decision granting summary judgment. Rule 52(a), indeed, expressly directs that findings of fact and conclusions of law are not required. But an explanation identifying the facts not genuinely at issue can be valuable to both the parties and a reviewing court. The current draft includes an optional provision that encourages explanation.

The practice when summary judgment is not granted on all the claims in an action is commonly referred to by a label not found in Rule 56, "partial summary judgment." The present provisions on this topic may deserve some further attention, in part because they may seem to direct more extensive efforts than make sense. A fact that seems to be established beyond genuine issue, for example, may turn on evidence that must in any event be introduced to prove other facts. Carrying the issue forward for trial may be desirable. It also may be desirable to provide for a statement of facts that are in genuine issue — courts entertaining interlocutory immunity appeals frequently bewail the lack of any identification of the fact disputes found to defeat summary judgment on an official-immunity defense.

Still other Rule 56 procedures may deserve attention. The subcommittee will hold an informal meeting later in January to learn the experience of a number of lawyers with current practice across a variety of substantive fields that generate frequent summary-judgment motions.

E. OTHER PROJECTS

1. Rule 68

The Second Circuit has presented a specific question about the offer-of-judgment provisions in Rule 68. It confronted a case in which the defendant had offered $20,001 without any injunctive relief. The ultimate judgment awarded $10,000 and an injunction. The court concluded that the injunction was worth more than $10,001. The judgment thus was better than the offer, defeating any sanctions for refusing to accept the offer. The court, however, observed that it is difficult to compare money to specific relief, and suggested that the Committee might consider amending Rule 68 to address this difficulty.

Rule 68 provokes periodic suggestions for revision. More than ten years ago, the Advisory Committee devoted substantial effort to elaborating drafts that sought to implement a thoughtful proposal by Judge William W Schwarzer. The effort was eventually abandoned. Many difficulties were found in the attempt to develop a rule that might have greater effect and still be fair. These difficulties led to increasingly complex provisions. They also led some Committee members to doubt the wisdom of having any offer-of-judgment procedure.

The Second Circuit's suggestion is the most recent in a series of suggestions that emerge periodically. The Advisory Committee has carried them forward without any clear sense that Rule 68 provides an opportunity for useful amendments. The Federal Judicial Center provided valuable assistance for the last thorough review. It may be that further empirical work could point the way to improvements. The next step, if any, will be to determine the relative urgency of Rule 68 in relation to other projects that might be undertaken.

2. Class Actions

After the 2003 amendments to Rule 23, followed by the 2005 enactment of the Class Action Fairness Act, the Civil Rules Committee determined to continue to monitor class-action litigation to see if further rule amendments should be pursued. The FJC has progressed on its empirical study of the effects of CAFA on class-action litigation in the federal courts. The combination of the passage of time since the 2003 amendments and the enactment of CAFA, the empirical information on some of CAFA's impacts, and case law development present issues to be examined.

One area of particular concern is the absence of a specific rule provision on certifying class actions for the purpose of settlement. A very recent Second Circuit decision, *In re: Initial Public Offering Securities Litigation (Miles v. Merrill Lynch & Co., Inc.*, 2006 WL 3499937 (2nd Cir. Dec. 5, 2006)), is likely to provoke new interest in reviewing Rule 23. The appeals court reversed a grant of class certification in six "focus cases" in an MDL that consolidated 310 class actions. The Second Circuit emphasized that it was clarifying the standard for a district court to use in deciding whether the certification requirements were met, in light of the 2003 amendments to Rule 23. The court held that: (1) a district judge may not certify a class without making a ruling that each Rule 23 requirement is met and that a lesser standard such as "some showing" for satisfying each requirement will not suffice; (2) a district court must resolve factual disputes relevant to each Rule 23 requirement in deciding whether the requirement is met; (3) the fact that a Rule 23 requirement might overlap with an issue on the merits does not avoid the court's obligation to make a ruling as to whether the requirement is met; (4) in making this ruling, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has discretion to limit the extent of discovery and a hearing on the Rule 23 requirements, to ensure that a class certification hearing does not "become a pretext for partial trial of the merits." In applying these standards, the Second Circuit did not remand the case for a new determination on certification, because the plaintiffs' own allegations and the record showed that predominance could not be satisfied. The

result was decertification of the classes. The effect appears to be to endanger class certification for a settlement that amounted to hundreds of millions.

The case is likely to provoke renewed interest from both plaintiffs and defendants on whether the rules should provide a basis to certify cases for settlement even if they could not be certified for trial for reasons other than manageability. The Rules Committee will monitor these developments.

F. STYLE PROJECT

The Civil Rules Style Project was approved by the Judicial Conference at its September meeting and has been submitted to the Supreme Court. It remains on track for submission to Congress this spring, aiming at an effective date of December 1, 2007.

9-C

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

SEPTEMBER 7-8, 2006

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

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

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

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

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

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

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

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

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

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

81 *May 2006 Minutes*

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

84 *Time-Computation Project*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

567 ***Discovery Subcommittee***

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

569 *Rule 30(b)(6)*

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

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

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

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

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

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

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

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

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

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

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

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

640 The context of the present problem goes back to the 1970 discovery amendments. Before
641 1970 courts divided in their treatment of expert witnesses, but discovery was very difficult in most
642 courts. The 1970 amendments expanded discovery, but discovery of right was limited to
643 interrogatories demanding identification of the subject on which each expert would testify, the
644 substance of the facts and opinions to be stated, and a summary of the grounds for each opinion.
645 Practice under this rule apparently developed differently in different parts of the country. In some
646 places it became common practice to depose trial experts. In other places depositions were not
647 common. There also was a problem in getting an expert to agree that the opinion relied on a learned
648 treatise.

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

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

660 The treating physician question was addressed in the Committee Note as an illustration of
661 an expert witness not retained or specially employed to provide expert testimony. The fear was that
662 preparation of a report would be an undue burden, an intrusion on treatment of other patients, and
663 a deterrent to testifying at all. But the complication is that it may become difficult to distinguish the

664 roles of a treating physician who also testifies to the likely future effects of an injury, pain and
665 suffering, or other matters that do not arise naturally from treating the injuries.

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

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

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

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

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

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

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

709 Something might be done as to the treating physician, perhaps by attempting to distinguish between
710 opinions formed in the course of treatment and opinions developed for the purpose of trial.

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

717 More general approaches might address work-product and privilege explicitly in Rule
718 26(a)(2)(B). Or the project could undertake a more general review of the work-product provisions
719 in Rule 26(b)(3). The Rule protects only documents and tangible things, leaving other work-product
720 to protection by decisional law. It does not define "core" work product. It does not clearly say
721 whether a party can generate core work product, or only an attorney. But further development of
722 26(b)(3) would be challenging.

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

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

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

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

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

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

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

768 Looking back to Evidence Rules 701 and 702, it was stated that the amendments reflected
769 concern that expert testimony was being introduced through lay witnesses, bypassing the Rule
770 26(a)(2) disclosure requirements. Another participant observed that Rule 26(a)(2)(B) was in fact
771 drafted with an eye to excluding the drill press operator from the report disclosure requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

853 The relationship between Rules 26(b)(3) and (b)(4) was noted. From 1970 to 1993, Rule
854 26(b)(4) opened by stating that discovery of facts known and opinions held by an expert and acquired
855 or developed in anticipation of litigation or for trial "may be obtained only as follows." That clearly
856 superseded application of the (b)(3) tests. This language was deleted from (b)(4) by the 1993
857 amendments without changing the introduction that makes (b)(3) "subject to the provisions of
858 subdivision (b)(4)." There is no indication that any thought was given to the effect of this change
859 on the relationship between (b)(4) and (b)(3). As a matter of rule text, it is easy to read (b)(3) to
860 apply to an expert witness as a party's representative or as a party's consultant. If the purpose in
861 1970 was to substitute the apparently more discretionary standard of 1970 (b)(4)(A) and the
862 apparently more demanding standard of 1970 (b)(4)(B) for the work-product tests of (b)(3), the
863 purpose of the present structure is more difficult to fathom. Perhaps it would help to reconsider the
864 interrelation of (b)(3) with (b)(4) in light of the present problems.

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

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

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

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

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

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

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

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

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

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

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

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

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

906 The "other information" words prompted a statement that the Committee that prepared the
907 1993 amendments would have been surprised by the expansive meaning given these words. They
908 were thinking of hard fact information, not theories. It also was pointed out that the 1993
909 amendments were crafted, and were almost on the point of taking effect, before the Daubert case was
910 decided. The Daubert approach to expert testimony was not considered.

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

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

926 Protection against discovery of draft reports was urged again, with the suggestion that the
927 protection both for draft reports and for communications with counsel might be subject to the escape

928 provided in Rule 26(b)(4)(B). Discovery would be allowed "upon a showing of exceptional
929 circumstances under which it is impracticable for the party seeking discovery to obtain facts or
930 opinions on the same subject by other means," or under an adaptation that focuses on the
931 impracticability of effectively testing the expert testimony by other means. This standard is
932 "extraordinarily protective" and may require the adaptation.

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

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

953 Many possibilities remain open for study. The Discovery Subcommittee will continue its
954 work.

955 ***Rule 12(e)***

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

967 Part of the impetus for the overall pleading inquiries and for this more specific set of
968 proposals is the sense that in practice lower courts often enforce pleading standards higher than
969 general concepts of notice pleading. Persisting desires for more detail may reflect a genuine need
970 that can be better addressed by bringing it out into the open and regularizing it.

971 The focus of the Rule 12(e) proposals is on developing a tool that is available to the court in
972 cases that may be advanced by more precise initial pleading. There is no thought of going back to

973 the bill of particulars practice that was carried forward in the original 1938 rules and abandoned in
974 1948. Instead the hope is that there may be a way to use pleading, perhaps in conjunction with
975 focused and limited initial discovery, to identify cases that do not warrant the cost and delay of full
976 discovery and summary-judgment practice. The procedure would provide case-specific authority
977 to raise pleading standards without attempting to impose more demanding standards in all cases and
978 without attempting to define substantive categories to be held to higher standards.

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

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

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

997 A specific illustration was offered. The complaint in an action for negligent
998 misrepresentation may be sufficiently definite to support a responsive pleading. It is outside present
999 Rule 12e). But it is not possible to tell whether there is complete ERISA preemption, supporting
1000 federal-question jurisdiction, or only conflict preemption, presenting a defense to a state-law claim
1001 that does not support federal-question jurisdiction. The answer will turn on what was said to support
1002 the claim.

1003 A judge offered quite a different response. Parties often "throw up roadblocks." Many Rule
1004 12(b)(6) motions are premature summary-judgment motions. Rule 12(e) motions for a more definite
1005 statement are an effort at discovery. We should be concerned about creating new opportunities for
1006 obstruction. The proposed new tool is unnecessary in almost all cases.

1007 A different response was that any expanded rule should address all pleadings, not only the
1008 complaint. The drafts are written that way, recognizing that more definite pleading of an answer,
1009 a reply, and other pleadings can be helpful.

1010 A different concern was expressed. Recognizing the merit of some such proposal, the project
1011 may be perceived as an effort to deter disfavored claims, "as barring the right to pay $250 and start
1012 discovery." Perhaps it would be better to provide for a "contention statement" after preliminary
1013 discovery? Present practice produces many cases in which the court does not know what the
1014 plaintiff's theory is until the plaintiff replies to a motion for summary judgment. A similar concern
1015 was expressed — the idea may be good, but "it sends up red flags."

1016 Yet another judge expressed the same concerns. A pro se case may present a complaint that
1017 reads like a book, and is nearly as long. Knowing nothing else, the plaintiff presents a narrative of
1018 the sense of grievance. Expanding Rule 12(e) will lead to more motions — too many motions.

1019 Still another judge stated that we should not go back to the bill of particulars. The Northern
1020 District of Texas had a local rule, only recently repealed, that barred 12(e) motions seeking
1021 information that can be got by discovery. It still has a rule that requires court permission to file more
1022 than one summary-judgment motion. The result is to encourage motions to dismiss under Rule
1023 12(b)(6). If Rule 12(e) is expanded, the summary-judgment limit will likewise encourage Rule 12(e)
1024 motions.

1025 A lawyer responded to these concerns by doubting the danger that ill-founded motions would
1026 be encouraged. Some lawyers, to be sure, like to file motions. But many good lawyers recognize
1027 the importance of filing only well-founded motions. The tone set by a mediocre motion is likely to
1028 resonate throughout all later stages of the action. The draft that focuses on enabling the court and
1029 parties to conduct and manage discovery and to present and resolve dispositive motions is the most
1030 attractive. And it should send a message inviting more rigorous initial pleading.

1031 A possible part-way approach through Form 35 was suggested as an alternative. Form 35
1032 could be amended to suggest that the parties' report on the Rule 26(f) conference include pleading
1033 issues in addition to the time limit on amendments already noted.

1034 In a different direction, it was asked what would be provided by expanding more definite
1035 statement practice that could not be achieved under present rules. In a case presenting inscrutable
1036 possibilities of ERISA preemption, for example, focused discovery can be limited to the facts that
1037 will support an informed decision on jurisdiction. Case management under Rule 16 may be better
1038 than elaborating on pleading practice.

1039 This discussion was summarized by observing that the judges seemed to be reflecting
1040 experiences different from the experiences of the lawyers. The lawyers represented careful,
1041 thoughtful, desirable practice. They can understand the potential good uses of case-specific pleading
1042 orders as means to more efficient identification of the issues, control of discovery, and perhaps
1043 resolution by dispositive motion. The judges confront lawyers who do not practice to these
1044 standards, and fear misuses that will add to delay and impose burdens on the court that are not
1045 sufficiently alleviated by simply denying the ill-founded motions. The many tools available to shape
1046 discovery and to manage an action more generally may counsel that nothing be done. The idea still
1047 may deserve development, but great care will be required.

1048 Because of the tie between pleading and summary judgment, it may be possible to ask the
1049 Rule 56 Subcommittee to add consideration of the Rule 12(e) proposals to its chores.

1050 ***Rule 56***

1051 Judge Baylson introduced the Rule 56 Subcommittee report.

1052 The first part of the report proposes substantial changes in the time for making and
1053 responding to summary-judgment motions. Those changes were reviewed and acted on as part of
1054 the Time-Computation Project earlier in this meeting.

1055 Apart from time, the proposals focus on the procedure of summary judgment, not the
1056 standards that govern grant or denial.

1057 One proposal is to require both motion and response to provide a statement of undisputed
1058 facts, supported by citations to the record.

1059 A second set of proposals seeks to clarify the court's responsibility when there is no response
1060 to a summary-judgment motion, and also when a response is made in a form that does not comply
1061 with the rule.

1062 A third proposal explicitly states the court's authority to initiate summary judgment on its
1063 own.

1064 A fourth proposal would adopt into Rule 56 the "partial summary judgment" terminology
1065 widely employed in practice, and offer guidance on the court's responsibilities when it is not
1066 appropriate to dispose of an entire case by summary judgment.

1067 A fifth proposal is more a question — is it useful to carry forward present Rule 56(g) as a
1068 largely redundant and little-used sanction for filing affidavits in bad faith?

1069 In addressing these and other questions, it will be helpful to seek as much guidance as the
1070 Federal Judicial Center can provide in updating its regular study of Rule 56.

1071 Joe Cecil reported that the FJC launched studies of Rule 56 to support the Committee's work
1072 in the 1980s and has carried the work forward after the 1992 termination of the Committee work
1073 without any Rule 56 amendments. A summary of recent work has been made available for this
1074 meeting. It shows remarkable variations in summary-judgment activity across courts. The next step,
1075 if the Committee is interested in developing the work, will be to investigate CM/ECF data. These
1076 data will support consideration not only of Rule 56 activity but also of other dispositive motions,
1077 such as judgment as a matter of law under Rule 50, and even pleading. It is much more efficient to
1078 expand beyond Rule 56 into these related topics during one search process.

1079 The Committee agreed that further FJC study will be important, and invited as much work
1080 as can be accomplished within available resources and within a time frame matched to the progress
1081 of Committee work on Rule 56. A specific question was noted for possible inclusion in the study
1082 if feasible. This question would test the observation that some lawyers seem to be using Rule
1083 16(c)(1), which looks to the formulation and simplification of the issues, including the elimination
1084 of frivolous claims or defenses, as a substitute for summary judgment. This practice may reflect an
1085 attempt to focus the case on an issue the party finds comfortable.

1086 Discussion opened by observing that the many local rules addressing summary judgment
1087 provide the inspiration for reconsidering Rule 56. They also provide an abundant source of ideas.
1088 As one example, many courts require detailed statements of the facts claimed to be established
1089 beyond genuine issue, supported by specific references to supporting materials. These rules are
1090 distilled into several paragraphs of the agenda draft Rule 56(c). This is a matter of summary-
1091 judgment procedure, not the standards for grant or denial.

1092 The statement of "undisputed facts" provisions in the draft, subdivision (c), are adapted not
1093 only from local rules but also from the proposed amendments that ultimately failed of approval by
1094 the Judicial Conference in 1992. They separate the motion from argument, explicitly requiring that
1095 the motion and response be "without argument." Contentions as to the law and the evidence
1096 respecting the facts are to be made in a separate memorandum. The draft does not now provide for
1097 a movant's reply to new facts asserted in a response, but a paragraph can easily be added to address
1098 that need.

1099 The motion and response provisions in draft subdivision (c) include a provision, (2)(B)(ii),
1100 that expressly states that if the nonmoving party does not have the trial burden on a fact the response
1101 may simply state that the record does not support a fact asserted in the motion. It was suggested that
1102 this provision comes too close to bringing part of the Celotex decision into rule text. It would be
1103 better to leave this thought to the Committee Note.

1104 Concerns were addressed to the rule text stating that the motion should recite "the specific
1105 facts that are not genuinely in dispute." These words might invite the colossal waste of listing every
1106 fact thought to be undisputed. The motion should focus only on material facts, and may properly be
1107 limited to one or more facts that would make other facts — whether not genuinely in dispute — not
1108 material. A motion is more likely to be made by a party who does not have the trial burden, and may
1109 properly focus on a single dispositive fact — it was not the defendant who drove the vehicle
1110 involved in the accident. This problem may prove particularly important in employment
1111 discrimination cases because of the intrusion of the "prima facie" case that shifts a burden of
1112 explanation but not of proof. Although the draft was not intended to require a statement of all
1113 undisputed facts, the reference to "*the* specific facts that are not genuinely in dispute" may invite that
1114 reading. Further work on the language is indicated. It will be important, however, to take care in
1115 deciding whether to refer to "material" facts at this point in the rule.

1116 Reliance on local rules in drafting subdivision (c) prompted the further observation that many
1117 districts have local Rules 56. We should be careful to fix the many problems in present Rule 56
1118 without doing anything that would invalidate the local rules. The local rules reflect local culture.
1119 Not every good practice can be added to the national rule. For example, the draft requires citation
1120 to the pages of affidavits, deposition transcripts, and the like. The local rule in the Northern District
1121 of Texas instead requires that the motion be supported by an appendix and that citations be to the
1122 appendix. The local rule could be reconciled with the national rule draft, but such potential
1123 collisions should be considered. This plea was seconded by recalling that the Local Rules Project
1124 uncovered many rules that seemed inconsistent with Rule 56, but left them alone because they
1125 seemed better than Rule 56.

1126 The draft direction to recite specific facts not genuinely in dispute requires citation of
1127 "materials supporting the facts." How do these words apply when the motion is made by a party who
1128 does not have the trial burdens and who, under Celotex, says only that "there is no evidence that the
1129 defendant did any wrong"? This question points to drafting difficulties that are hard to resolve. One
1130 illustration of the difficulty is W.D.Tenn. Rule 7.2(d)(2):

> 1131 If the proponent contends that the opponent of the motion cannot produce evidence
> 1132 to create a genuine issue of material fact, the proponent shall affix to the
> 1133 memorandum copies of the precise portions of the record relied upon as evidence of
> 1134 this assertion.

1135 A quite different illustration is provided by the effort in the failed 1992 Rule 56 proposal:

> 1136 A fact is not genuinely in dispute if it is stipulated or admitted by the parties who
> 1137 may be adversely affected thereby or if, on the basis of the evidence shown to be
> 1138 available for use at a trial, or the demonstrated lack thereof, and the burden of
> 1139 production or persuasion and standards applicable thereto, a party would be entitled
> 1140 at trial to a favorable judgment or determination with respect thereto as a matter of
> 1141 law under Rule 50.

1142 How does a party point to precise portions of the record that show there is nothing? Demonstrate
1143 the lack of evidence available for use by the other party at trial? The trick is to develop a procedure

and, perhaps more difficult, a statement of the procedure that avoid the need to incorporate the Celotex distinctions in rule text. But perhaps that is not a desirable trick after all. It was suggested that the Evidence Rules incorporated the Daubert decision; why not incorporate Celotex in Rule 56? A draft effort is included in the agenda materials, but drew little comment. The difference from Daubert may be that the Evidence Rules were revised to synthesize emerging case-law insights, while practice has developed for 20 years under Celotex. Evidence Rule 702, further, was drafted in response to proposals for legislation that might have displaced the rulemaking process to questionable effect. Practice in at least one court seems to be that a movant who does not have the trial burden says either "there is no evidence of," or "we deposed [or put interrogatories to] the plaintiff, who produced no evidence of * * *." Another alternative is to allow a movant to state the facts it views as established beyond genuine issue without requiring that it point to support in the record. The nonmovant remains free to respond by pointing to record materials that do establish a genuine issue.

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

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

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

1189 A related question is presented by both subdivisions (f) and (g) of the agenda draft.
1190 Subdivision (f) includes a bracketed sentence directing that an order rendering summary judgment
1191 must specify material facts that are not genuinely at issue and that require judgment as a matter of
1192 law. This provision would enable parties and an appellate court to understand the ruling and
1193 evaluate it more readily. Subdivision (g), on the other hand, provides only that when summary
1194 judgment is not rendered on the whole action the court may specify facts that are genuinely at issue.
1195 Courts of appeals frequently observe that in cases that permit interlocutory appeal from a denial of
1196 summary judgment — most frequently on official immunity defenses — a statement of the fact
1197 issues that defeat summary judgment is highly desirable. It was observed that if a court grants a
1198 motion in part and denies it in part, the situation compels some explanation — the parties must be
1199 told what matters remain open for further proceedings, what matters are finally disposed of. If a
1200 plaintiff claims both discrimination and retaliation for complaining of the discrimination, the parties
1201 must be told if the summary-judgment ruling is that the discrimination claim is unsustainable while
1202 the retaliation claim survives for trial. But that need not be extended to require a statement of what
1203 fact issues remain open for trial on the retaliation claim.

1204 This view was reinforced. It is dangerous to require specification of facts or issues still to
1205 be tried. Summary-judgment rulings may be made before discovery is completed; indeed the case
1206 may be managed in stages to ensure the opportunity for early disposition of some issues that will
1207 direct development in later stages. Explanation of the ruling is useful, but it may be better to avoid
1208 asking the judge to specify the issues that remain.

1209 It was suggested that the subdivision addressing partial summary judgment might better
1210 speak of "issues" than of "facts." The distinction may be between identifying "facts" that are found
1211 established without genuine issue and "issues" that remain open for further proceedings. The
1212 standard for granting summary judgment has always referred to facts, at least in part because of the
1213 direct link to the Seventh Amendment theories that identify the jury as responsible for factfinding.
1214 If facts remain to be tried, however, it may be safer to identify the issues that arise from the facts
1215 rather than the facts themselves.

1216 An observer suggested that explanation by the judge is very important. A summary-judgment
1217 motion is very expensive. The judge's view of the case after considering the motion is very helpful,
1218 both in moving toward settlement and in preparing for trial. A response was that an explanation
1219 should be required for an order granting summary judgment, but the court should not be required to
1220 specify the issues or facts that remain for trial. Explanation may be useful as to other issues even
1221 if the whole case is resolved by summary judgment on one ground. "The plaintiff has no evidence
1222 that the defendant was driving the car. Summary judgment is granted for the defendant. But if that
1223 is wrong, there is [not] sufficient evidence for trial on the driver's negligence."

1224 The need for clarity that will tell the parties where they stand and how to go forward with the
1225 case may be addressed by further pretrial conferences rather than by the terms of the summary-
1226 judgment order. This opportunity is another reason to establish discretion as to the extent of detailed
1227 explanations in denying summary judgment.

1228 This discussion was concluded with the observation that "may" probably is the better choice.
1229 Substantial time may be required to explain why there is a genuine issue, and the explanation may
1230 not be complete. Denial may rest not so much on a firm conclusion that there is a genuine issue as
1231 on the conclusion that eliminating a particular element will not change the nature or length of the
1232 trial; it is safer to carry it forward for trial. Or denial may rest on the discretionary preference for
1233 trial even though the summary-judgment record shows no genuine issue. Trial may provide a more
1234 certain basis for judgment as a matter of law, or important issues of law or public interest may

1235 benefit from the illumination of a full trial record, or it may actually be more efficient to hold a
1236 relatively brief trial than to struggle through a difficult and uncertain summary-judgment ruling. An
1237 alternative might be to say nothing in the rule, omitting the complicated variations set out in present
1238 Rule 56(d).

1239 Subdivision (c)(6) focuses on the problems that arise when a nonmovant fails to respond at
1240 all to a motion for summary judgment or else responds in a fashion that does not satisfy the
1241 requirements for a proper response. It offers several variations that reflect the disparate responses
1242 identified by local rules. An illustration was offered to test the variations: A prisoner plaintiff claims
1243 that guards beat him severely without provocation or reason. The guards assert that they used only
1244 moderate force necessary to restrain the plaintiff. Depositions are taken. The defendants move for
1245 summary judgment. On the record it is clear that credibility issues defeat summary judgment. But
1246 the plaintiff fails to respond to the motion. Should the motion be granted by default? Even if it is
1247 defective on its face? Should the court have discretion to choose between granting the motion by
1248 default or denying it if examination shows it fails to meet the summary judgment standard? Or
1249 should the court be required to evaluate the motion and the materials cited to support it, granting the
1250 motion only if the movant has carried the summary-judgment burden?

1251 Local rules seem to adopt all of these approaches. The dominant view, however, seems to
1252 be that the court is obliged to review the motion and supporting materials and to grant it only if the
1253 summary-judgment burden is carried. That view can be changed by rule. A total failure to respond,
1254 for example, might be viewed as akin to default of answer or akin to a failure to prosecute. But once
1255 a defendant has appeared to defend on the merits, disputing the plaintiff's claims — the clear analogy
1256 to a pleading default — at least some cases express a tradition that the defendant is entitled to put
1257 the plaintiff to proof, whether by summary judgment or trial. On this view, the court should be
1258 required to evaluate the motion. This approach is suggested most clearly in the draft (c)(6) version
1259 2, alternative b: the motion may be granted "if the motion and supporting materials show that there
1260 is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of
1261 law." (Alternative c expresses the same thought without repeating the full text of the summary-
1262 judgment standard.) Support was expressed for this approach as the least disruptive.

1263 Each of the variations of (c)(6) include an express statement that the court "is not required
1264 to consider materials outside those called to its attention" by the parties. Although several appellate
1265 opinions and local rules say as much, it was thought helpful to include this express statement in Rule
1266 56.

1267 Related questions were explored briefly, more as possible topics for a Committee Note than
1268 as suggestions for rule text. If there are successive motions for summary judgment, the Note might
1269 comment on the court's authority to review the record on both motions. If the court does start to
1270 explore the record on its own, is it obliged to canvass the entire record? Or can it look selectively,
1271 perhaps distorting rather than improving the picture sketched by an inadequate response? What
1272 happens if on appeal from summary judgment a party points to record materials not pointed out to
1273 the district court?

1274 The final Rule 56 question was whether the bad-faith affidavit provision of present Rule
1275 56(g) serves any continuing purpose. Many cases reflect the "sham affidavit" problem arising when
1276 a party seeks to defeat summary judgment by submitting a self-serving affidavit that contradicts the
1277 party's own self-defeating deposition testimony. Courts generally agree that the affidavit can be
1278 disregarded unless a persuasive explanation is offered for changing the earlier position. But there
1279 is no indication that they go further by invoking Rule 56(g) sanctions. Although Rule 56(g) includes
1280 contempt as a sanction, going beyond Rule 11, there is no apparent reason to believe that this

1281 sanction either is much used or is necessary for deterrence. Rule 11, perhaps supplemented by 28
1282 U.S.C. § 1927, may suffice.

1283 Judge Rosenthal congratulated and thanked the Rule 56 Subcommittee for its progress.

1284 ***Rule 62.1***

1285 At the May meeting the Committee approved a recommendation to publish a new rule 62.1.
1286 Rather than seek publication of any rule proposals in 2006, however, it was determined that it would
1287 be better to defer this and other proposals for publication in 2007. The bench and bar will confront
1288 many important rule changes on December 1, 2006, including the e-discovery amendments, and the
1289 next year will confront the full Style package. A break for a year, deferring the next set of rules
1290 changes to December 1, 2009, seems desirable. Rule 62.1 was introduced to the Standing
1291 Committee at the June meeting nonetheless, to give advance notice and to elicit any interim
1292 suggestions that might be offered. Two questions were raised: is the rule best located between Rules
1293 62 and 63, or would another location be better? And can a better caption be found — "Indicative
1294 Rulings" will not be familiar to many lawyers.

1295 Location is influenced by the occasions for invoking Rule 62.1. Rule 62.1 describes the
1296 options available to a district court when a pending appeal ousts its "jurisdiction" to grant relief
1297 affecting the judgment on appeal. One of the draft versions was limited to motions for relief under
1298 Rule 60, and was framed as an amendment of Rule 60. But the Committee thought it better to
1299 address all situations in which an appeal cuts off district-court authority. The broader rule seems
1300 better situated between Rules 62 and 63 than anywhere else. There is a reasonably logical sequence.
1301 Rule 59 addresses post-trial relief, by new trial or altering the judgment. Rule 60 addresses post-
1302 final-judgment relief by motion to vacate. Rule 61 expresses a harmless error rule that covers both
1303 Rule 59 and Rule 60 motions. Rule 62 deals with stays of enforcement, a common form of action
1304 on a judgment pending appeal. Rule 63 swings off in a different direction entirely, dealing with
1305 inability of a judge to proceed. Rule 62.1 seems to fit best within the chapter, Rules 54 to 63,
1306 captioned "judgments." And there is no better place than between Rules 62 and 63.

1307 Choosing a caption proved more difficult. "Indicative Rulings" reflects terminology familiar
1308 to appellate lawyers, arising from the common approach that allows a district court that cannot grant
1309 relief to "indicate" that it would grant relief if the court of appeals were to remand for that purpose.
1310 The terminology is not likely to prove familiar to all lawyers. One possible alternative would be to
1311 bring up the tag line for subdivision (a): "Relief Pending Appeal." Then a new line would be needed
1312 for subdivision (a) — perhaps "Relief Available," or "Action on Motion." The Rule title might be
1313 made longer: "Relief From Judgment Pending Appeal: Indicative Rulings." The Style Project has
1314 favored long titles as a useful index device, and this might not be too much. The Committee
1315 concluded that it will be appropriate to adopt whatever title is agreeable to the Standing Committee.

1316 ***Rule 68***

1317 The Second Circuit in a recent opinion suggested that the Committee should explore
1318 amending Rule 68 to establish standards for comparing the judgment with an offer for judgment in
1319 cases that involve both money damages and specific relief. The case is a good illustration of the
1320 question. The plaintiff demanded damages and an injunction restoring him to his previous job. The
1321 defendant's Rule 68 offer was $20,001 without any mention of injunctive relief. The jury awarded
1322 $140,000 in compensatory damages, but the plaintiff accepted a remittitur to $10,000. As to money
1323 alone, the judgment was $10,001 less favorable than the offer. But the court also awarded an
1324 injunction restoring the plaintiff to his former job. The court of appeals resolved the Rule 68

1325 comparison by asking whether the injunction was worth at least $10,001. On the fats of the case the
1326 injunction clearly was worth more than that; the judgment was more favorable than the offer.

1327 It is easy to understand the Second Circuit concern with the difficulty of comparing a
1328 judgment to a Rule 68 offer in a case that involves specific relief. The differences between the
1329 plaintiff's original job and new job in responsibilities, prestige, and opportunities for
1330 accomplishment were manifest and great. Other cases will present much more difficult comparisons.
1331 Comparisons often will be difficult when the focus is on specific relief alone. In an action to enforce
1332 a covenant not to compete, for example, the defendant might offer to submit to an injunction
1333 enjoining sale of five products in one state for two years. The injunction might cover four of the five
1334 products, add two others, and extend to two states for two years. Which is more favorable? Or if
1335 it is easy to say that offer or judgment is more favorable — the offer is for a one-year injunction and
1336 the judgment is for six months or two years — how can that be compared to an offsetting difference
1337 in damages?

1338 When Rule 68 was last considered in depth, the draft required separate comparisons of
1339 damages to damages and of specific relief to specific relief. As to specific relief, a judgment would
1340 be more favorable than the offer only if the judgment included all of the nonmonetary relief offered
1341 "or substantially all the nonmonetary relief offered and additional relief." The draft Committee Note
1342 concluded: "Gains in one dimension cannot be compared to losses in another dimension." That
1343 approach is quite different from the path followed by the Second Circuit, and should be easier to
1344 administer. That does not ensure that it is better.

1345 The decision whether to take up the Second Circuit's suggestion is tied to broader Rule 68
1346 questions. Suggestions to revise Rule 68 are made periodically by various sources. Usually the
1347 suggestions focus on a desire to add more effective sanctions so that Rule 68 offers will become
1348 more common. The hopes are to achieve earlier settlements and more settlements. Another hope
1349 is to encourage plaintiffs to bring small but strong claims, relying on an offer of judgment to
1350 recapture litigation costs that would include attorney fees. The Committee has twice developed
1351 elaborate proposals along these lines, once in the early 1980s and again in the early 1990s. Both
1352 times the projects were abandoned. The 1980s project proceeded to a point that generated substantial
1353 opposition. The 1990s project faltered in the face of ever-growing complexity, doubts whether
1354 attorney-fee sanctions fit comfortably within Enabling Act limits, and concerns about the impact of
1355 Rule 68 in the one area — claims that support statutory fee awards — where it is now used with
1356 some frequency.

1357 It would be possible to limit a Rule 68 project to the narrow confines of the Second Circuit's
1358 suggestion. But there are so many causes for dissatisfaction with some of its present incidents that
1359 it might prove difficult to justify any project that passes by clear problems while responding to one
1360 particular issue.

1361 It was noted that in Texas, at the insistence of the legislature, the Supreme Court wrote an
1362 offer-of-judgment rule. The project demanded serious effort. The result was meant to be a balanced
1363 rule, favoring neither plaintiffs nor defendants. It allows a 20% margin between judgment and offer
1364 before sanctions are imposed; that figure itself was much debated. It includes such provisions as one
1365 allowing retraction and subsequent renewal of an offer. As near as appears, the rule is not used at
1366 all.

1367 Some help may be on the way. Professors Thomas A. Eaton and Harold S. Lewis, Jr., are
1368 completing work on proposals to amend Rule 68 for statutory fee-shifting cases. The proposals draw
1369 from information gained in intensive interviews with plaintiff and defense attorneys in many

1370 different states, focusing on employment discrimination and civil rights cases. The empirical
1371 foundations for their work could prove valuable in deciding whether to return once again to Rule 68.

1372 The Committee agreed to defer further consideration of Rule 68. One participant, drawing
1373 from the Minutes reporting on deliberations in 1993 and 1994, reminded the Committee that one
1374 option may be abrogation.

1375 ***Supplemental Rule C(6)(a)***

1376 Adoption of Supplemental Rule G led to several conforming amendments that withdrew
1377 provisions of civil asset forfeiture proceedings from other Supplemental Rules. An unintended
1378 omission failed to capitalize the first word in Rule C(6)(a)(i). One cure would be simply to
1379 capitalize "A." But a better parallel to subdivisions (1), (2), and (5) might be achieved by adding
1380 a few words:

1381 **(6) Responsive Pleading; Interrogatories.**

1382 **(a)** ~~**Maritime Arrests and Other Proceedings**~~ *Statement of Interest; Answer*. In an action
1383 in rem:

1384 **(i)** a person who asserts a right of possession or any ownership interest in the
1385 property that is the subject of the action must file a verified statement
1386 of right or interest: * * *.

1387 The Committee agreed to recommend that the Standing Committee approve this revision for
1388 adoption without publication as an entirely technical amendment.

1389 ***Federal Judicial Center Report***

1390 Thomas Willging reported on the Federal Judicial Center study of the Class Action Fairness
1391 Act. The study is aimed at measuring the impact of CAFA on federal-court resources. Since the
1392 report at the May meeting the study has expanded to include all 85 of the federal districts that will
1393 be studied. The period covered runs from July 2001 to June 30, 1005. That gives barely more than
1394 four months of experience with CAFA. Data will be added as the study goes on. But already,
1395 surprisingly, it has been possible to note an immediate impact on filings and removals. The rate of
1396 filing class actions has increased from 10.5 per day to 12 per day. Not all new class actions are
1397 related to CAFA. But there are significant increases in contract, tort, and "other" actions of the sort
1398 expected to be CAFA cases. The increase in labor cases, on the other hand, reflects Fair Labor
1399 Standards Act cases, not attributable to CAFA; this increase appears to be part of a long-term trend.
1400 The percentage of class actions based on diversity jurisdiction has increased from 13% to 19%. And
1401 cases removed rose from 18% of all class actions in federal court to 23%. Further work will provide
1402 more information about long-term trends, and also will reveal geographic patterns.

1403 Judge Rosenthal expressed appreciation for the amount of work already done, and noted that
1404 this study will be very helpful in discharging the duty to report to Congress under CAFA.

1405 ***New Topics***

1406 During the discussion of state holidays for the Time-Computation Project, the definition of
1407 "state" in Rule 81 was addressed. It was suggested that the Committee should consider adding
1408 territories to the definition. The topic will be put on the agenda.

1409 Discussion of Rule 23(h)(1) suggested that the Committee may want to give further thought
1410 to the need for clear expression of the relationship to Rule 54(d)(2), and also to the possibility that
1411 it would be better to set a fixed time for fee motions in class actions.

1412 At some point the Committee may want to study the discrepancy between Style Rule
1413 41(a)(1)(A)(i), which cuts off a plaintiff's right to dismiss an action by service of an answer or a
1414 motion for summary judgment, and Style Rule 41(c)(1), which cuts off dismissal of other claims only
1415 on service of a responsive pleading. It has been said that the difference reflects a mere oversight in
1416 1948 amendments.

1417 ***Next Meeting***

1418 The most likely dates for the next meeting will be either April 12-13, 2007, or April 19-20,
depending on reconciliation of all competing schedules.

Respectfully submitted,

Edward H. Cooper
Reporter

10-11A

MEMORANDUM

DATE: December 14, 2006

TO: Judge David F. Levi
Standing Committee on Rules of Practice and Procedure

CC: John K. Rabiej

FROM: Judge Mark R. Kravitz
Catherine T. Struve

RE: Time-Computation Project

We write on behalf of the Time-Computation Subcommittee to report on the progress of the Time-Computation Project and to solicit the Standing Committee"s views on certain outstanding issues. Part I of this memo summarizes the Time-Computation Subcommittee's recommendations and requests. Part II summarizes developments in the Project since the Standing Committee's June 2006 meeting. Subsequent parts provide more detail on each outstanding issue.

I. Summary of recommendations and requests

Approval of the template. The Subcommittee seeks the Standing Committee's approval of the proposed template, which is attached to this memo. Specific issues relating to the template are discussed in more detail below.

Statutory deadlines. With respect to the Appellate, Civil and Criminal Rules, it appears that the best way to deal with the question of statutory deadlines would be to compile a short list of statutory deadlines that must be changed in order to offset the shift to a days-are-days approach, and to seek passage of legislation that would lengthen those deadlines. However, the Bankruptcy Rules Committee has reported that such an approach does not seem like a viable option for the Bankruptcy Rules at the present time. The Subcommittee thus seeks guidance from the Standing Committee on how best to approach the question. Options are discussed in Part III below.

Definition of clerk's office inaccessibility with respect to electronic filing. The Standing Committee directed the Subcommittee to attempt to define inaccessibility for purposes of electronic filing. Part IV below contains proposed language for such a definition. However, the consensus during the most recent time-computation conference call was that the question of timeliness in the event of court-end or user-end technical failures should be left for the moment to local rulemaking.

After-hours filing by personal delivery to a court official. As discussed in Part V, 28 U.S.C. § 452 has been read to permit after-hours filing by personal delivery to a court official. A prior template draft explicitly incorporated a reference to such filing in its definition of the end of the "last day" of a period. The reaction to that draft was universally negative, and the current draft omits explicit reference to in-person, after-hours filing. But the draft Rule refers to the fact that a different concluding time can be set "by statute," and the draft Note mentions the caselaw that developed under Section 452.

Date-certain deadlines. As discussed in Part VI, the Subcommittee has noted a split in approach between the 6th Circuit (which has held that Civil Rule 6(a) does not govern date-certain deadlines) and the 5th Circuit (which has held that Bankruptcy Rule 9006(a) does govern date-certain deadlines). The template Note makes clear that the template does not govern date-certain deadlines – i.e., that the amended time-computation rules adopt the 6th Circuit approach and reject the 5th Circuit approach.

Deadlines in the Evidence Rules. At its fall meeting, the Evidence Rules Committee noted that the Evidence Rules contain a few deadlines and suggested that a reference to the Federal Rules of Evidence be placed in the Civil and Criminal Rules versions of the template. As discussed in Part VII, the Subcommittee does not favor placing such a reference in the template. Members of the Subcommittee suggested to the Evidence Rules Committee that a provision be added to the Evidence Rules that would incorporate by reference the time-computation provision in the set of rules that applies to the relevant proceeding. The Chair and Reporter of the Evidence Rules Committee do not favor such a provision; they will suggest to the Evidence Rules Committee at its spring meeting that there is no need for the Evidence Rules to address the question of time computation.

The availability of extensions under subdivision (b). Any attempt to draft general but simple time-computation rules will likely yield an approach that, at least in rare situations, generates some problems of application. Part VIII discusses one such possible problem, and suggests that the availability of extensions of time under subdivision (b) of the time-counting rules may provide at least a partial solution to such problems.

II. Developments since June 2006

The template has undergone multiple revisions in response to feedback received by the Subcommittee over the past six months. This section summarizes those developments.

As you know, at the June 2006 Standing Committee meeting, we reported on the Project's progress and the Committee approved the template with a few modifications. We noted the need to alter short deadlines to offset the change in time-computation approach. The Committee discussed the fact that the Civil, Bankruptcy and Appellate time-computation rules govern statutory as well as rule-based deadlines. The Committee considered possible approaches to the matter of statutory deadlines but did not resolve the issue. The Committee also discussed the next steps to be taken in connection with the project, and the Committee's consensus was that

the Advisory Committees should now proceed promptly with their work concerning the revision of deadlines. The Standing Committee also charged the Time-Computation Subcommittee with coordinating that work and investigating remaining issues, including (1) the question of statutory deadlines that could be affected by the change in time computation approach, (2) the issue of "inaccessibility" of the clerk's office, and (3) the issue of "virtual holidays" – i.e., days which are not technically legal holidays but on which, as a matter of practice, some or all federal courts are closed. At the June meeting, Judge Rosenthal and Professor Cooper reported that the Civil Rules Committee's subcommittees had already moved forward with the deadlines project; one of their suggestions, which each Advisory Committee was encouraged to follow, is to try where possible to lengthen short deadlines to increments of seven days (i.e., 7 days, 14 days or 21 days).

Based on the discussion at the June 2006 Standing Committee meeting, we circulated proposed template revisions to reporters in early July. The revisions substituted the term "filings" for "papers," so as not to exclude electronic filings; deleted the mention of "weather" from the Rule text's reference to inaccessibility; deleted state holidays from the definition of "legal holiday"; added new subdivision (a)(3) to define the end of the "last day" of a period; refined the note's discussion of periods stated in hours; and added proposed language to the rule text concerning backward-counted time periods.

Also in early July, we circulated the proposed template revisions to the Time-Computation Subcommittee. The Subcommittee held a conference call in late July; in advance of that call, we circulated a revised template draft showing further proposed changes. In addition to refining the note language, those changes tweaked the language concerning backward-counted periods and then-subdivision (a)(3)'s definition of "last day." During that conference call, members questioned the decision to remove state holidays from the definition of legal holiday. Professor Cooper also raised the question of 28 U.S.C. § 452 and its potential relevance to the timeliness of after-hours filing. The subcommittee discussed the question of inaccessibility at some length, including the question of electronic filings; members noted the significance of the model local rule regarding electronic case filing. In addition, the subcommittee discussed the question of statutory deadlines.

In mid-August, we circulated another revision of the template draft to the Subcommittee and to the reporters. Among other things, the draft revised subdivision (a)(1) to reflect the fact that its time-computation approach applies to periods stated in units longer than days – e.g., weeks, months or years; revised subdivision (a)(2)(C)'s definition of the end-point for a period stated in hours; added a new subdivision (a)(3) that defines "next day" in order to clarify how counting backward works; revised subdivision (a)(4)'s definition of "last day" to reflect the fact that courts currently permit after-hours filing if the filer seeks out a court official and hands the filing to that official in person; and reinstated state holidays in the definition of legal holiday.

On August 21, we circulated a further revision of the template draft; changes made in this version included a refinement to subdivision (a)(3)'s definition of "next day." This is the version that the advisory committees used in connection with their fall meetings.

At its September meeting, the Civil Rules Committee discussed both the template and the question of short deadlines. As to the template, there was consensus that the template's

definition of "last day" should not refer expressly to filing by personal delivery to a court official; the Committee's proposed alternative language is now reflected in the attached template draft. Some members found subdivision (a)(3)'s definition of "next day" unclear; it was suggested that (a)(3)'s operation would be clearer if (a)(1) and (a)(2) referred to continuing to count to "the **first** day" (rather than the "next" day) "that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible." (The attached template draft does not reflect that proposed change, because it was concluded that the suggested change would not make things clearer.) The Committee discussed at some length the possible approaches to the question of statutory deadlines. The Civil Rules Committee also considered a number of time periods set by the Civil Rules, and sketched out an approach to altering many of those periods to account for the change in time-computation approach. Most 10-day periods will likely be extended to 14 days. Twenty-day periods are likely to become 21-day periods due to the preference for 7-day increments. But periods of 30 days or more are unlikely to change.

The Bankruptcy Rules Committee also discussed the Time-Computation Project at its September meeting. The Committee has identified a large number of federal statutory bankruptcy-related deadlines, and there exist an even greater number of state statutory deadlines that also are computed using the time-computation rule. The Bankruptcy Rules Committee does not think that it would be advisable to seek a legislative fix for the bankruptcy-related federal statutory deadlines, because – given the scope of the 2005 amendments to the Bankruptcy Code – Congress appears unlikely to be receptive to further amendments to the Bankruptcy Code for at least the next several years. In addition, the Bankruptcy Rules Committee has expressed concern that the political climate might result in excessive focus on the bankruptcy-related changes, which could distract from less-controversial aspects of the changes proposed to implement the time-computation project. Moreover, the Bankruptcy Rules Committee would not propose amending Bankruptcy Rule 9006(b) to authorize courts to extend statutory deadlines, because the Committee believes such an amendment would constitute supersession of the relevant statutory deadlines (not merely gap-filling) and there is no supersession authority for the Bankruptcy Rules.

The Criminal Rules Committee's October meeting included a discussion of the Time-Computation Project. The Committee has reviewed the Criminal Rules deadlines that would be affected by a change in time-computation approach. The Committee has not yet looked in detail at the statutory criminal procedure deadlines that would be affected, but it has sought input on that topic from the Department of Justice.

The Appellate Rules Committee discussed the Time-Computation Project at its November meeting. The Committee's Deadlines Subcommittee has reviewed the rule- and statute-based time periods that would be affected by the change in time-computation approach, and has proposed lengthening a number of the rule-based periods and a handful of the statute-based periods. Thus, the Committee is on track to vote at its spring meeting on a package of deadline amendments to complement the adoption of the new time-computation template. The Deadlines Subcommittee, and some other members of the Committee, have voiced skepticism concerning the advisability of the time-computation project. On the other hand, the Committee's liaison from the appellate clerks has voiced support from the project. All Committee members

agree that if the other Advisory Committees adopt the shift in time-computation approach, then the Appellate Rules should track the time-computation method that applies in the courts below.

Meanwhile, our search of the U.S. Code for statutory provisions that set short time limits in connection with litigation has recently concluded. The initial search results show that some 171 statutory time periods might be affected by the alteration in the Rules' time-computation approach. The list is available from the Rules Committee Support Office; we will monitor new legislation for additional relevant time periods.

After our most recent time-computation project conference call, we circulated the draft template to Professor Kimble for style suggestions. The attached template reflects changes we made in response to his suggestions. One such change warrants explanation. Professor Kimble suggested that subdivision (a)(4)(B)'s phrase "at the closing of the clerk's office" be revised to read "when the clerk's office closes." But some participants thought that the latter phrase departed from the intended meaning by including early closings of the clerk's office. For that reason, we changed the relevant part of subdivision (a)(4)(B) to read "when the clerk's office is scheduled to close." This language, and the other changes that resulted from Professor Kimble's style suggestions, have been circulated to the full Subcommittee, but the Subcommittee has not yet had an opportunity to comment on the changes.

III. Statutory deadlines

After much discussion of the question of statutory deadlines, it is clear that there is no silver bullet for this problem. With respect to fields other than bankruptcy, the emerging consensus appears to be that the best course of action is to adopt a days-are-days approach for statutory as well as rule-based periods and to seek legislation to lengthen the most important affected statutory deadlines.[1] It would not, of course, be practicable to lengthen all 171 statutory periods. Rather, the consensus appears to be that we should instead focus on identifying frequently-applied deadlines that must be lengthened in order to avoid hardship from the switch to the days-are-days approach. (One example would be 28 U.S.C. § 636(b)'s 10-day time limit for serving and filing objections to a magistrate judge's proposed findings and recommendations.)

As noted in Part II above, the Bankruptcy Rules Committee has expressed concern that seeking enactment of a package of legislative amendments concerning short statutory deadlines (even as part of a larger package of such amendments that includes non-bankruptcy deadlines) would be unwise. Professor Morris has also pointed out that Bankruptcy Rule 9006(a)'s time-

[1] The Enabling Act's authorization of supersession provides a possible means of lengthening some statutory deadlines through the rulemaking process. However, supersession through rulemaking would leave the superseded statutory provisions on the books until Congress removed them, which would be confusing to practitioners. Moreover, supersession is not an option for bankruptcy-related statutory deadlines, because the current enabling legislation for the bankruptcy rules contains no supersession clause. *See* 28 U.S.C. § 2075.

computation provisions govern the computation of a large number of short deadlines set by *state* statutes – which introduces an additional complication.

Thus, although a legislative package would be the likely choice if the issue arose only outside of bankruptcy, the concerns raised by the Bankruptcy Rules Committee make it worthwhile to consider other possible options. One approach might be to amend subdivision (b) of the template to authorize courts to extend at least some statutory deadlines for good cause; the extension would be limited to the time that would have been allowed under the current time-computation rules. Obviously, this approach would not guarantee lawyers the time provided under the current time-computation rules; the matter would lie within the court's discretion. Moreover, the discretionary power presumably would not extend to statutory jurisdictional deadlines – which may be some of the most important ones. And, in the view of the Bankruptcy Rules Committee, authorizing extension of statutory deadlines under Bankruptcy Rule 9006(b) would constitute supersession of those deadlines. Because there is no supersession authority with respect to the Bankruptcy Rules, the measure would require legislation, and would thus raise the concerns (mentioned above) concerning bankruptcy-related legislation.

Another possible response to the problem of statutory deadlines would be to limit the scope of the time-computation project – either by removing statutory deadlines from its scope or by removing bankruptcy practice from its scope. Both strategies would be problematic. Having different time-computation systems for rule-based and statute-based deadlines could prove confusing to practitioners, and would cause particular problems in the instances where a deadline is reflected in both a statute and a rule. Adopting a different time-computation system for bankruptcy than for other fields could also cause confusion.

Another potential approach might be to defer publication of the time-computation proposals for a year or two, in order to let the dust settle on the pending Bankruptcy Rules changes. The large set of proposed Bankruptcy Rules amendments that is currently out for comment includes some of the very provisions that contain short deadlines. Some have raised the concern that it would be confusing for the bar to consider a package of changes to those deadlines before the pending amendments have made their way through the rulemaking process. Arguably, such a delay could also help address concerns over statutory deadlines, to the extent that bankruptcy-related legislation might become a somewhat less controversial proposition a few years down the road.

Some participants in our discussions have questioned whether lawyers currently rely on the rules' time-computation provisions to extend statutory deadlines. Those participants suggest that though some lawyers may rely on them when calculating time periods, it may be the case that the time-computation rules most often come into play with statutory deadlines post hoc, when a lawyer has missed what he or she took to be the statutory deadline and is searching for a basis on which to argue the filing is still timely. Experience with Bankruptcy Rule 9006, however, indicates that bankruptcy practitioners have been in the habit of relying on Rule 9006 when calculating statutory deadlines. We will undoubtedly gain a better general sense of the bar's views during the notice and comment period.

IV. Inaccessibility of the clerk's office

As directed by the Standing Committee, the Time-Computation Subcommittee has considered options for addressing the question of technical failures that render a clerk's office inaccessible to electronic filers.

We began by surveying the measures that currently address the question of court-end and user-end technical failures in connection with electronic filing. A rough survey of district court and bankruptcy court local rules and/or CM/ECF manuals available on Westlaw discloses a variety of approaches to these questions. The following statistics are drawn from a survey of local rules and/or CM/ECF manual provisions for some 120 district or bankruptcy courts.[2] The sample was obtained by searching Westlaw's RULES-ALL database; search results were skimmed for relevance, and the relevant results were compiled in a spreadsheet for further analysis.[3]

- Most courts in the sample (some 98 out of 120 courts) provide that the court has discretion to extend at least some deadlines in the event of court-end technical failure.
    - These courts vary in their approach to user-end technical failures. Some 29 of these courts provide that user-end technical failures will not result in an extension. Fourteen of the courts provide explicitly that the court has discretion to extend a deadline in the event of user-end technical failure. More than 30 of the courts have a rule that tracks the model local rule approved by the Judicial Conference, which provides that "[a] Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court"; this provision appears to encompass both court-end and user-end technical failures.[4]
    - Some of these courts warn filers that the court lacks authority to extend certain deadlines.
- Some 15 courts appear to provide an automatic extension in the event of a court-end technical failure.

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[2] The search obviously did not yield provisions for all the relevant courts. There are 94 judicial districts, so one would expect a complete set of results to include at least 188 hits. The search terms used may have been incomplete, or some courts may not have provisions that specifically address technical failures' effect on deadlines.

[3] The search was: "ELECTRONIC FILING" & (INACCESSIB! "TECHNICAL DIFFICULTY" "TECHNICAL PROBLEM" "TECHNICAL DIFFICULTIES" "FILING PROBLEM" "TECHNICAL FAILURE").

[4] The Commentary to the Model Rule supports this view. See Commentary ¶ 1 ("The Model Rule also addresses the possibility that the filer's own unanticipated system failure might make the filer unable to meet a filing deadline").

- Four of those courts provide that a user-end technical failure can result in a discretionary extension of time, two provide that a user-end technical failure will not result in an extension, and six make no mention of user-end technical failures.

- Definitions of court-end technical failure vary. A common approach is to provide that the court's system shall be deemed subject to a technical failure if it is unable to accept filings continuously or intermittently for a stated period of time after a stated hour of the day. The period and the hour vary from court to court:

  - A period greater than one hour after 10:00 a.m. (some 21 courts)
  - A period greater than one hour after noon (some 18 courts)
  - A period greater than two hours after noon (three courts)
  - A period greater than one hour after 8:00 a.m. (two courts)
  - A period greater than two hours after 9:00 a.m. (one court)
  - A period greater than two hours after 2:00 p.m. (one court)

- Of the courts that state that user-end technical failure will not result in an extension, seven courts permit the user to seek permission to make a provisional filing by fax in order to meet the deadline. (The user then must make the electronic filing promptly thereafter.)

The current diversity of approach suggests that courts are still experimenting with methods for determining the effects of court-end and user-end technical failures. Some trends seem clear:

- More courts will extend a deadline due to court-end technical failure than due to user-end technical failure.

- No court provides an automatic extension based on user-end failure.

- Courts that provide for extensions based on court-end failure are more likely to do so as a matter of discretion than to do so automatically.

However, considerable variation exists, for example in the timing requirements for a finding of court-end technical failure.

The question for the time-computation project is how to address inaccessibility in the light of the evolving and diverse local approaches to the matter of technical failure. Participants in the most recent time-computation project conference call favored leaving the concept of

"inaccessibility" undefined in the time-computation rule, so as to leave the question of technical failure to be dealt with by local rule. The findings noted above indicate that the courts have moved ahead in dealing with the question of technical failures' effect on court deadlines, and have done so in ways that may be specifically adapted to local conditions. For instance, some provisions include reference to drop boxes, or to provisional filing by fax, or to calling help lines – provisions that may be important to the functioning of the rule in question but are likely to work differently in different courts. Leaving the term "inaccessible" undefined in the time-computation rule would leave room for further local experimentation and adaptation.[5] Participants pointed out that the relevant technology is changing rapidly, and that those changes would likely outstrip the rulemaking process. One participant asserted that the almost infinite variety of permutations in the factual details concerning system downtime would render the concept of system failure impossible to define.

Nonetheless, mindful of the Standing Committee's directive, the Subcommittee also considered possible language that could be added to the template to define the effect of court-end and/or user-end technical failure. Possibilities are legion, but, for purposes of discussion, the Subcommittee focused on the following basic template and optional components:

Basic template:

(X) ***"Inaccessibility" Defined for Purposes of Electronic Filing.*** The clerk's office is "inaccessible" for purposes of electronic filing when a failure of the court's electronic case filing system prevents the filer from making the electronic filing. A "failure" occurs if after 10:00 a.m. in the court's time zone on the relevant day the system fails to accept a filing on at least two occasions separated by at least one hour.

Optional components:

[When a deadline is set by a period stated in hours, a failure also exists if the court's system fails to accept a filing on at least two occasions, separated by at least one hour, preceding the expiration of the deadline.]

[A court may adopt a local rule that requires a filer to make reasonable efforts to file on the due date by means other than the electronic case filing system in the event that the court's system failure prevents timely electronic filing.]

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[5] Admittedly, existing local rules would not mesh seamlessly with the "inaccessibility" concept in the proposed time-computation rule. For one thing, hardly any of the technical-failure provisions use the term "inaccessible," and few of the provisions explicitly tie court technical failures to the concept of inaccessibility in the time-computation rules. (Instead, some provisions tie the availability of discretionary relief to rules, such as Civil Rule 6(b), concerning extensions of time.)

[When there is no failure of the court's system but technical problems at the filer's end prevent timely filing, the filer may seek relief, if appropriate, under subdivision (b).]

In the event of a court-end technical failure, the basic template shown above would extend (for the electronic filer) all deadlines that are affected by the basic computation provisions in template 6(a). By contrast, the optional component concerning user-end technical failure permits relief, at the court's discretion, only when such relief is permissible under Rule 6(b). This treatment of user-end technical failure accords with current practice; as noted above, none of the 120 courts surveyed grants automatic extensions for user-end technical failure. It should be noted that under Rule 6(b) extensions are not available for the deadlines set in "Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them."[6] Moreover, under subdivision (b) as it exists in the Appellate and Bankruptcy Rules and in the current (non-restyled) Civil Rules, extensions are not available for statutory time periods.[7] The optional component concerning local rules requiring reasonable efforts to file by means other than the ECF system is inspired by existing provisions in some local rules that require such efforts. The optional component defining "failure" to include system failure over the space of an hour preceding the expiration of a deadline stated in hours is designed to respond to situations in which a deadline expires before 11:00 a.m.; this provision might be desirable because the basic definition of "failure" would fail to capture a court-system failure from, say, 9:30 to 10:30 a.m. preceding a deadline that expires at 10:30 a.m.

The template provided on the preceding page addresses inaccessibility that arises when a person intends to file electronically and is prevented from doing so by technical failure. The template does explicitly not address the question of "virtual holidays" – i.e., days that are not technically legal holidays but on which the clerk's office closes. For example, the day after Thanksgiving might be such a day. For non-electronic filers, the clerk's office presumably is "inaccessible" if the clerk's office is closed on such a day. But the template provision listed on the preceding page appears to indicate (by omission) that such a "virtual holiday" would not count as inaccessibility for purposes of electronic filing. Under such a regime, those required to file electronically would have to meet a deadline that fell on the virtual holiday, while those exempted from electronic filing would get the benefit of an extension (by virtue of subdivision (a)(1)(C)'s or (a)(2)(C)'s inaccessibility provisions) to the next business day.

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[6] At its September meeting, the Civil Rules Committee decided to propose lengthening the deadlines set in Rules 50, 52 and 59 from 10 to 30 days but not to propose softening Rule 6(b)'s ban on extensions of those deadlines.

[7] Current Civil Rule 6(b) applies to time periods set "by these rules or by a notice given thereunder or by order of court ." Similar limitations appear in Appellate Rule 26(b) and Bankruptcy Rule 9006(b).

No such limitation appears on the face of Criminal Rule 45(b), which applies "[w]hen an act must or may be done within a specified period . . . ." Likewise, the restyled version of Civil Rule 6(b) which is scheduled to take effect on December 1, 2007, applies "[w]hen an act may or must be done within a specified time ...."

V. After-hours filing and Section 452

As noted in Part II, over the summer we added language – now contained in subdivision (a)(4) – designed to establish when the last day of a period ends. A complication arose because 28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." Some courts have interpreted Section 452 (and/or corresponding provisions in the Bankruptcy,[8] Civil[9], Criminal[10] and Appellate[11] Rules) to permit after-hours filing if the filer seeks out a court official and hands the filing to that official in person. The August version of subdivision (a)(4) attempted to illustrate how the rule would look if it explicitly took account of that caselaw. The draft was problematic, however, in that it might encourage lawyers (or pro se litigants) to seek court officials out at their homes – a possibility that poses security concerns. The Subcommittee received a lot of comments to the effect that an explicit reference in the rule's text to after-hours in-person filing is a bad idea.

The current draft of subdivision (a)(4) was suggested by the Civil Rules Committee after its September meeting. The rule text no longer mentions after-hours filing with a court official. The note mentions Section 452 and states that subdivision (a)(4) is not intended to address the court's authority to permit an after-hours filing under the statute. This approach seems desirable in that it does not highlight Section 452 in the rule itself – which might encourage use of after-hours filing in inappropriate circumstances – but does refer to Section 452 in the Note so as to make clear that there is no intent to supersede that statute. We also added a reference to statutes in the opening language of subdivision (a)(4), thus: "Unless a different concluding time is set by statute, by local rule or by order in the case . . . ." We added the reference to statutes out of concern that otherwise some might conclude from the Rule text that subdivision (a)(4) alters the effect of the caselaw concerning after-hours filing under Section 452.

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[8] Bankruptcy Rule 5001(a) provides: "The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules."

[9] Civil Rule 77(a) provides: "District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules."

[10] Criminal Rule 56(a) provides: "In General. A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order."

[11] Appellate Rule 45(a)(2) provides in relevant part: "When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order."

VI. Computation of time regarding date-certain deadlines

It has been suggested that the Time-Computation Project may wish to consider a provision that deals with date-certain deadlines. As you know, the template draft currently addresses only periods that require computation, and not periods that end on a specific date set by court order. The issue came to our attention because Dewey Cole, a litigator with an interest in the rulemaking process, drew our attention to a split in approach between the 6th Circuit (which has held that Civil Rule 6(a) does not govern date-certain deadlines) and the 5th Circuit (which has held that Bankruptcy Rule 9006(a) does govern date-certain deadlines). The Subcommittee's consensus is that the template should not address date-certain deadlines.

If one were to address the question of date-certain deadlines, a provision might be added to the template as a new subdivision (a)(3):

> (3) ***Date Certain.*** If a court order sets a date certain deadline, the order does not explicitly opt out of this subdivision, and the date set is a Saturday, Sunday, legal holiday, or – if the act to be done is a filing in court – a day on which the clerk's office is inaccessible, then the deadline is the next day that is not a Saturday, Sunday, legal holiday or – if the act to be done is a filing in court – day on which the clerk's office is inaccessible.

The Note could explain the concept as follows, with conforming changes as appropriate elsewhere in the Note:

> **Subdivision (a)(3).** New subdivision (a)(3) governs when a court order sets a date certain for a filing or other event. Caselaw has divided on the question of whether a rule for computing periods of time applies when a court has set a specific date as a deadline. *Compare, e.g., Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline") *and Fleischhauer v. Feltner*, 3 F.3d 148, 151 (6th Cir. 1993) ("Computation under Rule 6(a), by its very nature, is only necessary when a court orders something to be done in a particular number of days.") *with Matter of American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). Under subdivision (a)(3), date-certain deadlines that fall on weekends, holidays, or (for filings) days when the clerk's office is inaccessible are altered by resetting the deadline to the next day that is not a weekend, holiday, or (for filings) day when the clerk's office is inaccessible. The court can opt out of this approach by stating in the order that subdivision (a)(3) does not apply.

As this illustrates, a provision addressing date-certain deadlines would be relatively straightforward to draft. But participants in the time-computation project believe that it is not worthwhile to lengthen the template by including such a provision. Courts that find the template approach useful can apply it to date-certain deadlines if the need arises, without the matter being explicitly covered in the relevant Rules.

VII. Deadlines in the Evidence Rules

The Evidence Rules contain very few time periods.[12] It is not entirely clear whether the current time-computation Rules govern the computation of periods in the Evidence Rules. Criminal Rule 45(a)'s text seems to omit the Evidence Rules from its scope.[13] The Civil, Bankruptcy and Appellate Rules' time-computation provisions omit any reference to the Evidence Rules but, as you know, they do explicitly cover statutory periods. One might argue that each of the relevant Evidence Rules could be considered a statute, since each was initially adopted by statute.[14] Assuming that the current computation rules apply to the Evidence Rules, none of the Evidence Rules time periods is short enough to be affected by the shift to a days-are-days computation method.[15]

As noted above, the Evidence Rules Committee discussed the time-computation project at its fall meeting. It was noted that there have been no reported problems with the computation of any time periods in the Evidence Rules.[16] However, the Evidence Rules Committee suggested

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[12] A party intending to offer evidence of a victim's sexual predisposition or past sexual behavior under FRE 412(b) must so move "at least 14 days before trial" unless the court sets a different time for good cause. FRE 412(c)(1)(A). When the government intends to offer evidence of the defendant's commission of other sexual assaults under FRE 413(a) or of the defendant's commission of an offense of child molestation under FRE 414(a), the government must disclose the evidence to the defendant "at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause." FRE 413(b), 414(b). A similar 15-day notice provision exists in FRE 415(b) with respect to evidence of a party's commission of offenses of sexual assault or child molestation offered under FRE 415(a).

The ten-year period in FRE 609(b) is relevant to the admissibility of evidence that a witness was previously convicted of a crime. FRE 803(16)'s hearsay exception for ancient documents applies to "[s]tatements in a document in existence twenty years or more...." The authentication of an "ancient document" under FRE 901(b)(8) depends on a showing, inter alia, that the document or data compilation "has been in existence 20 years or more at the time it is offered."

[13] "The following rules apply in computing any period of time specified in these rules, any local rule, or any court order. . . ." Fed. R. Crim. P. 45(a).

[14] The matter is somewhat complicated, of course, because some of the relevant Evidence Rules were since amended through the rulemaking process. For example, FRE 412 was adopted by statute (1978), then amended by statute (1988), then amended both by statute and rulemaking in 1994.

[15] Other aspects of the template, however – such as the definition of the last day of a period, or the instructions on how to count backward – would, if applicable, affect the FRE time periods.

[16] A quick Westlaw search performed for the Time-Computation Subcommittee disclosed no decisions addressing the applicability of Civil Rule 6(a) or Criminal Rule 45(a) to

that uniformity would be served if the template versions in Civil Rule 6(a) and Criminal Rule 45(a) were augmented to specify that they cover any time-counting issue under the Evidence Rules.[17]

Participants in the most recent round of time-computation discussions did not voice support for the Evidence Rules Committee's proposal. Participants expressed discomfort with including references to the FRE in different Rules' time-computation provisions – particularly in the light of the possibility that in subsequent years the time-computation provisions in the various Rules might be amended and thus diverge in content. It was suggested that if clarification concerning the FRE time periods is desired, it might be possible to add a provision to the Evidence Rules stating that when periods of time set by the FRE must be computed, they should be computed by using the time-computation provision in the Civil, Criminal or Bankruptcy Rules (depending on which set of rules applies to the proceeding).

The Chair and Reporter of the Evidence Rules Committee have indicated that they would not support the latter proposal. If the Evidence Rules are to be amended to deal with the issue of time computation, they would prefer to adopt the template rather than to refer to other sets of rules. (They note that it is not user-friendly to send practitioners from one set of rules to another in order to determine time-computation.) They will therefore prepare a version of the template as a proposed FRE 1104, for consideration by the Evidence Rules Committee at its spring meeting. However, the Chair and Reporter do not believe that such an amendment is worthwhile, because time-counting issues ordinarily do not arise with respect to the FRE, and because if such issues do arise, Civil Rule 6(a) or Criminal Rule 45(a) could be applied by analogy.

VIII. Possible use of extensions under subdivision (b) to address anomalous applications of subdivision (a)

When one adopts any simple, broadly applicable time-counting approach, there will likely be at least a few situations in which the approach's application yields odd results. This Part illustrates that risk with an example, and suggests that the availability of extensions of time under subdivision (b) may provide at least a partial solution to such problems.

Mark Levy has pointed out that when a backward-counted filing deadline falls on a day when unanticipated conditions render the clerk's office inaccessible, the template would seem to produce an unreasonable result. For example, under current Appellate Rule 31(a)(1) a reply brief must be filed at least 3 days before argument unless the court for good cause allows a later filing. Suppose the argument date is Friday December 22, and the due date (under the template) is thus Tuesday December 19. And suppose that an unexpected snowstorm (and accompanying power

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computing time periods set by the Evidence Rules.

[17] Thus, the Evidence Rules Committee proposed revising the first line of the template to read: "The following rules apply in computing any time period specified in these rules, in the Federal Rules of Evidence, or in any local rule, court order, or statute."

failure) renders the clerk's office both physically and electronically inaccessible on December 19. Template subdivisions (a)(1)(C) and (a)(3) indicate that these circumstances yield a due date of December 18 – which seems unfair to the filer since this due date only becomes apparent on December 19.

For Appellate Rule 31(a)(1), a solution lies in the "good cause" safety valve; it would be astonishing if a court did not find good cause to allow a later filing in that instance. The two other Rules provisions that currently set backward-counted filing deadlines appear to contain similar safety valves.[18] And even if the particular Rules themselves did not contain such safety valves, subdivision (b) of the appropriate time-counting Rule would provide one.[19]

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[18] See Appellate Rule 28.1(f)(4) (in case involving cross-appeal, appellee's reply brief is due "at least 3 days before argument *unless the court, for good cause, allows a later filing*"); Bankruptcy Rule 6004(b) ("Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than five days before the date set for the proposed action *or within the time fixed by the court.*").

[19] The subdivisions (b) read as follows:

- Appellate Rule 26(b): (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
  (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
  (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

- Bankruptcy Rule 9006(b): (b) Enlargement
  (1) In general
  Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.
  (2) Enlargement not permitted
  The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024.
  (3) Enlargement limited
  The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

Here, as elsewhere, the analysis is complicated by the question of statutory deadlines. A quick search through the collection of short statutory deadlines discloses two backward-counted deadlines[20] that appear to require a filing in court. 18 U.S.C. § 3509(b)(1)(A) provides in relevant part that "The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable." 18 U.S.C. § 2252A(c) provides in relevant part: "A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon

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- Civil Rule 6(b) (non-restyled): (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

- Civil Rule 6(b) (restyled): (b) Extending Time
  (1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:
    (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
    (B) on motion made after the time has expired if the party failed to act because of excusable neglect.
  (2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(b), except as those rules allow.

- Criminal Rule 45(b): (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) Exception. The court may not extend the time to take any action under Rule 35, except as stated in that rule.

[20] There is also 28 U.S.C. § 144's requirement that "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." But this requirement seems anachronistic anyway, in light of the fact that formal terms of court have been abolished.

which the defendant intends to rely." With respect to these two statutory provisions, an oddity in current Criminal Rule 45(b) may provide a safety valve. Unlike similar provisions in the other time-computation rules, Rule 45(b)'s authorization for the court to extend a time period arguably applies to statutory periods: Rule 45(b) applies "[w]hen an act must or may be done within a specified period," and does not explicitly limit itself to periods set by rule. (Restyled Civil Rule 6(b) adopts similar language.)

It seems likely, therefore, that any anomalies in the computation of existing backward-counted filing deadlines[21] can be dealt with by means of the court's discretion to extend the relevant time period. This example illustrates the potential importance of the power to grant extensions under subdivision (b). It may be worthwhile to give attention to the scope of the subdivision (b) power, and particularly to the question of whether that power does or should extend to some statutory deadlines (and, if so, which sorts of statutory deadlines).

IX. Conclusion

Thanks to the hard work and input of many participants, the Time-Computation Project is progressing well. As discussed above, certain key questions remain, and the Subcommittee looks forward to the Standing Committee's guidance on those questions.

Encls.

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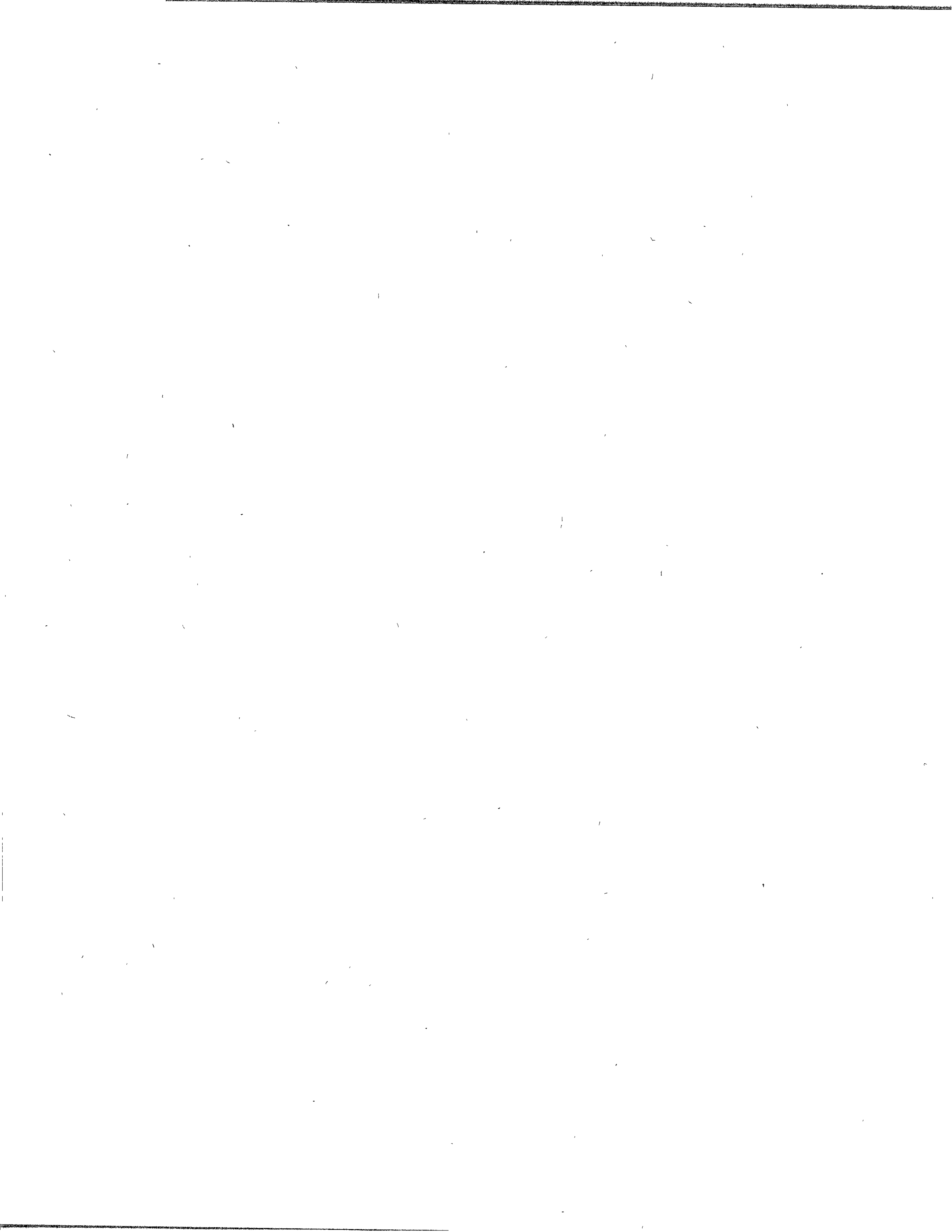
[21] It should be noted that the Subcommittee has not performed an exhaustive search for backward-counted statutory filing deadlines. The search was performed within the existing database of statutory periods, which covers only *short* statutory periods.



11-B

PROPOSED TEMPLATE

Rule 6. Computing and Extending Time

1 **(a) Computing Time.** The following rules apply in
2 computing any time period specified in these rules or in
3 any statute, local rule, or court order.
4 **(1)** ***Period Stated in Days or a Longer Unit.*** When
5 the period is stated in days or a longer unit of time:
6 **(A)** exclude the day of the event that triggers the
7 period;
8 **(B)** count every day, including intermediate
9 Saturdays, Sundays, and legal holidays; and
10 **(C)** include the last day of the period unless it is
11 a Saturday, Sunday, legal holiday, or — if the
12 act to be done is a filing in court — a day
13 when the clerk's office is inaccessible. When
14 the last day is excluded, the period continues
15 to run until the end of the next day that is not
16 a Saturday, Sunday, legal holiday, or day
17 when the clerk's office is inaccessible.
18 **(2)** ***Period Stated in Hours.*** When the period is stated
19 in hours:
20 **(A)** begin counting immediately on the
21 occurrence of the event that triggers the
22 period;

23 **(B)** count every hour, including hours during
24 intermediate Saturdays, Sundays, and legal
25 holidays; and
26 **(C)** if the period would end on a Saturday,
27 Sunday, legal holiday, or — if the act to be
28 done is a filing in court — a time when the
29 clerk's office is inaccessible, then continue
30 the period until the same time on the next day
31 that is not a Saturday, Sunday, legal holiday,
32 or day when the clerk's office is inaccessible.
33 **(3)** ***"Next Day" Defined.*** The "next day" is
34 determined by continuing to count forward when
35 the period is measured after an event and backward
36 when measured before an event.
37 **(4)** ***"Last Day" Defined.*** Unless a different time is set
38 by a statute, local rule, or order in the case, the last
39 day ends:
40 (A) for electronic filing, at midnight in the court's
41 time zone; and
42 (B) for filing by other means, when the clerk's
43 office is scheduled to close.
44 **(5)** ***"Legal Holiday" Defined.*** "Legal holiday" means:

45 **(A)** the day set aside by statute for observing New
46 Year's Day, Martin Luther King Jr.'s
47 Birthday, Washington's Birthday, Memorial
48 Day, Independence Day, Labor Day,
49 Columbus Day, Veterans' Day, Thanksgiving
50 Day, or Christmas Day; and
51 **(B)** any other day declared a holiday by the
52 President, Congress, or the state where the
53 district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a statute, a local rule, or a court order. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, a filing is required to be made "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to

time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the even that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(3). Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

When the act to be done is a filing in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office, and the deletion from the text is not meant to suggest otherwise.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such

deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. When the act to be done is a filing in court, and inaccessibility of the clerk's office occurs on the day the deadline ends and prior to the time the deadline ends, that day is treated like a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from Daylight Saving Time to standard time.

Subdivision (a)(3). New subdivision (a)(3) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. See, e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1).

Subdivision (a)(4) does not apply to the computation of periods stated in hours under subdivision (a)(2).

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing to be made by locating an appropriate official and handing the papers to that official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the court's authority to permit such a filing under the statute; instead, the rule is designed to deal with the ordinary course of events.

Subdivision (a)(5). New subdivision (a)(5) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

11-C

MEMORANDUM

DATE: August 9, 2006

TO: Judge Mark R. Kravitz

FROM: Catherine T. Struve

RE: 28 U.S.C. § 452, cognate rules, and the definition of "last day"

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." Corresponding provisions exist in the Bankruptcy,[22] Civil[23], Criminal[24] and Appellate[25] Rules. During the time-computation subcommittee's July 31 conference call, the question was raised whether the "courts always open" provisions bear upon the time-computation definition of the end of the "last day."

A quick survey of treatises and caselaw discloses divided authority concerning the effect of such provisions on whether a litigant can timely file after the closing of the clerk's office, and if so, how. Cases that focus on this issue generally separate into two camps: those that require the after-hours filer to find a court official to whom to hand the papers, and those that permit the after-hours filer to place the papers in the court's night depository or even in another location within the court's custody. The majority of treatises (including Federal Practice and Procedure) take the former view, though Moore's argues that putting the papers in a designated depository should work. It is notable that none of these discussions grounds its conclusions in an argument concerning the intent behind Section 452; this is unsurprising, since there is no indication that the statute or its predecessors was designed to address the issue. This brief survey of authorities indicates that a time-computation provision defining the end of the "last day" could bring clarity to this murky area and would not contravene a discernable statutory purpose.

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[22] Bankruptcy Rule 5001(a) provides: "The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules."

[23] Civil Rule 77(a) provides: "District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules."

[24] Criminal Rule 56(a) provides: "In General. A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order."

[25] Appellate Rule 45(a)(2) provides in relevant part: "When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order."

The statutory and rules provisions. The predecessors of Section 452 date back to 1842.[26] In 19th-century treatises, predecessor provisions are mentioned sometimes in the course of discussions concerning the terms of court,[27] and sometimes during discussions of jurisdiction.[28] Both contexts suggest that the purpose of courts-always-open provisions was to address the power of the courts to act.[29] This was the view taken in the House Report concerning the 1948 legislation that codified the present Section 452: "The phrase 'always open' means 'never closed' and signifies the time when a court can exercise its functions. With respect to matters enumerated by statute or rule as to which the court is 'always open,' there is no time when the court is without power to act."[30]

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[26] Section 5 of the Act of August 23, 1842, 5 Stat. 517, 518, provided in part:

> That the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits.

This provision (a predecessor to Revised Statutes §§ 638 and 574) was mirrored in Equity Rule 1 of the Rules of Practice for the Courts of Equity of the United States, January Term 1842.

[27] See, e.g., Horace Andrews, Manual of the Laws and Courts of the United States, and of the several States and Territories 9 (1873) (in a section discussing the "terms of the courts of the United States," noting that "[t]he circuit courts, as courts of equity, are always open for the purpose of filing pleadings, issuing and returning process and commissions, and for interlocutory proceedings").

[28] See, e.g., Robert Desty, A Manual of Practice in the Courts of the United States 51 (5th issue 1881) (section on "Courts always open for certain purposes" listed under the topic heading "Circuit Courts – Jurisdiction"); George W. Field, A Treatise on the Constitution and Jurisdiction of the Courts of the United States 146 (1883) (discussing fact that "circuit courts . . . are always open" in chapter on jurisdiction).

[29] See John M. Gould and George F. Tucker, Notes on the Revised Statutes of the United States 89 (1889) (observing with respect to Rev. St. § 574 that "while common-law judges properly exercise their authority only when holding a court, and have no power to sit in vacation, yet courts of equity are always open, the chancellor's authority being personal . . . and capable of exercise equally in term time and in vacation"); cf. Horn v. Pere Marquette R. Co., 151 F. 626, 635 (C.C. E.D. Mich. 1907) ("The power of a United States judge to do chamber business is in large part ascribable to the statutory provisions of section 638, Rev. St. . . . , whereby Circuit Courts are declared to be always open for the transaction of certain business . . . .").

[30] H. Rep. No. 308, 80th Cong., 1st Sess., A52 (1947). The legislative history of the 1963 amendments to Section 452 corroborates the view that the provision was designed to address the question of when courts have the power to act. See S. Rep. No. 88-547, 1963 U.S.C.C.A.N. 996,

The advisory committee notes to the relevant Rules generally do not indicate the purpose of the courts-always-open provisions, other than to say that the provisions correspond in substance to Section 452.[31]

The divided caselaw. Some caselaw indicates that "courts always open" provisions allow a litigant to file after the closing of the clerk's office[32] so long as the litigant can find an appropriate court official[33] to receive the papers after hours.[34] Thus, for example, the First Circuit cited Civil Rule 77(a) for the principle that "A person wishing to file a notice of appeal

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997 (1963) ("[T]he requirement [of] holding formal periodic terms by the district courts no longer serves a useful purpose and . . . those statutory requirements should be eliminated.").

[31] See Civil Rule 77, 1937 advisory committee note (rule states substance of Section 452); see also Bankruptcy Rule 5001, [1983] advisory committee note (rule is drawn from Civil Rule 77); Criminal Rule 56, 1944 advisory committee note (stating that relevant part of rule is drawn from Civil Rule 77, and noting "policy of avoiding the hardships consequent upon a closing of the court during vacations").

[32] One district court, though, suggested that reliance on such an interpretation would be risky. Holding that Civil Rule 6(a) applied to the statute of limitations for a Jones Act claim (so that the last day of the period, falling on a Sunday, should be extended to the following Monday), the court rejected the argument that Civil Rule 77(a)'s "courts always open" provision would satisfactorily address such a situation: "Theoretically, the putative litigant might hunt up a Judge of this Court or the Clerk at his residence or elsewhere and file with one of them. But I think it unfair that substantial rights should depend upon the doubtful contingencies which may arise in the attempt to do so." Rutledge v. Sinclair Refining Co., 13 F.R.D. 477, 479 (S.D.N.Y. 1953).

[33] An early case indicated that the judge is not such an appropriate official: In In re Gubelman, 10 F.2d 926, 929 (2d Cir. 1925), *modified on other grounds*, Latzko v. Equitable Trust Co. of New York, 275 U.S. 254, 257 (1927), the Second Circuit interpreted "filing" (for purposes of a statutory provision concerning bankruptcy) to require presentation to the court clerk: "A paper is not filed by presenting it to the judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the clerk of the court, for the purpose of making it a part of the records of the case." But see, e.g., Civil Rule 5(e) ("The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. . . .").

[34] At least one early case applied this principle to determine whether a diversity action was filed within the relevant state statute of limitations. See Hagy v. Allen, 153 F.Supp. 302, 305 (E.D. Ky. 1957) (citing Civil Rule 5(e) and rejecting defendants' argument "that since the complaints we[re] filed [with the clerk at her home] and not at the office that they were not properly filed on December 31"). *Hagy*, of course, predates the Supreme Court's holding that Civil Rule 3 (providing that an action is commenced by filing complaint) is not "intended to toll a state statute of limitations." Walker v. Armco Steel Corp., 446 U.S. 740, 750 (1980).

after closing hours on the last day may seek out the clerk or deputy clerk, or perhaps the judge . . . , and deliver the notice to him out of hours. The notice of appeal would then be filed within the statutory period." Casalduc v. Diaz, 117 F.2d 915, 917 (1st Cir. 1941); see also McIntosh v. Antonino, 71 F.3d 29, 35 n.5 (1st Cir. 1995) (citing *Casalduc* for proposition that "[a]fter hours, papers can validly be filed by in-hand delivery to the clerk or other proper official"; noting that "some clerks' offices reportedly have established so-called 'night depositories' to accommodate after-hours filings"; and declining to decide whether an item is filed at the time it is placed in such a depository after hours).[35]

Other cases are yet more liberal, and provide that the "courts always open" provisions mean that filing has been effected when litigants to leave the papers at the clerk's office (or another place designated by the clerk's office, such as a post office box) even if no one from the clerk's office is there to receive them at that time.[36]

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[35] Likewise, a district court considering a case in which the statute of limitations ran out on a Sunday and the litigant's representative "arrived at the office of the clerk of this court, as he says, at 12:15 P.M. [on Saturday] only to find it closed," observed that the suit "could have been filed on [that] Saturday . . . , with any judge of the court." Rose v. United States, 73 F. Supp. 759, 760 & n.1 (E.D.N.Y. 1947). See also In re Asher Development III, Inc., 143 B.R. 788, 788-89 (D. Colo. 1992) ("Although there is no explicit local bankruptcy rule on point, custom allows an attorney to make prior arrangements to file tardy pleadings with the clerk of a court at a convenient location outside of normal business hours."); In re Peacock, 129 B.R. 290, 291 (Bankr. M.D. Fla. 1991) (in rejecting argument that filing could not have been accomplished on a Sunday, citing Bankruptcy Rule 5001 for proposition that "that the clerk and the court are always available to accept filings, even at their homes"); Greeson v. Sherman, 265 F. Supp. 340, 342 (W.D. Va. 1967) (interpreting Civil Rules 3 and 5(e) and holding that filing was effective at the time that "plaintiff's complaint was delivered to the home of the Deputy Clerk on the night of December 30, 1966 by plaintiff's counsel"); Muse v. Freeman, 197 F. Supp. 67, 69-70 (E.D. Va. 1961) ("Irrespective of the validity of the order closing the Clerk's Office to the public on Saturdays, the evidence is clear that deputy clerks, whenever called upon to do so, will accept legal documents for filing on Saturdays. Moreover, the Judge is generally available in his office on Saturdays due to the congested docket prevailing in this area. That the present action could have been filed on Saturday, April 23, 1960, cannot be denied.").

[36] See, e.g., Greenwood v. State of N.Y., Office of Mental Health (OMH), 842 F.2d 636, 639 (2d Cir. 1988) (holding that time-stamped deposit of Section 1983 complaint in court's night depository box constituted filing for purpose of statute of limitations); Freeman v. Giacomo Costa Fu Andrea, 282 F. Supp. 525, 527 (E.D. Pa. 1968) (reasoning "that if plaintiff's messenger had deposited the complaint in the clerk's mail-slot or slipped it under the door of the clerk's office, as soon as he arrived at the courthouse, the action would have been 'commenced' during decedent's lifetime"); see also Johansson v. Towson, 177 F. Supp. 729, 731 (M.D. Ga. 1959) (holding that "the receipt by the Deputy Clerk of these complaints in his Post Office Box in the early morning hours of Saturday, August 23, constituted a sufficient filing of these suits prior to midnight of the following day, notwithstanding the fact that the Clerk did not open the box until 8:30 a.m. on Monday, August 25"); Johnson v. Esso Standard Oil Co., 181 F. Supp. 431, 433-34

The treatises. Almost all the treatises that I surveyed take the view that if the clerk's office is closed the litigant must find an appropriate court official and deliver the papers to that person. See, e.g., Wright, Miller & Marcus, 12 Fed. Prac. & Proc. Civ.2d § 3081 (as updated 2006) (courts-always-open provision "does not mean that the office of the clerk of the court must be physically open at all hours or that the filing of papers can be effected by leaving them in a closed or vacant office. Under Rule 5(e) papers may be filed out of business hours by delivering them to the clerk or deputy clerk or, in case of exceptional necessity, the judge").[37] Moore's Federal Practice notes that "[h]anding over papers to the clerk may take place at the clerk's office or home," and warns that "[l]eaving papers under the door of the clerk's office after the office is closed has, in the past, been held to be insufficient to constitute filing." Mary P. Squiers, 1-5 Moore's Federal Practice - Civil § 5.30. The treatise argues, however, that in light of Civil Rule 77(a), "the placement of papers in a night depository box maintained exclusively by the clerk" ought to be held "sufficient to constitute filing as of that date for statute of limitations purposes." Id.[38]

(W.D. Pa. 1960) (finding that complaint "was . . . placed in the Clerk's post office box on November 24, 1958, after 2:30 p.m. and before 5:00 p.m., and . . . picked up by the Clerk's office the following day," and holding that "the delivery of this complaint to the Clerk in his post office box on Monday, November 24, 1958, constituted a filing of the complaint and commencement of plaintiffs' action on that day"). Another case relied on a "courts always open" provision to hold a 5:55 p.m. filing timely; since the court did not specify that the litigant sought out a court official at that hour, this may have been a case in which the litigant simply dropped off the papers at the clerk's office. See In re Warren, 20 B.R. 900, 902 (Bankr. D. Me. 1982).

[37] See also David G. Knibb, Federal Court of Appeals Manual § 7.3 (4th ed., updated through 2006) ("The desperate appellant can still meet the deadline after the clerk's office has closed on the last day by personally delivering the notice to the clerk, together with the prescribed filing fee."); 8 Federal Procedure, Lawyers' Edition § 20:330 (database updated through June 2006) ("There is some authority that, if a deadline is approaching and the clerk's office is closed, a party wishing to file a paper must seek out the clerk and place the paper in his actual custody.") (citing *Casalduc*); Lawrence R. Ahern, III & Nancy Fraas MacLean, Bankruptcy Procedure Manual § 5001:01 (2006 ed.) (citing Bankruptcy Rules 5001 and 5005(a) and stating that "[f]iling is accomplished during non-business hours by personal delivery to either the clerk or the judge of the court where the case under the Code is pending"); Suzanne L. Bailey et al., 36 C.J.S. Federal Courts § 488 (database updated May 2006) ("A notice of appeal may be filed on the last day after the closing hours of the clerk's office by seeking out the clerk or deputy clerk and delivering the notice of appeal to him or her . . . .").

[38] One treatise seems to go further than Moore's, suggesting that when an official cannot be found to receive the papers in person, the "courts always open" provision permits the litigant to deliver the papers to the closed office:

> The fact that the clerk's office is physically closed should not deter a party from taking steps to file papers either by slipping or sliding the papers under the door of the clerk's office, by leaving the papers in the clerk's mail slot or post office box, by delivering the papers to the clerk at his or her home, or by delivering the papers

to the judge. And, if the clerk's office is open but there is no one present to receive the papers, the papers may be left in his or her office. . . . When papers are "filed" but are not physically handed over to the proper official, counsel should, at the earliest opportunity, call the clerk of court to inform him or her about such "filing" to insure that the papers are not lost or misplaced; otherwise the papers might not be considered "filed," at least in those jurisdictions where "filing" requires delivery of the paper into the actual custody of the proper official.

8A Federal Procedure, Lawyers' Edition § 22:24 (database updated June 2006).

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AGENDA # ______

Committee on ______________________

Winter 2006-7

SUBJECT: Long-Range Planning (Information)

The long-range planning meeting of Judicial Conference committee chairs was held on September 18, 2006. At the meeting, Judge Charles R. Breyer, planning coordinator for the Judicial Conference's Executive Committee, noted that there are a number of strategic issues that impact multiple committees, and he emphasized the need to ensure that they are effectively addressed.

Among the cross-cutting topics examined at the meeting was the impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Judge Marjorie O. Rendell, chair of the Committee on the Administration of the Bankruptcy System, led a discussion about the planning implications of the drop in bankruptcy case filings that has occurred since the Act took effect. Among the committees impacted are the Bankruptcy, Budget, Court Administration and Case Management, and Judicial Resources Committees.

Another cross-cutting topic considered was the increase in the number of judges who will be eligible to take senior status over the next several years. Ensuring that resources are available to support senior judges is an important planning issue for several committees, including the Budget, Court Administration and Case Management, Judicial Resources, and Space and Facilities Committees.

Other cross-cutting issues discussed included information technology, courtroom usage, and relations between the judiciary and Congress. In addition, a prototype *District Court Planning Profile* was distributed to illustrate the types of analysis that could be performed to enhance planning for appellate, district, and bankruptcy courts, the probation and pretrial services system, and the defender services program. In describing the district court prototype, it was noted that every committee has interests and issues that relate to the district courts.

A report of the meeting is included as Attachment 1.

Attachment 1. Report of the Judicial Conference Committee Chairs' Long-Range Planning Meeting, September 18, 2006.

Judicial Conference Committee Chairs Long-Range Planning Meeting

September 18, 2006

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
SEPTEMBER 2006 LONG-RANGE PLANNING MEETING

The September 18, 2006 long-range planning meeting was held in Washington, D.C. It was facilitated by Judge Charles R. Breyer, planning coordinator for the Judicial Conference's Executive Committee. The meeting was attended by the Executive Committee and chairs of 15 Judicial Conference committees. Administrative Office participants included Director James C. Duff, Associate Director Clarence A. Lee, Jr., and Deputy Associate Director Cathy A. McCarthy, who provides principal staff support for the long-range planning process. A list of participants is included as Appendix A.

Judge Breyer began the meeting by stressing the importance of identifying and addressing crosscutting issues. Many of the key issues and decisions facing the judiciary have a great impact on the work of multiple committees. Judge Breyer also reminded the committee chairs that the Executive Committee would be reviewing the jurisdiction of the committees at its February 2007 meeting, as is required every five years. Part of that review is a committee self-evaluation, to be done at their upcoming meetings. He asked committee chairs to give careful consideration to how well current committee jurisdictions enable us to address crosscutting issues.

Crosscutting and Committee Strategic Goals and Issues

Judge Breyer thanked the committee chairs for their letters identifying trends and issues that are important to the judiciary and to the work of their committees. Cathy McCarthy referred the chairs to a list of the crosscutting and committee strategic goals and issues identified in the letters (see Appendix B). She said the strategic issues would be combined into a strategic planning document that would be presented in draft form at the March 2007 long-range planning meeting. Judge Breyer asked a few committee chairs to report on strategic developments they had identified.

Two-Branch Conference

Judge D. Brock Hornby, chair of the Committee on the Judicial Branch, discussed a planned conference to promote an ongoing dialogue between the judiciary and Congress. It will take place in Washington early in the 110th Congress. It will be organized and run by former Federal Judicial Center Deputy Director Russell Wheeler, who is now with the Governance Institute. To some extent, the conference represents a

small re-start of the former Brookings Institution-sponsored Administration of Justice Conferences and two three-branch conferences conducted in the early 1990s. Judge Hornby described this conference as having a lower profile than the 1990s conferences; it would primarily be an opportunity for judges to listen to members of Congress. If successful, it could be followed in 2009 with a three-branch conference.

Analysis of Local Rules of Court

Judge David F. Levi, chair of the Committee on Rules of Practice and Procedure, described efforts to analyze local rules of court for consistency with national rules of practice and procedure. Under 28 U.S.C. § 2071, all rules prescribed by individual courts must be consistent with Acts of Congress and with national rules. The process for amending national rules usually takes two to three years and involves extensive and thorough public examination. Steps include approval by the advisory committee, the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court. Congress then has at least seven months to act on any rules prescribed by the Supreme Court.

While local rules must comply with 28 U.S.C. § 2071, local rulemaking is not subject to the national rulemaking process, including congressional modification. Congress has periodically expressed concern over the proliferation of local rules, as have attorneys with national practices, who note the difficulty in keeping current with local procedural requirements. On a number of occasions, Congress has specifically called for local rules. The Civil Justice Reform Act of 1990, for example, invited district courts to experiment with local procedures and implement case-management procedures via local rule.

Judge Levi reported that the Advisory Committee on Civil Rules is currently analyzing local district court rules in conjunction with its study of Civil Rule 56, which covers the procedure for summary judgment motions and decisions. As a long-range planning issue, Judge Levi said the balancing of national uniformity and local experimentation and flexibility will continue to be a concern to the committee. This balance is expressed in the *Long Range Plan for the Federal Courts*:

> *The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to*

account for differing local circumstances and to experiment with innovative procedures.[1]

Impact of Technology

Judge Thomas I. Vanaskie, chair of the Committee on Information Technology, discussed the impact of technology on the work of other committees. Judge Vanaskie recalled a panel discussion about the future of technology at the March 2005 long-range planning meeting, when Judge James Robertson, the Committee's former chair, posed three strategic questions:

- How remote or "virtual" does the judiciary want to be?
- Who is going to do the work?
- How uniform does the judiciary want to be or have to be?

In terms of "being virtual," Judge Vanaskie mentioned the expanded availability of high-speed access to the internet as a trend with crosscutting implications, as it may impact IT security policies, telecommuting trends, and space considerations. The implementation of CM/ECF in the courts is changing the picture of "who is going to do the work," with changes in the composition of court staff. Job categories such as "docket clerk" may become anachronistic over time, and the division of labor between clerks' offices and chambers is likely to continue to evolve. He remarked that maintaining a good balance between the need for uniformity and for local flexibility presents challenges. With regard to CM/ECF, for example, uniformity is necessary for certain aspects such as system architecture, security, billing, and statistical reporting; but there is also a great interest in allowing for modifications to the system to meet local preferences and encourage innovation.

Judge Vanaskie also spoke of identifying and meeting the IT needs of judges as a planning objective. A number of powerful stand-alone applications have been made available to judges and chambers staff, but much work remains in integrating the various tools that are available, such as CM/ECF, computer-assisted legal research tools, and basic desktop applications. He noted that we will need to develop the skills and abilities of IT staff so that they are highly skilled not only in how to get systems up and running, but also in how applications work.

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[1]Implementation Strategy 28b, *Long Range Plan for the Federal Courts*, p. 58.

Courtroom Usage Study

Judge Breyer advised paying close attention to a courtroom-usage study that is underway. The study's results will affect courtroom policies, judicial and administrative practices, courthouse construction, and the judiciary's budget.

The study was requested by the House Committee on Transportation and Infrastructure's Subcommittee on Economic Development, Public Buildings and Emergency Management. The Executive Committee referred the matter to the Committee on Court Administration and Case Management (CACM). The CACM Committee asked the Federal Judicial Center (FJC) to conduct a comprehensive, unbiased, and methodologically sound study on how courtrooms are used in the federal judiciary.

Judge John R. Tunheim, CACM Committee chair, described how the study will measure actual and latent courtroom usage in 27 district courts that are representative in terms of small, medium and large districts. One point of emphasis, he said, was that the study would consider the full range of courtroom uses, and not be limited to trials. These uses include hearings, time spent by attorneys learning to use courtroom technology, and naturalization ceremonies, to name a few. The FJC is training court staff on data-collection methods. Actual data collection will begin in January 2007 and take place over three months in each of the study courts; data collection in all 27 courts will be completed by July 2007. Proposed recommendations would be considered by the Committee in December 2007, for possible consideration by the Judicial Conference in March 2008.

Rent and Cost Containment

Administrative Office Director James C. Duff provided an update on two additional crosscutting issues – rent and cost containment. He discussed meeting with the new General Services Administration (GSA) Administrator, Lurita Doan, and the Public Buildings Service Commissioner, David Winstead, regarding GSA's rent bill calculations and a process to refund the judiciary for overcharges. The judiciary has already received millions of dollars in rent adjustments. While it is too early to report whether substantive change has occurred in GSA policies on rent and pricing for courthouses, these meetings have been cordial.

Regarding cost containment, Director Duff stated that the hard work of committees in pursuing cost-containment initiatives has been critical to the judiciary's success in balancing financial plans and convincing Congress that our resource requests are well justified. He noted that the Administrative Office (AO) will undertake an internal

strategic assessment to identify opportunities for additional savings and efficiency in AO operations. The results of a survey sent by Director Duff to Judicial Conference members, committee chairs, chief judges, and court unit executives will provide key input in determining AO priorities and making resource decisions.

Analysis to Support Committee Planning

At previous meetings, the chairs discussed ways to coordinate planning between committees to address the needs, issues, trends, and developments in the appellate courts, district courts, probation and pretrial services system, bankruptcy courts, and defender services program.

As a follow-on to the previous discussions, Cathy McCarthy introduced a draft *District Court Planning Profile* as an example of types of information and analysis that can be produced to support planning by committees (see Appendix C). Each committee deals with policies and issues that affect the district courts. Future *Planning Profiles* will cover information of interest to committees, including the use of technology, workload and staffing, costs, and other issues. Planning profiles will be produced and enhanced over time to help committees identify, coordinate and address various long-range planning issues.

Senior Judges

At the Budget Committee meeting in July 2006, several committee chairs discussed the planning implications of the increase in the number of judges who will be eligible to take senior status. Judge Breyer noted the Executive Committee's interest in well-founded planning estimates on the number of senior judges expected over the next decade.

Peggy Irving and Patrick Walker of the AO's Article III Judges Division presented data that estimated a net increase of 70 to 80 senior judges by 2011 (see Appendix D). Their analysis shows that, nationally, there is a larger-than-usual number of judges who will be eligible to take senior status in the next five to ten years, but there has been a decrease in the rate at which judges take senior status in either their first or second year of eligibility. Together, these factors make predicting the number of senior judges in the coming years difficult. National figures do not reflect locally important variations concerning factors that motivate judges to take senior status. AO staff will continue to pursue relevant data to refine their analysis to examine localized trends and other factors.

Judge Tunheim noted that analyzing the work that senior judges do could inform policies relating to the space and staff provided to senior judges. Participants also stressed the importance of local legal culture and its impact on whether or not judges choose to take senior status.

Judge W. Royal Furgeson, chair of the Committee on Judicial Resources, noted that the "conversion" rate is very difficult to estimate and asked whether surveying judges concerning their intention to take senior status within a certain time period might lead to greater certainty. A consensus emerged that a survey would not yield more reliable analysis than can be achieved through actual trend analysis. Among issues discussed were the difficulty of an individual judge predicting his or her future actions, and the rapidity with which one's life circumstances can change in unexpected ways.

Judge Jane R. Roth, chair of the Committee on Space and Facilities, said that her committee had determined that the proposed cap on the growth in space would not adversely affect the ability to house senior judges appropriately. Committee staff systematically reviewed jurisdictions' available space and the number of judges eligible to take senior status and determined that the judges taking senior status could be accommodated within existing space or within the budget caps recommended for approval by the Judicial Conference.[2] Judge Roth reiterated the importance of cross-committee coordination and analysis to support planning. Prior to receiving a full analysis, she had been concerned that a rent cap policy would limit the amount of space available for senior judges. She urged committees to remain in close communication and to work together on issues that impact each other.

Changes in Bankruptcy Workload

Judge Marjorie O. Rendell, chair of the Committee on the Administration of the Bankruptcy System, led a discussion about the impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), which has changed the work of bankruptcy courts to a significant but not-yet-fully-understood extent. These changes have raised a series of planning issues for many Judicial Conference Committees.

BAPCPA was signed into law on April 20, 2005, with an effective date of October 17, 2005. Through extensive national and local efforts, the federal judiciary met all statutory deadlines and made all necessary changes in practices and procedures. Changes

[2]On the day after the planning meeting, the Judicial Conference set an annual cap on rent at an average annual growth rate of 4.9 percent for fiscal years 2009 through 2016.

included the implementation of a new fee schedule, extensive reprogramming to CM/ECF, the design and implementation of software to compile new statistics, and the delivery of training for judges and court staff. Each bankruptcy court has had to interpret and apply the statute to individual cases and decide how to process new types of proceedings, motions, pleadings, and other papers.

Judge Levi described the process of implementing new rules and forms on an extremely accelerated schedule. Federal rulemaking under the Rules Enabling Act ordinarily takes about three years to complete, given the consideration of proposals by committees of lawyers, judges, law professors, and the public. The schedule allows for widespread publication and comment. To implement BAPCPA, the judiciary had six months, not three years, to implement rules changes. To allow time for the publication of proposed interim rules, Judge Levi noted that the actual time taken was about 120 days. In that time, the Judicial Conference's Advisory Committee on Bankruptcy Rules issued interim procedural rules for the bench and bar to implement the Act, and revised most of the official bankruptcy forms required in bankruptcy cases. Proposed permanent changes to the Federal Rules of Bankruptcy Procedure were published for comment in August 2006.

Judge Rendell said that under BAPCPA, additional procedural steps are required, such as means testing, credit counseling, and the completion of a financial management course. She described the impact of BAPCPA on the work of judges, but cautioned that much of the information about changes in judges' work is anecdotal, and it is unclear whether some changes in work are temporary or permanent. Part of the additional work per case is associated with the unsettled nature of the new law, as indicated by a high number of reported decisions on credit counseling, for example. There are also 35 new types of motions and hearings that never occurred previously. There also appears to be an increase in the number of pro se filings, which take up more of a judge's time.

Glen Palman, chief of the AO's Bankruptcy Court Administration Division, described the changing work of bankruptcy clerks' offices, with more work per case required. Before the Act went into effect, the AO, working with bankruptcy clerks' offices, estimated that BAPCPA would have about a ten percent impact on the amount of work required per case.

BAPCPA created a tremendous spike in the number of cases filed, followed by a precipitous drop. Total monthly bankruptcy filings were 133,707 in July 2005. They rose to 630,402 in October 2005, peaking just before the implementation date of October 17. November filings were only 14,521. Since March 2006, monthly filings have averaged around 50,000-55,000, and were nearly 60,000 in August 2006 (see Appendix E). The

spike and drop-off have made forecasting extremely difficult for the AO's statisticians, as well as for other organizations that closely follow bankruptcy filings. Judge Rendell noted that there is public confusion about the bankruptcy requirements. Increases in attorneys fees, and media coverage portraying bankruptcy as unavailable to debtors may be deterring more potential filers than the actual procedural requirements.

The drop in bankruptcy filings also has had a substantial impact on the judiciary's fee revenue. Filing-fee revenue usually accounts for five percent of the funding for the Salaries and Expenses financial plan, which covers the courts and probation and pretrial services offices. Ninety-five percent of all fee collections come from bankruptcy filing fees. The fiscal year 2006 financial plan assumed $207 million in bankruptcy filing fees, but collections were approximately $168 million. The future is highly uncertain, but in fiscal year 2007, bankruptcy filing fees are estimated to decline to $84 million, and to be $91.5 million in fiscal year 2008.

Judge Rendell and other committee chairs discussed the impact of the current state of uncertainty on their planning and budgeting efforts, and the need to work in close coordination to consider possible scenarios and address vital issues. Mr. Palman stated that, due to the great level of uncertainty, the AO and the bankruptcy courts would begin planning for several scenarios, including a long-term contraction of the bankruptcy system, as well as a future resumption of previous filing levels. Judge Rendell noted that an issue the Bankruptcy Committee will consider is whether to wait until the case law and workload level off and normalize before considering new evaluation criteria for judgeship requests, or to adopt new criteria while the workload remains unsettled. Before the Act passed, the Bankruptcy Committee had begun to reexamine the criteria, which were adopted by the Judicial Conference in 1991. Since BAPCPA has created such substantial change in the system, this reexamination will need to restart. Until revised criteria are adopted, information about changes in judges' work will be somewhat anecdotal.

Judge Furgeson said that the Judicial Resources Committee recommended that the proposed staffing formula for bankruptcy clerks' offices[3] be approved for one year only because BAPCPA took effect during the work measurement study on which the formula is based. The committee chairs discussed the preferred timing of a new work measurement study and staffing formula, and whether it would be better to wait for a year, given the high level of uncertainty.

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[3]The formula was approved by the Judicial Conference the day after the long-range planning meeting.

One key issue is how to communicate with Congress about the resource requirements of the bankruptcy courts. Judge Gibbons, chair of the Committee on the Budget, stated that, while anecdotal information about the additional level of work per case is helpful in communicating with Congress about the resource needs of bankruptcy courts, once updated judgeship criteria and staffing formulas are available, it will be much easier to present and defend bankruptcy court resource requests. The chairs of the Bankruptcy, Budget, Judicial Resources and CACM Committees discussed the need to coordinate on analyzing, planning, and recommending short- and long-term strategies.

The next long-range planning meeting of committee chairs is scheduled for March 12, 2007. Suggestions for possible topics of interest for the next meeting should be sent to Judge Breyer or Cathy McCarthy.

Appendix A: Participants in the September 2006 Long-Range Planning Meeting

Committee Representatives	Administrative Office Staff
Planning Coordinator, Executive Committee	
Hon. Charles R. Breyer	Clarence A. Lee, Jr. Cathy A. McCarthy Brian Lynch Carolyn Peake
Executive Committee	
Hon. Thomas F. Hogan, Chair Hon. Michael Boudin Hon. Joel M. Flaum Hon. Paul R. Michel Hon. Lawrence L. Piersol (incoming) Hon. David L. Russell Hon. Deanell Reece Tacha (incoming) Hon. John M. Walker, Jr. James C. Duff, Director of the Administrative Office	Wendy Jennis Helen G. Bornstein
Committee on the Administrative Office	
Hon. Robert B. Kugler, Chair	Cathy A. McCarthy
Committee on the Administration of the Bankruptcy System	
Hon. Marjorie O. Rendell, Chair	Francis F. Szczebak Ralph E. Avery Kevin R. Gallagher
Committee on the Budget	
Hon. Julia Smith Gibbons, Chair Hon. Robert C. Broomfield	George H. Schafer Marguerite R. Moccia James R. Baugher Michael V. (Mickey) Bork
Committee on Court Administration and Case Management	
Hon. John R. Tunheim, Chair	Noel J. Augustyn Mark S. Miskovsky

Committee	Staff
Committee on Criminal Law Hon. Paul G. Cassell, Chair	John M. Hughes James C. Oleson
Committee on Defender Services Hon. John Gleeson, Chair	Theodore A. Lidz Richard A. Wolff Carole W. Cheatham
Committee on Federal-State Jurisdiction Hon. Howard D. McKibben, Chair	Karen M. Kremer Ralph E. Watkins
Committee on Information Technology Hon. Thomas I. Vanaskie, Chair	Melvin J. Bryson Terry A. Cain Penelope J. (Penny) White
Committee on Intercircuit Assignments Hon. Royce C. Lamberth, Chair	Margaret A. (Peggy) Irving Patrick J. Walker
Committee on the Judicial Branch Hon. D. Brock Hornby, Chair	Steven M. Tevlowitz
Committee on Judicial Resources Hon. W. Royal Furgeson, Jr., Chair	Charlotte G. Peddicord Allen Brown Harvey Jones
Committee on the Administration of the Magistrate Judges System Hon. Nina Gershon, Chair	Thomas C. Hnatowski Kathryn Marrone
Committee on Rules of Practice and Procedure Hon. David F. Levi, Chair	Peter G. McCabe John K. Rabiej
Committee on Space and Facilities Hon. Jane R. Roth, Chair	Ross Eisenman Melanie F. Gilbert Linda S. Holz

Other Administrative Office staff in attendance:

Timothy K. Dole
Steven G. Gallagher
Ronald E. Kendall
Lisa M. Lavery
Robert Lowney
Elizabeth A. McGrath
Mary Louise Mitterhoff
Glen K. Palman
Sandra J. Reese
William T. Rule
Leeann R. Yufanyi

Key Crosscutting Strategic Goals and Issues

- Preserving the quality of justice
- Preserving judicial independence
- Maintaining appropriate federal jurisdiction
- Ensuring judicial security
- Enhancing relations with Congress
- Maintaining high standards of ethics and conduct
- Maintaining effective judicial governance, internal controls and oversight systems
- Obtaining needed resources from Congress
- Controlling costs while assuring operational effectiveness and quality
- Coping with changing work
- Attracting and retaining a highly competent and diverse workforce
- Providing fair and reasonable compensation for judges and staff
- Enhancing productivity and service through innovation and investment in information technology
- Sustaining public trust through open access to the courts and to case information

Committee Strategic Goals and Issues

Committee on the Administrative Office

- Enhancing internal controls and oversight systems to maintain congressional and public confidence in the judiciary
- Supporting AO efforts to identify and analyze critical long-range trends, issues and developments impacting the judiciary and its programs
- Ensuring the AO is appropriately organized and prepared to address the current and future needs of the courts and the Judicial Conference

Committee on the Administration of the Bankruptcy System

- Ensuring the continuity of operations in the event of a disaster
- Enhancing the security of bankruptcy proceedings (including such activities as meetings of creditors that take place away from the courthouse) and the effect of increased security on the operation of the courts
- Mitigating the impact on the quality of justice in the event that the judiciary's budget is not increased, or is actually decreased, in the future
- Providing flexibility in the deployment of judge resources in light of the volatility of bankruptcy case filings
- Considering the impact of the Bankruptcy Act of 2005, including such matters as staffing, fee income, and expectations concerning the eventual steady-state caseload
- Identifying and obtaining the appropriate number of bankruptcy judgeships
- Meeting the need for more statistical information on the bankruptcy system
- Managing changes in bankruptcy judges' work due to the advent of electronic case files in the bankruptcy courts
- Focusing automation applications, training and practices on the needs of judges

Committee on the Budget

- Addressing long-term funding challenges posed by the fiscal environment by obtaining needed resources from Congress and by containing growth in judiciary costs
- Assessing security concerns and their impact on future budgets, especially in view of terrorism

Committee on Court Administration and Case Management

The Committee's subcommittee on long-range planning has been asked to identify strategic issues and report to the full Committee in December 2006.

2003 strategic issues:

- Providing court information in languages other than English and addressing cultural and language differences to ensure accurate translations and meaningful access to the federal courts for all citizens
- Determining the impact of an aging society on the federal court system
- Determining if and whether the court system can alter its structure to address the projected population shift to western and southern states
- Preserving respect for an independent judiciary and its importance in a democratic government
- Preparing for a more stringent budget environment and developing a plan to operate with reduced funds
- Explaining to Congress and others the budgetary needs of the courts and developing ways to stem the growth of the federal judiciary's budget (i.e., shared administrative services)
- Preserving the human face of the judiciary while also using technology in the most efficient and effective means in all areas of court operations

Committee on Criminal Law

- Containing costs while effectively investigating defendants and supervising offenders
- Making the probation and pretrial services system more results-based through the implementation of an outcome-based case tracking system and the use of evidence-based practice
- Assessing the potential for the electronic transmission of sentencing documentation
- Centralizing the delivery of the Probation and Pretrial Services Automated Case Tracking System (PACTS) to control costs and improve continuity of operations capabilities
- Enhancing continuity of operations planning for probation and pretrial services offices
- Considering the impact of the increasing federalization of criminal law
- Supporting the workload of the district courts along the southwest border
- Supporting the Article III judges who will be taking senior status over the next several years

Committee on Defender Services

Mission: *To ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act, and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services.*

Goals

- Providing assigned counsel services to all eligible persons in a timely manner
- Providing appointed counsel services that are consistent with the best practices of the legal profession
- Providing cost-effective services

- Protecting the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced

Strategic Issues

- Ensuring the availability and quality of Criminal Justice Act services
- Considering the impact of technology on Criminal Justice Act services
- Developing and sustaining a diverse workforce for the future
- Maintaining the independence of the defense function
- Supporting death penalty representation under the Criminal Justice Act and related statutes

Committee on Federal-State Jurisdiction

- Guarding against expansion of federal jurisdiction that would be inconsistent with principles of judicial federalism
- Identifying problem areas in federal jurisdiction that could be addressed through legislation
- Fostering communication between state and federal judiciaries

Committee on Information Technology

- Meeting the needs of judges and chambers
- Improving service while containing costs
- Preparing for the future to take advantage of technical innovations
- Leveraging the existing base of talent to improve the information technology tools used within the judiciary
- Meeting the demands of increased data communications
- Ensuring security and privacy

Committee on the Judicial Branch

- Increasing judicial compensation to continue to ensure quality of justice
- Advocating other matters for the well-being of judges, including enhanced benefits
- Ensuring that the judiciary has a strong public image
- Maintaining good relations with Congress
- Maintaining judicial independence

Committee on Judicial Resources

- Attracting and maintaining a well-qualified, diverse workforce
- Managing long-term personnel costs
- Addressing workforce succession planning, including assessing retirement trends, attrition and training needs
- Investing wisely in information technology to enhance productivity and service
- Measuring accurately requirements for judgeships and staff

Committee on Judicial Security

The Committee's strategic and long-range planning subcommittee, which began its work in May 2006, is in the process of identifying strategic issues for consideration by the full Committee. Also, it is hoped that committee participation in the US Marshals Service's Institute on Judicial Security, a newly formed "think tank" on judicial security, will be helpful in the Committee's long-range planning efforts.

2003 strategic issues of the former Committee on Security and Facilities relating to judicial security:

- Planning for security resources effectively
- Assessing the impact of technology on the security and facilities programs

Committee on the Administration of the Magistrate Judges System

The Committee has asked staff to prepare background materials on a number of specific issues for a long-range planning discussion at its December 2006 meeting.

2003 strategic issues:

- Maintaining appropriate limits on magistrate judge numbers and authority
- Identifying appropriate roles for magistrate judges in court governance
- Maintaining appropriate chambers staffing for magistrate judges
- Identifying the contributions of magistrate judges to the quality of justice
- Promoting the evaluation of full, fair, and effective utilization of magistrate judges
- Helping courts obtain the greatest benefit from their magistrate judges

Committee on Rules of Practice and Procedure

- Restyling rules for consistency and readability
- Assessing the impact of technology on rules
- Analyzing local rules of court for consistency with national rules
- Upholding the integrity of the rules process
- Seeking greater participation in the rulemaking process by bench, bar, and public

Committee on Space and Facilities

The Committee discussed several issues relating to cost-containment and long-range planning at its June 2006 meeting. Several initiatives underway will have a significant impact on the Committee's long-range strategic plan. The Committee plans to have a discussion of the plan at its December 2006 meeting.

2003 strategic issues of the former Committee on Security and Facilities relating to space and facilities:

- Planning comprehensively for housing the federal courts
- Dealing with GSA restructuring and downsizing
- Assessing the impact of technology on the security and facilities programs

District Court Planning Profile

Examining Trends and Issues for District Courts — September 2006

To prepare for and actively shape the future of the district courts, key issues facing the district courts need to be identified and monitored.

To enhance long-range planning for district courts, the Administrative Office is developing a prototype *District Court Planning Profile* to examine trends, issues, and developments of importance to the district courts. The *Planning Profile* will cover the following types of information:

- issues impacting judges and chambers as well as clerks' offices;
- workload and staffing issues and trends;
- issues relating to technology, space and facilities, and administration;
- an analysis of spending trends and requirements;
- operational matters; and
- policy issues.

The *Planning Profile* will have a broad scope, to focus on judiciary-wide issues and trends from the distinct perspective of the district courts, and on trends and issues that are unique to the district courts.

Planning Profiles will also be developed for appellate courts, bankruptcy courts, the probation and pretrial services system, and the defender services program.

Use of the *District Court Planning Profile*

The *Planning Profiles* can be used by committees to:

- identify committee strategic issues and goals
- identify, monitor, and address district court trends and issues
- foster collaboration on issues that cut across committee lines
- inform the development of budget requests relating to the district courts
- consider the impact of policy decisions on district court operations
- consider the inter-related nature of policy issues facing committees.

Inside the *District Court Planning Profile*

- Realizing the Promises of Technology 2
- Workload 3
- Judges and Staff 9
- Costs 10
- Other Trends and Issues 10
- Information in Future *Profiles* 12

Realizing the Promises of Technology

Planning Question:

What changes will occur once district courts take full advantage of case management and electronic case filing capabilities?

Discussion:

The implementation of CM/ECF – the judiciary's case management and electronic case filing system – is nearly complete in the federal district courts, with only four courts yet to complete implementation. The system has improved service for judges, attorneys and court staff. It has also made the handling of cases more efficient – district clerks have been reducing positions dedicated to case administration. This decline in the number of staff required for functions such as case intake, case processing, and records management is reflected in the proposed staffing formula for district court clerks' offices. However, since CM/ECF is relatively new to the district courts, its full impact has yet to be realized.

Some district courts implemented CM/ECF in two stages, electing to implement the case management function of the software before implementing electronic case filing. However, electronic case filing is now available in 84 courts. Recent statistics show that electronic case filing is now widely in use:

- more than 7.5 million cases are currently managed on CM/ECF
- over 400,000 attorneys are registered to file electronically
- for many courts, the percentage of cases filed electronically is 70 percent or higher
- many district courts have begun to allow attorneys to open cases and remotely pay filing fees
- in 59 of the courts currently accepting electronic filing, more than half of the docket entries are made by attorneys rather than by court staff.

Additional Discussion to Address Planning Question:

The *Planning Profile* could consider how many months or years it will take for district court filings to reach maximum levels of electronic filing and docketing. The *Profile* could also assess the extent to which clerks' office procedures have been re-engineered, and how the work of judges and chambers staff has changed, and is anticipated to change.

The strategic question "How uniform does the judiciary want to be or have to be?" which is raised in the *Long Range Plan for Information Technology in the Federal Judiciary*, could also be explored. Local variations in practices and procedures could be analyzed, with the costs and benefits of more or less standardized procedures assessed.

Planning Question:

How can IT meet the needs of district court judges?

Discussion:

Information technology systems have been installed to automate case processing and administrative functions. These systems have provided a wide array of benefits to district court judges, as has the expanded use of computer-assisted legal research. However, the work of judges and their immediate staffs has not been a primary focus of the technology program to date, as noted by the *Long Range Plan for Information Technology in the Federal Judiciary.*

The plan identifies **Meeting the Needs of Judges and Chambers** as its first strategic direction. It notes:

> A number of opportunities exist to provide tools to help judges do their work more efficiently in areas ranging from text-searchability across pleadings, opinions, and court records; knowledge management (giving judges the ability to reuse information to the extent possible, eliminating the need to "reinvent" it); and the more timely receipt of critical information through seamless transmission of data from one court type to another.

The needs of judges and chambers staff are a major focus of modifications and enhancements being made to CM/ECF. Release 3.1, scheduled for early 2007, includes a number of modifications requested by judges and chambers staff.

Additional technology planning topics:

- changes in how judges and chambers perform legal research, including the use of computer-assisted legal research tools in chambers
- impact of courtroom technology on the work of judges and court staff, including the variation in what's available
- utilization of PACER, the system allowing public access to electronic court documents
- efforts to reduce costs and improve continuity of operations
- operational impacts of other systems such as the Jury Management System (JMS)

District Court Workload

Planning Questions:

What are the filing trends in the district courts? Do the trends vary by location? What do these trends mean for Judicial Conference committees?

The numbers of cases and defendants filed in district courts are key planning indicators of the judicial business of the federal judiciary. These statistics are also widely used by Judicial Conference committees to estimate resource requirements. The numbers of civil filings and felony defendants received are components of clerks' office staffing formulas. Filing information is also used to identify the need for additional Article III and magistrate judges, and to determine a court's space needs.

Discussion:

On the national level, filings in the district courts have declined slightly over the past two years. The decline has come despite the heavy caseload of courts along the southwest border, and the impact of the Supreme Court's decisions in *Blakely v. Washington* (2004) and the consolidated cases of *United States v. Booker* and *United States v. Fanfan* (2005). The filing information that follows is for the years ending June 30, unless noted otherwise.

Impact of *Blakely* and *Booker/Fanfan*

What has been the impact of Blakely and Booker/Fanfan on the work of the district courts? What will happen in the future?

The Supreme Court's decisions in *Blakely* and *Booker/Fanfan* may account for an increase in sentence-related cases (prisoner petitions) filed in the federal district courts. Federal and state inmates have petitioned appellate and district courts to reconsider sentences imposed prior to

the *Booker/Fanfan* decision. Federal prisoners had until January 12, 2006 (one year from the date of the *Booker/Fanfan* decision), to file motions to vacate sentence under *Booker/Fanfan*. The one-year statutory deadline for state prisoners to file such motions starts running the date all state remedies have been exhausted.

Overall, the number of prisoner petitions rose 18 percent to 62,698 in 2005 before falling 11 percent to 55,775 in 2006.

Prisoner Petitions Filed in District Courts

2004	2005	2006
53,132	62,698	55,775

The number of motions to vacate sentence, a subset of all prisoner petitions, rose 97 percent in 2005 to 11,318, before declining 39 percent to 6,892 in 2006.

Motions to Vacate Sentence in District Courts

2004	2005	2006
5,742	11,318	6,892

Since the *Booker/Fanfan* decision, the majority of sentences imposed by federal judges have been within the voluntary sentencing guidelines. In March 2006, the U.S. Sentencing Commission reported that 62.2 percent of all defendants were sentenced within the guidelines, 23.7 percent were sentenced below the guidelines range based on government motions, and only 12.5 percent were sentenced below the guidelines range based on a judge-initiated downward departure or variance.

Additional Discussion:

The *Planning Profile* could consider the extent to which state prisoners are anticipated to file motions to vacate sentences, and when those petitions may be filed. The *Profile* could also consider regional differences in prisoner petitions, and whether certain districts may see a disproportionate number of filings.

Southwest Border Court Workload Crisis

Does the workload crisis continue in southwest border courts? What resources and tools are available to provide relief?

Increased enforcement of immigration laws has led to a continued increase in the number of immigration cases coming through the southwest border courts – the District of Arizona, the Southern District of California, the District of New Mexico, and the Southern and Western Districts of Texas.

Four of the five southwest border courts have disproportionately high numbers of criminal filings, immigration-related filings, and filings per judgeship. Conditions have improved somewhat in the fifth court, the Southern District of California, but even this district court still had the sixth highest number of criminal felony filings per judgeship in the country for the year ending September 30, 2005.

In the southwest border courts, immigration filings increased by 58 percent from 2000 to 2006. Nationally, immigration filings increased by 39 percent during the same time period. In the year ending June 30, 2006, 72 percent of all immigration filings occurred in the southwest border courts.

Immigration Filings in Southwest Border Courts, 2000-2006

2000	2001	2002	2003	2004	2005	2006	% Change 2000-2006
7,635	7,204	7,735	10,188	11,551	12,124	12,084	58%

The growth in immigration filings has contributed to faster growth in criminal filings along the southwest border courts than in the rest of the country. Criminal filings increased by 22 percent from 2000 to 2006 in southwest border courts, compared to ten percent nationally. In the five districts along the southwest border, immigration filings accounted for between 47 and 69 percent of the total criminal filings.

Immigration Filings as a Percentage of Criminal Filings in Southwest Border Courts, 2006

AZ	CA-S	NM	TX-S	TX-W	Southwest Border Courts	National
55%	54%	69%	69%	47%	59%	25%

Filings per Judgeship

As the number of immigration filings has grown, criminal felony filings per judgeship have increased as well. In 2005, the number of criminal felony filings per judgeship in the District of New Mexico was 405, more than four times the national average. The five southwest border courts rank first through fourth and sixth nationwide, in the number of criminal felony filings per judgeship.

Criminal Felony Filings per Judgeship in Southwest Border Courts, 2005

Arizona	278
California-Southern	193
New Mexico	405
Texas-Southern	326
Texas-Western	379
National Average	**87**

Judiciary and Other Criminal Justice System Resources in the Southwest Border Region

Unlike other components of the justice system, federal courts have not had a dramatic increase in the number of resources available to handle immigration cases. In 2002, nine temporary and permanent judges were added to the southwest border courts. This addition of judges brought the average criminal caseload per authorized judge below 300 filings per year for the southwest border courts as a whole. However, by 2005, the annual average had again risen above 300 filings per judge.

Some additional resources have been provided to fund personnel for district court clerks' offices in four of the southwest border districts. Overall, funded staffing levels increased by 14 percent in the southwest border districts between fiscal years 2000 and 2006.

Funded Staffing Levels in District Court Clerks' Offices in Southwest Border Districts, 2000-2006 (excludes court reporters and interpreters)

	2000	2006	% Increase '00-'06
AZ	110	133	21%
CA-S	109	103	-6%
NM	60	81	35%
TX-S	166	188	13%
TX-W	122	141	16%
TOTAL	567	646	14%

Most probation and pretrial services offices in southwest border districts have seen larger increases in the number of funded staff, since their staffing formula is more closely related to the criminal caseload of the courts. Funded staffing decreased substantially in the Southern District of California, as criminal filings and defendants have decreased in that district.

Funded Staffing Levels in Probation and Pretrial Services Offices in Southwest Border Districts, 2000-2006

	2000	2006	% Increase '00-'06
AZ	259	320	24%
CA-S	248	178	-28%
NM	110	160	45%
TX-S	337	459	36%
TX-W	315	412	31%
TOTAL	1269	1529	20%

Other components of the justice system have seen significant increases in resources:

- From 1993 to 2005, the Border Patrol budget quadrupled from $362 million to $1.4 billion and the number of Border Patrol agents nearly tripled from 3,965 to 11,300 (about 90 percent of all Border Patrol agents are deployed along the US-Mexico border).
- A recently enacted fiscal year 2006 Emergency Supplemental Appropriation added $1.9 billion in increased enforcement resources on the Southwest Border, including funding for additional US attorneys, 1,000 additional Border Patrol agents, and 4,000 National Guard members.
- From fiscal year 2002 to 2005, the percentage of immigration cased filed by the Department of Justice grew from 23.5 percent of all criminal cases to 30.2 percent. For that same time period, the percentage of US Attorney's court-related work hours grew by 25 percent in the southwest border courts in comparison to a national growth of 7.5 percent. While there have been reports of vacancies in US Attorneys' offices, from fiscal year 2000 to 2005, the Attorney and Support Personnel FTEs for all US Attorneys' Offices grew by 9 percent.

Additional Discussion:

The *Planning Profile* could include a description of the work of magistrate judges in the southwest border courts. The *Profile* could report on the number of visiting and senior judges who are serving in the southwest border courts. It could also cover the space needs of the southwest border courts, and the extent to which they are being addressed. A description of court interpretation, translation, and other services provided to non-English-speaking people in southwest border courts could also be added.

Recent and Projected Civil Filings

What are the trends in civil filings? Have they increased in some districts? What are the projections for the future?

The total number of civil filings declined from 282,758 in 2005 to 244,343 in 2006. Much of this decline was due to a significant drop of 20,883 cases in one district. Personal property damage cases dropped 83 percent, with the District of South Carolina accounting for most of this decrease. The previous year, that district had an unusually large influx of filings related to high-risk mortgage loans. The court's civil filings dropped from 23,249 in 2005 to 2,366 in 2006.

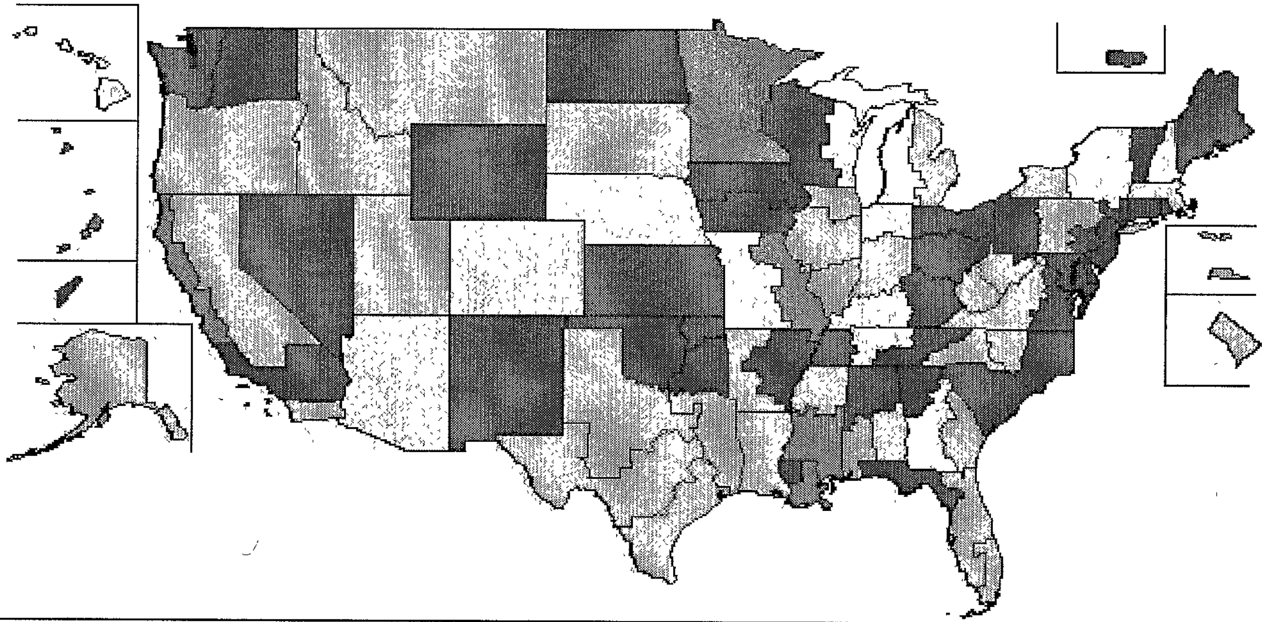
Over the past five years, civil filings have dropped a little less than nine percent.

Civil Filings, 2002-2006

2002	2003	2004	2005	2006	% decrease, '02-'06
268,071	254,499	258,117	282,758	244,383	-8.9%

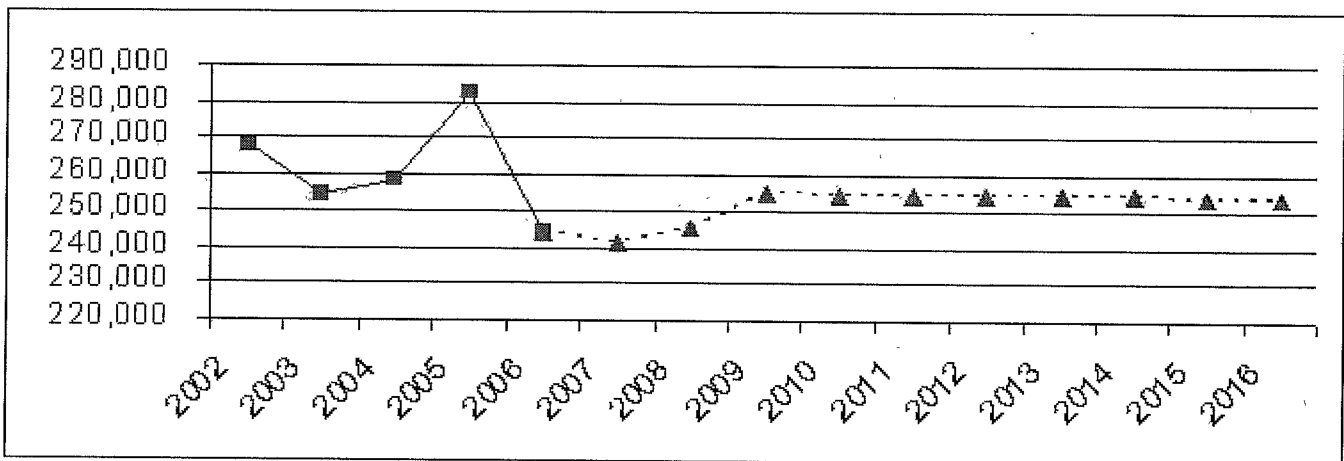
While national figures show a decrease in civil filings, 19 districts saw an increase between 2005 and 2006. In six districts, that increase was more than ten percent.

Percentage Change in Civil Filings, 2005-2006



The civil filings forecast released in June 2006 projects that civil filings will be 241,300 in 2007 and 245,600 in 2008. Long-range civil filings forecasts produced in November 2005 indicated stable civil filings levels through 2016, with estimates for each year ranging from 253,800 to 254,900.

Civil Filings, 2002 to 2016



Recent and Projected Criminal Filings

From 2005 to 2006, criminal filings fell three percent to 67,309, and the number of criminal defendants dropped 3 percent to 89,375.

While national figures show a decrease in the number of criminal cases and defendants filed, many districts saw increases. Forty-three districts saw an increase in criminal filings, and in 24 districts, that increase was more than ten percent. Forty-six districts saw an increase in the number of criminal defendants commenced, with 21 district courts seeing an increase of more than ten percent.

Over the past five years, criminal filings have increased 4.6 percent, and criminal defendants increased 5.1 percent.

Criminal Cases Filed, 2002-2006

2002	2003	2004	2005	2006	% increase, '02-'06
64,186	70,359	70,456	69,328	67,309	4.6%

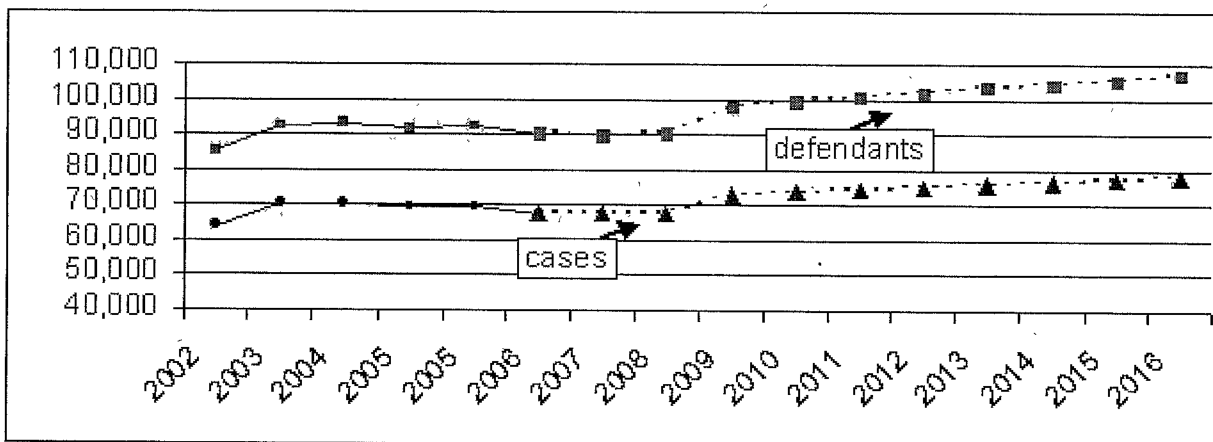
Criminal Defendants Filed, 2002-2006

2002	2003	2004	2005	2006	% increase, '02-'06
85,042	92,703	92,714	91,788	89,375	5.1%

The criminal filings forecast released in June 2006 projects that criminal filings will drop to 67,200 for 2007 and tick upwards to 67,300 in 2008. Criminal defendants are forecasted to fall to 89,100 in 2007 and rebound to 90,100 in 2008.

The long-range criminal filings forecast produced in November 2005 estimates that criminal filings will increase one percent per year from 2009 through 2016, rising to 77,500 cases. Criminal defendants are estimated to increase at one to two percent per year from 2009 through 2016, rising to 106,600 defendants.

Criminal Cases and Defendants Filed, 2002-2016



Additional workload information could include: filing and termination trends for specific types of cases; additional information about major appellate court decisions impacting district court workload; information about legislative changes that may impact workload; information about the number of trials and trial-related activity.

District Court Judges and Staff

Planning Questions:

How is the composition of the district court workforce anticipated to change? Where is growth anticipated? Where will numbers decline?

Discussion:

Over 12,000 judges and staff work in the 94 district courts, making the district courts the largest of the judiciary's programs. District courts account for about 37 percent of the judges and staff in the federal judiciary. District court staffing declined in 2005 and is virtually unchanged in 2006.

There are a total of 678 authorized Article III district and territorial district judgeships. The number of judgeships has not grown since 2002. There has been growth in the number of senior judges and magistrate judges.

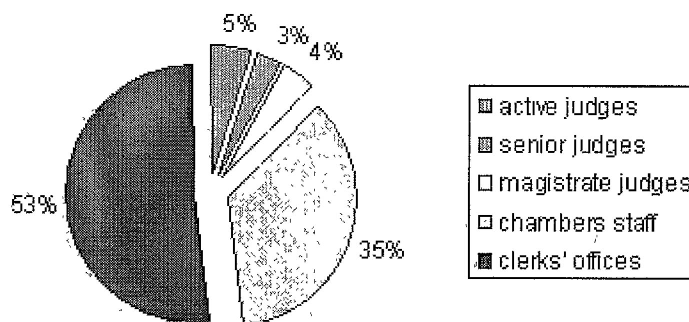
There are 503 authorized full-time magistrate judge positions, 45 part-time positions, and 3 combination clerk of court/magistrate judge positions.

The number of additional magistrate judge positions added each year has declined substantially since the 1990s. From 1991 to 2000, the Judicial Conference approved an average of 14 additional magistrate judge positions per year. From 2001 to 2005, an average of seven positions per year were approved. More recently, five additional positions were approved by the Judicial Conference for 2006, and three for 2007. Two additional positions are proposed for 2008.

Clerks' offices account for over half of the workforce in district courts, with almost 6,300 full-time equivalents. This total includes district court executives, court reporters and court interpreters.

Chambers staff account for 35 percent of the district court workforce, with nearly 3,200 employees working for active and senior district judges, and over 1,000 employees working for magistrate judges.

Composition of the District Court Workforce



Additional Discussion:

The *Planning Profile* could also provide information from the judiciary's long-range budget estimates, indicating the categories of staffing that are anticipated to increase over the next ten years. The impact on staffing of alternative scenarios, such as additional Article III judgeships, could also be illustrated.

Additional planning topics relating to judges and staff:

- further breakdown of staffing figures (courtroom deputies, case administration, court reporters, electronic court recorders)
- trends in the percentage of staff providing administrative services
- distribution of specialized staff (interpreters, death penalty law clerks, pro se law clerks) across the district courts

District Court Costs

Planning Questions:

What are the cost drivers for the district courts? What is the projected spending level?

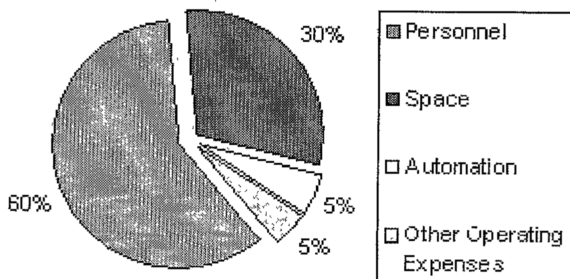
District court costs grew only 2.5 percent in fiscal year 2005, after two years of moderate growth (4.7 and 5.1 percent for 2003 and 2004, respectively). Growth in previous years had been much higher.

Growth in District Court Costs, 2001-2005

2001	2002	2003	2004	2005
9.2%	6.5%	4.7%	5.1%	2.5%

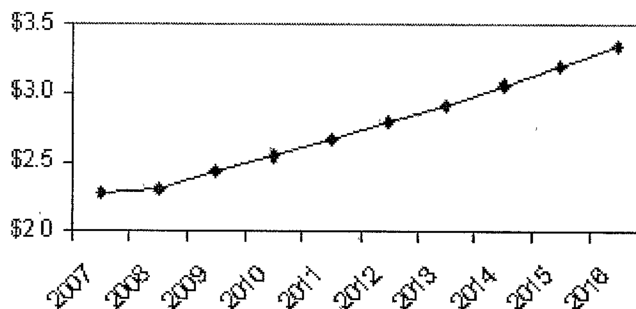
District court costs totaled more than $2 billion in fiscal year 2005. Personnel spending, at $1.23 billion in 2005, accounted for 60 percent of district court spending. Rent payments, adjusted to exclude space occupied by probation and pretrial services, were $627 million. Information technology expenditures were $108 million, or five percent of the total. Other district court expenses totaled $96 million, including an estimated $32 million for computer assisted legal research and law books. The following chart illustrates district court costs by major category.

District Court Costs by Category, 2005



The long-range budget estimates developed in January 2006 indicated that requirements for district courts would rise an average of 4.2 percent between fiscal years 2008 and 2016. By 2011, district court requirements will be over $2.6 billion, rising to more than $3.3 billion by 2016. These estimates will be updated.

District Court Future Funding Requirements, 2007-2016 (in Billions)



Additional information about costs: further breakdown of cost figures; description of personnel costs; long-range spending trends; identification of fastest-growing expense categories and cost drivers.

Additional Trends and Issues For the District Courts

Among the trends and issues of importance to the district courts:

Jurisdiction and Adjudication Trends and Issues

- **Legislative changes** – the estimated impact of legislative changes, such as the revised Social Security Administration disability claims process, which eliminates the present right of a claimant to seek review by the Appeals Council prior to seeking review in the federal district courts.

- **Relevant studies** – results of studies, such as the AO and FJC study on the handling of capital habeas corpus petitions filed in federal courts by state prisoners.

- **Changes in the manner in which cases are disposed** – trends relating to the percentage of cases proceeding to trial, plea, and settlement.

- **Expansion of federal jurisdiction** – the Criminal Law Committee identified the increasing federalization of criminal law as a planning issue, in that it impacts the workload of the district courts and the probation and pretrial services program. A strategic issue for the Committee on Federal-State Jurisdiction Committee is guarding against the expansion of federal jurisdiction that would be inconsistent with the principles of federalism.

Judicial Administration Trends and Issues

- **Rent validation efforts** – major administrative initiatives, such as efforts to obtain and review GSA's documentation for rental charges in district courts, to verify the accuracy of the rent bills for each court facility, and to challenge rent bills where applicable.

Demographic and Social Trends and Issues

- **Baby boomer generation reaching retirement age** – the number of district court staff who are reaching retirement age, particularly those in leadership positions. The Committee on Judicial Resources has identified the need for workforce succession planning, including the assessment of retirement trends, attrition and training needs.

- **Increasing need to address language and cultural differences** – the need for interpretation and other services. The Committee on Court Administration and Case Management has identified a growing need to provide court information in languages other than English and to address cultural and language differences to ensure accurate translations and meaningful access to the federal courts for all citizens.

- **Pro Se Litigation** – trends in pro se litigation: what types of cases are filed by pro se parties, whether parties are pro se throughout the entire adjudication process or for some stages, and the challenges pro se cases present to judges and staff.

Science and Technology Trends and Issues

- **Electronic Discovery and Digital Evidence** – trends in electronic discovery and digital evidence, and their impact on district courts. In August 2006, members of the Advisory Committee on Criminal Rules and AO staff attended an all-day demonstration on computer forensics presented by the Department of Justice's Cybercrime Laboratory.

Inside Future *Profiles*

D*istrict Court Planning Profiles*, when complete, may cover the following topics:

Case Management Information
- median time to disposition for civil and criminal cases terminated
- Civil Justice Reform Act-related statistics and trends
- analysis of case management information for selected types of cases

Jury Management
- juror utilization trends and statistics
- petit and grand juror forecasts

Court Reporting
- information about credentials (e.g., real-time certification) of staff court reporters
- trends in the number of proceedings that are reported using real-time court reporting
- trends in the number of electronic court recorder operator positions
- distribution of district courts that employ electronic court recorder operator positions.

Court Interpretation
- distribution of interpretations by district and language
- number of certified and otherwise qualified interpreters available by district
- distribution of staff court interpreters
- illustration of district courts that provide telephone interpretation services to other courts

Workload and Staffing Patterns
- distribution of pro se law clerks
- distribution of death penalty law clerks

Space and Facilities
- trends in district court rent costs
- information about the amount of space available to district courts
- trends and summary information about spending on tenant alterations and cyclical facilities maintenance
- long-range space requirements for district courts
- information about the number of facilities that meet current security standards
- information about the types of courtroom technology available

Profiles to Address Committee Planning Needs

Committees will be asked to provide input on information that should be included in *Planning Profiles* that will be created for appellate, district, and bankruptcy courts, probation and pretrial services, and the defender services program.

Chart 1
Article III Judges Eligible to Take Senior Status - Nationwide

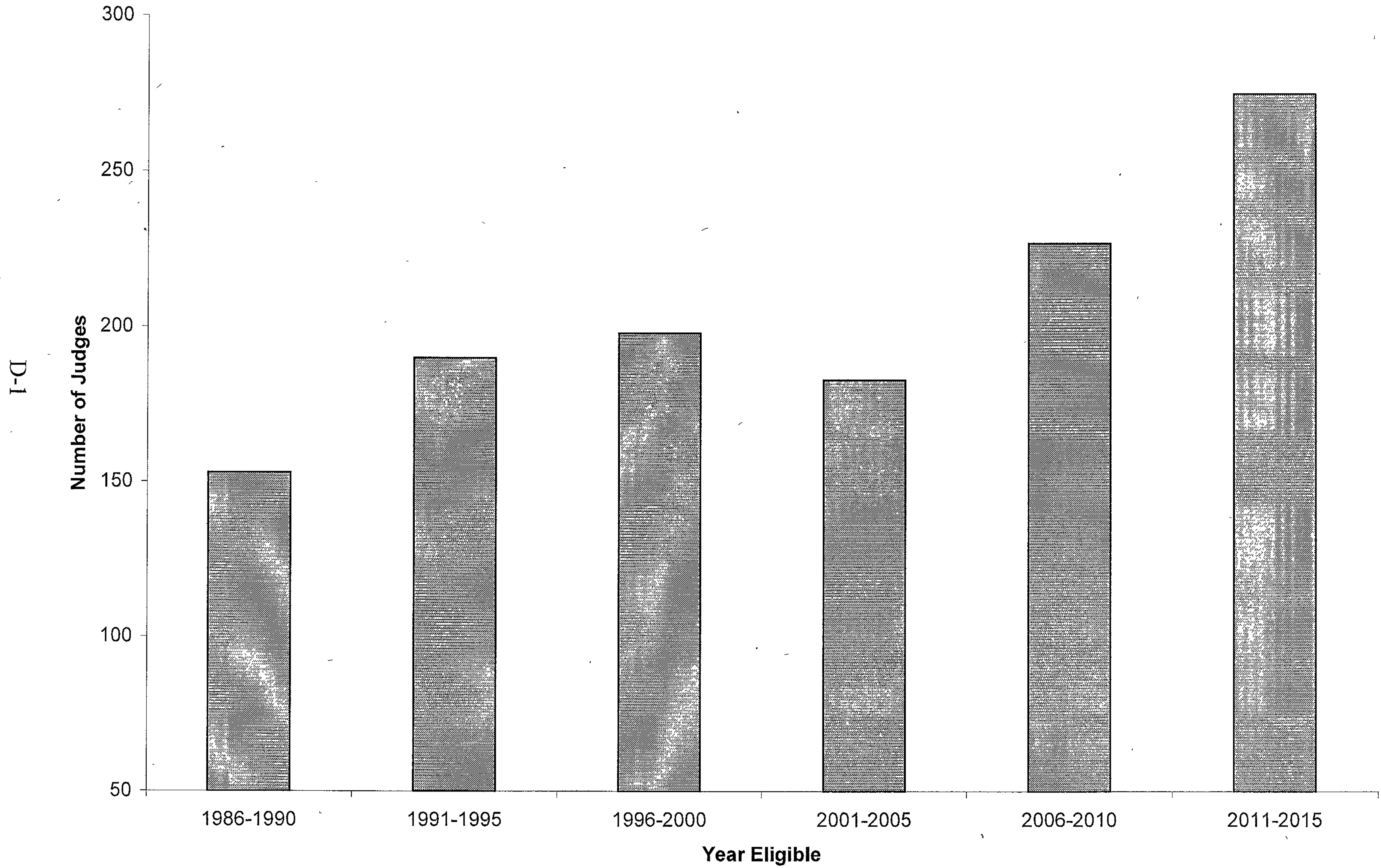
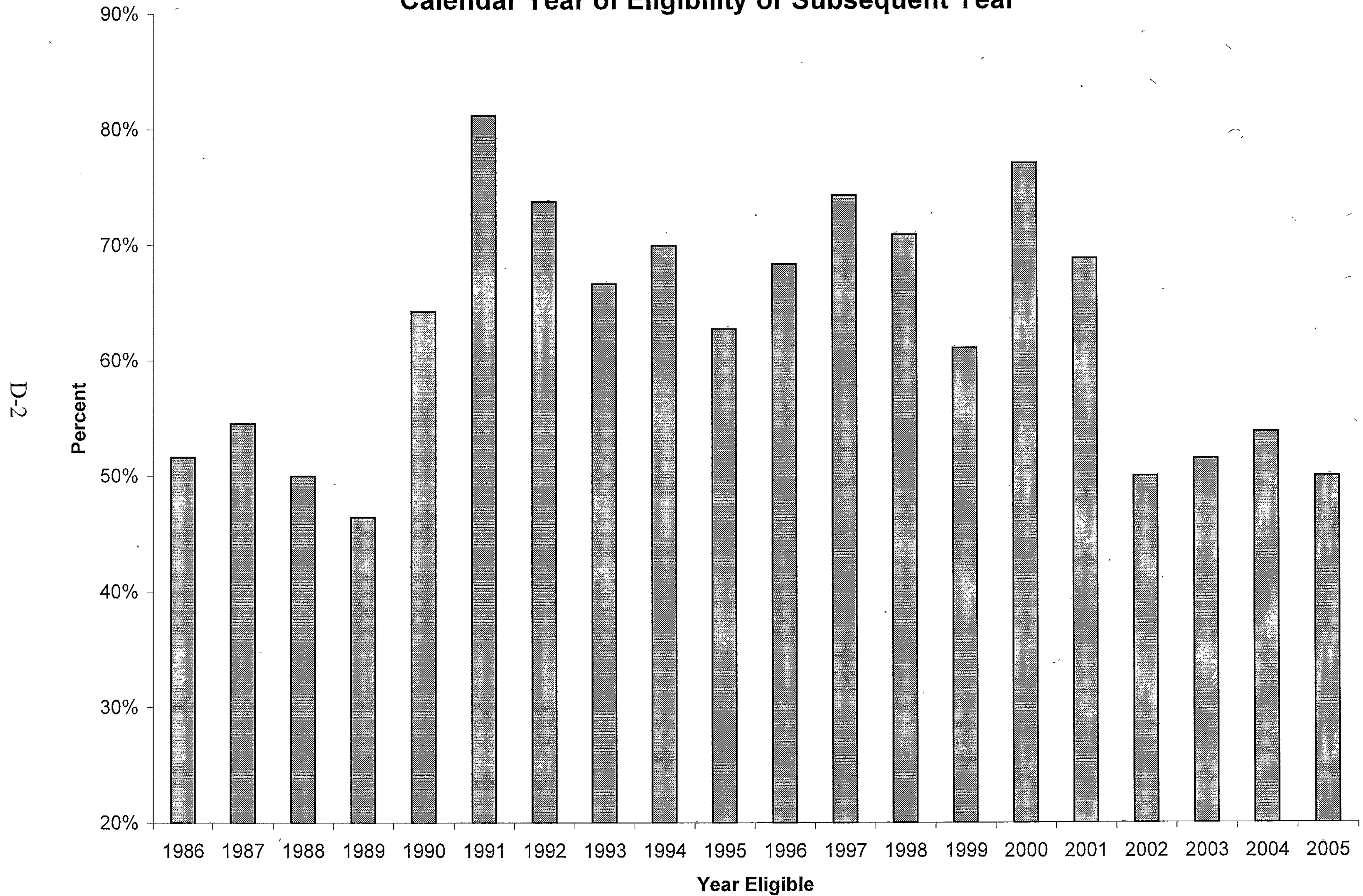


Chart 2

Nationwide Percentage of Article III Judges Taking Senior Status in Either Initial Calendar Year of Eligibility or Subsequent Year



Article III Senior Judges – Background

- On December 31, 2005, there were:
  - 466 Article III senior judges
  - 83 active judges who were eligible but had not taken senior status
- 227 Article III judges will become eligible to take senior status between 2006 and 2010. An additional 50 judges become eligible in 2011.

Senior judges carry approximately 17 percent of the caseload in the appellate and district courts each year

Estimated Article III Judges On-Board in 2011

- Estimate of senior judges on-board by 2011 is based on actual data from 1986 through 2005
- Since 2001, the percentage of active judges taking senior status has declined
- The number of senior judges that leave the bench via retirement or death averaged 24 per year between 1995 and 2005

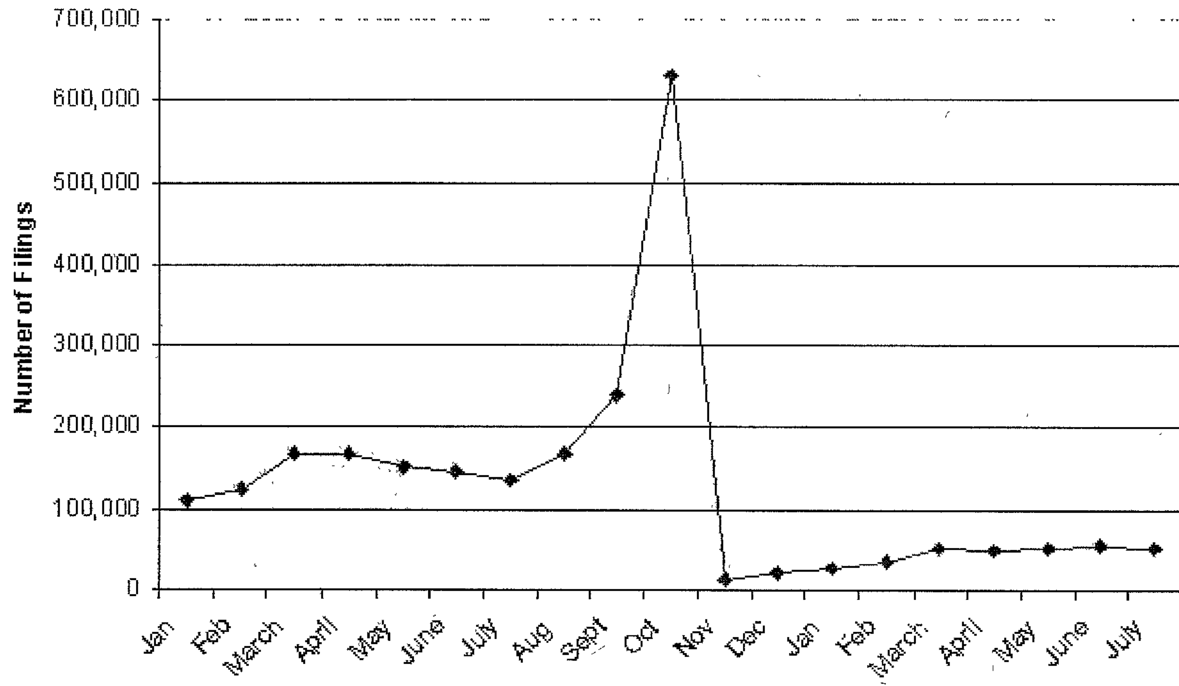
Estimated Article III Judges On-Board in 2011 (Continued)

- Based on historical percentages, it is estimated that approximately:
  - 55 of the 83 judges in active status and eligible to take senior status on December 31, 2005 may do so by 2011
  - 163 of the 277 judges that become eligible to take senior status between 2006 and 2011 may do so by 2011
  - 144 senior judges may leave the bench between 2006 and 2011
- It is estimated that the number of senior judges may increase by 74 (55+163-144) between 2006 and 2011

What Information Should We Research Further?

- What is the cause for the decline in the percentage of eligible judges that have taken senior status since 2001?
- What factors determine how long after reaching eligibility judges will wait before taking senior status?
- Are there district or circuit court variations in the rate at which judges take senior status?

Appendix E: Bankruptcy Filings, January 2005 through July 2006



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
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CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

December 12, 2006

Re: January 13, 2007 Meeting
on Expert Disclosure Issues

Dear Participant:

Thanks very much for agreeing to participate in our January 13, 2007 meeting on expert disclosure issues. The meeting is being organized by a discovery subcommittee of the Advisory Committee on the Federal Rules of Civil Procedure. This letter will provide information about the meeting, the participants, the topics to be discussed, and the enclosed materials.

A. The Meeting.

The meeting will be held on Saturday, January 13, 2007, at the Hermosa Inn in Paradise Valley, Arizona. The meeting will start at 8:30 a.m. and end at 1:00 p.m. Light refreshments will be available for folks to start gathering beforehand, and a working lunch will be served from 12:00 to 1:00 p.m. Dress will be business casual.

By now you should have heard from Judy Krivit of the Administrative Office of the Courts concerning room arrangements. If you have questions about rooms or the hotel, please feel free to call Judy at 202-502-1820.

B. Participants.

The meeting will include a diverse and knowledgeable group of people:

1. The Honorable Lee H. Rosenthal of the United States District Court in Houston, Chair of the Advisory Committee on the Federal Rules of Civil Procedure;

2. The Honorable Mark R. Kravitz of the United States District Court in New Haven, a member of the Standing Committee on Rules of Practice and Procedure;

3. Chilton Davis Varner of King & Spaulding in Atlanta, a member of the Advisory Committee;

4. Daniel C. Girard of Girard Gibbs, LLP in San Francisco, a member of the Advisory Committee;

5. Anton R. Valukas of Jenner & Block, LLP in Chicago, a member of the Advisory Committee;

6. Professor Edward H. Cooper of the University of Michigan Law School, Reporter for the Advisory Committee;

7. Professor Richard L. Marcus of the Hastings College of Law, Special Reporter to the Advisory Committee and ;

8. Professor Daniel J. Capra of the Fordham University Law School, Reporter for the Advisory Committee on the Federal Rules of Evidence;

9. Thomas Allman of Mayer, Brown, Rowe & Maw, LLP in Chicago;

10. Andrew Scherffius of Scherrfius, Ballard, Still & Ayres in Atlanta;

11. Jocelyn Larkin of the Impact Fund in Berkeley;

12. William R. Jones, Jr. of Jones Skelton & Hochuli in Phoenix;

13. Loren Kieve of Quinn, Emanuel, Urquhart, Olliver & Hedges, LLP in San Francisco;

14. Greg Arenson of Kaplan, Kilsheimer & Fox, LLP in New York City;

15. [Phoenix-area plaintiff's attorney];

16. Daniel R. Shulman of Gray Plant Mooty in Minneapolis;

17. John Rabiej of the Administrative Office of the Courts

We will also have a representative of the American College of Trial Lawyers in attendance. This is a large group, but we intend to conduct the meeting in a way that allows every participant to express his or her views on the issues under discussion.

C. Issues.

The purpose of the January 13 meeting will be to discuss several specific issues

related to expert disclosures and discovery. These issues have been brought to the attention of the Advisory Committee from a variety of sources. The issues have been discussed by the Advisory Committee and deemed worthy of further investigation by the discovery subcommittee. No decision – not even a tentative decision – has been made about whether changes should be made to the Federal Rules of Civil Procedure. The subcommittee will take the views expressed at the January meeting into account in considering whether to recommend that the Advisory Committee consider formal amendments to the rules. Proposed amendments, if any, will of course follow the usual committee and public comment process.

We would like the January discussion to focus on four general issues. Our objective is a broad policy and practice discussion rather than a detailed consideration of specific amendment possibilities. We will not ask participants to make presentations. We look for an open discussion by all participants. Please recognize the need to keep comments relatively focused and brief in order to permit all to express their views.

This is a description of the issues in very general terms (there are many sub-issues we won't attempt to identify here):

1. Should attorney-expert communications be shielded from discovery?

The 1993 Advisory Committee Note to Rule 26 suggests that communications between attorneys and their retained testifying experts are discoverable. After more than a decade of experience with this approach, some feel that discovery into attorney-expert communications consumes a substantial amount of litigation resources while rarely yielding helpful information, and that the availability of such discovery results in artificial and expensive procedures such as the retaining of a second group of consulting experts. The competing view asserts that the origins of an expert's opinion and the influence that a lawyer had on that opinion are highly relevant to a jury's evaluation of the opinion. The ABA House of Delegates recently proposed that attorney-expert communications be shielded from discovery.

2. Should draft expert reports be shielded from discovery?

Cases often include attempted discovery of draft expert reports. We understand that some even include attempts to find deleted drafts in the expert's electronic storage media. Perhaps because drafts generally are discoverable, many experts do not retain them. Some practitioners, including the ABA, have proposed that draft expert reports be shielded from discovery. This view suggests that discovery of draft reports results in artificial procedures and expensive litigation that rarely provides helpful information. Others believe that the evolution of an expert's opinion is highly relevant to a jury's assessment of that opinion.

3. Should treating physicians and similar witnesses be required to provide expert reports, and, if so, when?

Rule 26 and its Committee Note suggest that treating physicians need not prepare expert reports. Some are of the view, however, that such reports should be required when the treating physician ventures beyond facts or opinions developed during the treatment. Some suggest, for example, that if a physician did not develop a prognosis or causation opinion during treatment and is asked to provide such an opinion at trial, the opinion is tantamount to a retained-expert opinion and should be subject to the report requirement in Rule 26(a)(2)(B). Similar questions can arise with respect to other percipient witnesses who have expertise. For example, if a city sanitation engineer was involved in the inspection and licensing of a waste water treatment facility and is later subpoenaed to testify in a contamination case arising from the facility, can the engineer provide opinions that he did not develop in the course of his inspection without first disclosing those opinions in an expert report?

4. Employee witnesses.

Rule 26(a)(2)(B) and its Committee Note seem to provide that employees of a party need not provide an expert report unless their job for the party is to provide expert opinions. It is often the case, however, that employees may have expertise in areas highly relevant to a case. Should these employees be permitted to express opinions beyond those developed through their involvement in the facts of the case without first disclosing those opinions in an expert report? Reported cases have disagreed on whether reports are required from such witnesses.

D. Materials.

We have enclosed several documents to provide background for the discussion. These include the following:

1. Excerpt from Minutes, September, 2006 Meeting, Advisory Committee on Civil Rules. The minutes were prepared by Professor Cooper to reflect the Advisory Committee's discussion of the issues now being investigated by the subcommittee. Because the discussion covered a broad range of relevant viewpoints, we thought the notes might be helpful.

2. A memorandum prepared by Professor Marcus titled "Rule 26(a)(2) Issues." This memo was prepared for the Advisory Committee's September meeting and provides a helpful discussion of the history of expert disclosures and some of the issues that have arisen since the 1993 amendments. This document is probably the best overview of the current state of the law and the issues that have arisen.

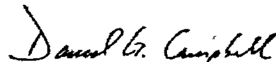
3. A second memorandum from Professor Marcus dated December 2006. This memorandum constitutes a more detailed look at possible specific changes to Rule 26. Professor Marcus undertook this effort to help us focus on some of the practical challenges that may arise if an attempt is made to amend the rules.

4. The resolution adopted by the ABA House of Delegates at its meeting on August 7-8, 2006, and a supporting Report of the Federal Practice Task Force of the ABA. These documents set forth the ABA's proposal that expert-attorney communications and expert report drafts be shielded from discovery.

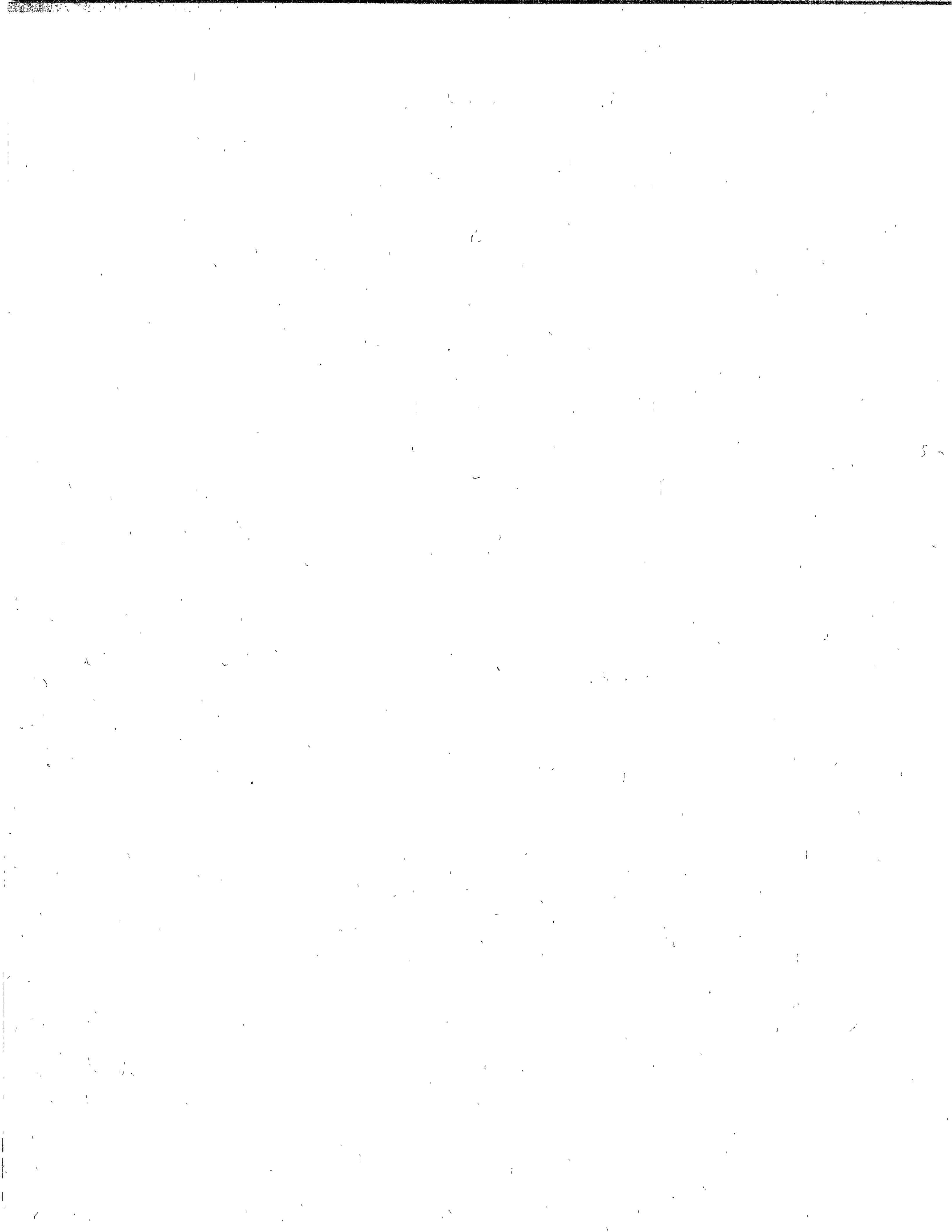
5. An August 3, 2000 letter from Gregory K. Arenson to Peter G. McCabe enclosing a Report on Expert Witness Disclosure and "Core" Work Product, dated June 22, 2000. This report was prepared by the Committee on Federal Procedure of the New York State Bar Association. We understand that a majority of the members of the New York Committee have since revised their views and now favor an approach like the ABA's, but we have included this document because it provides a contrasting view to the ABA's.

Thank you again for agreeing to participate in the January 13 meeting. We look forward to hearing your views.

Sincerely,



Judge David G. Campbell
Subcommittee Chair



EXCERPT FROM MINUTES
SEPTEMBER, 2006, MEETING
ADVISORY COMMITTEE ON CIVIL RULES

[for use during Jan. 13, 2007
meeting on Rule 26(b)(2)]

Discovery Subcommittee

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

* * *

Rule 26(a)(2)(B)

The introductory statement identified three broad categories of questions arising under Rule 26(a)(2)(B). One involves identification of the trial witnesses that should be required to prepare a report — questions have arisen both as to a party's employee whose duties do not regularly involve giving expert testimony, a matter identified in rule text, and also as to a treating physician, a matter identified in the 1993 Committee Note.

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

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

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

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

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

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

The treating physician question was addressed in the Committee Note as an illustration of an expert witness not retained or specially employed to provide expert testimony. The fear was that preparation of a report would be an undue burden, an intrusion on treatment of other patients, and a deterrent to testifying at all. But the complication is that it may become difficult to distinguish the roles of a treating physician who also testifies to the likely future effects of an injury, pain and suffering, or other matters that do not arise naturally from treating the injuries.

The distinction between employees whose duties do not regularly involve giving expert testimony and employees whose duties do regularly involve expert testimony is not clearly explained in the 1993 Committee Note. The purposes are left to inference. At the extreme, it might be argued that as soon as an employee is designated to provide expert testimony the employee has been retained or specially employed for that purpose. That approach dissolves the distinction deliberately drawn in the rule, however, and is not convincing. A different problem arises with the employee who is both an actor or viewer with respect to events

in suit and also an expert in the subject. The Eleventh Circuit says that a Rule 26(a)(2)(B) report should be provided when the employee is a "pure expert," but not when the employee is also an actor or viewer. But a report has value whenever expert opinions are to be expressed. The article that was filed as a proposal to amend the rule says that reports are essential. It also predicts that if reports are not required of the "regular employee," use of such witnesses will expand rapidly.

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

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

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

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

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

Any number of rules changes might be considered in responding

to these questions. Many are sketched at pages 222 to 225 of the agenda materials. An obvious possibility would be to require a disclosure report of any employee who will offer an expert opinion, deleting the exemption for an employee whose duties do not regularly involve giving expert testimony. This possibility could be complicated by distinguishing between the "pure" expert employee who is not an actor or viewer of the events in suit and a "hybrid" employee who is an actor or viewer and also has expert knowledge. Something might be done as to the treating physician, perhaps by attempting to distinguish between opinions formed in the course of treatment and opinions developed for the purpose of trial.

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

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

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

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

Discussion followed. The first observation was that indeed the law seems to be moving away from the rule's clear meaning with respect to reports from employees whose duties do not regularly involve giving expert testimony. In a pharmaceutical product action, for example, an officer-employee might be asked whether the company properly designed a clinical trial. It will be objected that a report was required. But you have to ask the question – the jury will wonder why you did not. The 1993 rule got it right; the

cases that require reports, disregarding the rule, are wrong. The 1993 Committee Note also got it right as to treating physicians. These witnesses "did not go looking for employment as expert witnesses. They would rather not be witnesses." A treating physician may refuse to testify at all if a report is required. The regular employee often has privileged information not because of the witness role but because of ordinary work duties.

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

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

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

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

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

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

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

These observations continued by asserting that the requirement that the expert disclosure report include all information considered was intended to support cross-examination on facts similar to "data." "[I]nformation" was not intended to include work-product revealed by counsel. Work-product protection should extend to all exchanges with trial expert witnesses. "Fair notice

of what the expert is going to say is all we should require."

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

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

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

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

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

A Committee member observed that when you are trying to retain a good expert who is not a "practiced expert witness," it can be difficult to overcome the reluctance that arises on learning

everything that must be done to thwart discovery.

Discussion turned back to the practice of stipulating to narrow discovery. It was agreed that some lawyers do this, but the stipulation may not extend to all issues in the case, and it is not followed in all cases. If you have to go to court, the court will resolve disputes by ordering that drafts be produced. But that is undesirable. The expert has to defend the opinion in its own terms; that should suffice. The general work-product tests are good, and should apply to communications between counsel and expert witness — the attorney should be able to discuss work-product with an expert witness, protected against disclosure or discovery unless the 26(b)(3) showings of substantial need and undue hardship can be made.

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

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

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

Turning again to discovery of draft reports, an expert witness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Protection against discovery of draft reports was urged again, with the suggestion that the protection both for draft reports and for communications with counsel might be subject to the escape

provided in Rule 26(b)(4)(B). Discovery would be allowed "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means," or under an adaptation that focuses on the impracticability of effectively testing the expert testimony by other means. This standard is "extraordinarily protective" and may require the adaptation.

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

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

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

Rule 26(a)(2) Issues

The purpose of this memorandum is to introduce the issues that have been raised regarding Rule 26(a)(2), which was added to the rules in 1993. These issues fall into three categories: (1) The exemption from the report requirement in Rule 26(a)(2)(B) for regular employees of a party or others who have not been "specially employed" to provide expert assistance in preparation of the litigation; (2) The question whether core work product or otherwise privileged material provided to a testifying expert must be disclosed in such a report; and (3) The question whether the expert's draft reports and/or notes must be disclosed.

Background on Expert Discovery

A starting point is to revisit the background for the current expert discovery rules that existed before Rule 26(a)(2) was adopted in 1993.

Before 1970, there was very limited discovery regarding testimony from expert witnesses. The idea was that "[t]he expert, unlike an ordinary witness, has no unique knowledge. That is, the other side, at least in theory, can obtain the same information merely by engaging an expert of its own. Hence, it may be argued that a lawyer could want to obtain information from his adversary's expert only to avoid doing any preparation himself, and to save his client considerable expense. Ultimately this could lead to a deterioration in case presentation and lower the standards of the bar generally." Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 482-83 (1962). Thus, the starting (and seemingly current) point is that discovery or disclosure regarding experts is not warranted merely because it could provide information bearing on the case; a party could not use expert discovery to build its case.

The problem, however, was that the opposing party needed information to prepare to cross-examine the expert. The courts began authorizing some discovery for this purpose, and the practices diverged in different places. According to John Frank, who was on the Advisory Committee when expert discovery rules were added to the Civil Rules, the practice in the West was to allow discovery rather freely, while in the East expert discovery was frowned upon. McLaughlin, Discovery and Admissibility of Expert Testimony, 63 Notre Dame L. Rev. 760, 764 (1988) (quoting John Frank). These regional differences are worth noting because they may endure to this day.

The discovery revisions in 1970 therefore included a compromise measure regarding expert discovery. Rule 26(b)(4)(A) thus provided that, by interrogatory, a party could compel the other side to identify expert witnesses who would testify and to "state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." That was the only expert discovery provided as a matter of right, although Rule 26(b)(4)(A) went on to say that the court could order further discovery (often by deposition of the expert) on motion. Again, it seems that the practice in different places diverged; in the New York area expert depositions were reportedly rare, while in the West they were customary. Thus, Judge Schwarzer, reflecting the western view, reported in 1987 that "experts who are prospective witnesses are normally produced for deposition by the opposing party as a matter of course." Schwarzer, Guidelines for Discovery, Motion Practice and Trial, 117 F.R.D. 273, 276 (1987).

An additional strand regarding examination of expert witnesses comes from the Federal Rules of Evidence. Fed. R. Evid. 803(18) now provides a hearsay exception for use of a "learned treatise." Before the adoption of this rule an expert witness could not be asked about what a book said unless he or she testified to having relied on it. And there was often great difficulty in obtaining the admission that the expert actually relied on a given book. Now the questioner has a multitude of ways to show that something is a learned treatise and need not show that the witness relied on it to use it in examining the witness.

Against this background, the expansion of expert discovery in 1993 was a significant further breakthrough. It is worth recalling that 1993 was a year of great controversy about discovery amendments. The initial disclosure requirement of Rule 26(a)(1), in particular, was the object of a veritable firestorm of criticism. The Advisory Committee eventually went forward with it, but with an opt-out provision. Despite that, there was a broad effort in Congress to excise it from the amendment package. The administration supported this effort. Both business group lobbyists and civil rights group lobbyists favored the legislation excising this provision (the latter mainly because the legislation also overturned numerical limitations on depositions and interrogatories). The House unanimously passed this legislation, and it would have been adopted by unanimous consent in the Senate and signed by the President but for the opposition of one Senator. Due to that Senator's refusal to consent to suspending the rules, the legislation failed and the rules went into effect as written.

The point of this digression is that one could make a good argument that 26(a)(1) was really a paper tiger, and that the big deal in the amendments package was 26(a)(2), along with the change to Rule 26(b)(4)(A), which got virtually no attention in the hoopla about other discovery rule changes. Since 1993, there has been a lot of litigation about 26(a)(2), and one might say it proved to be a real tiger. Maybe the time to look carefully at how it has worked is upon us.

One major feature of the 1993 amendments is that Rule 26(b)(4)(A) now makes depositions of expert witnesses automatically available (although usually postponed until after the expert report is prepared). A second major feature is that Rule 26(a)(2)(A) requires disclosure of the identity of "any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence" 90 days before trial unless another date is set; no longer must interrogatories be submitted for that purpose. A third major feature is that Rule 26(a)(2)(B) also requires a very detailed report from the expert witness, a requirement backed up with the simultaneous adoption of Rule 37(c)(1) on exclusion of information that was not disclosed as required to be disclosed. But as discussed in (1) below, that report requirement (and the attendant delay in deposition) does not apply if the expert witness is a regular employee of a party who does not normally provide expert testimony or is a witness who was not "specially employed" to provide it in this case. A fourth major feature of the rule is that it says the report should "contain a complete statement of * * * the data or information *considered* by the witness in forming the opinions." Thus, the report was not limited to what the witness relied upon. Finally, the Committee Note said with regard to this disclosure requirement:

> Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions -- whether or not ultimately relied upon by the expert -- are privileged from disclosure when such persons are testifying or being deposed.

This feature gave rise to what is considered in (2) below -- a dispute about whether certain "core" work product or other confidential materials provided to testifying expert witnesses should be subject to disclosure. In the background is the further issue raised in (3) below -- whether the expert's draft reports, working papers, etc. should be subject to disclosure because they also indicate what the witness considered.

The 1993 amendments to the Civil Rules thus ushered in a brave new world of expert discovery, particularly in places (reportedly including New York) where it had been quite circumscribed before. Many challenges were brought to the adequacy of expert reports, and in some instances expert witnesses were not allowed to testify, or were not allowed to testify to certain things, because their reports were not adequate. See 8A Fed. Prac. & Pro. § 2289.1 at n.3 (Supp. 2006)

(describing cases). Efforts to supplement such reports at the last minute were sometimes rebuffed on the ground that it was unfairly late to introduce new theories or conclusions.

A final piece of the present situation came with the 2000 amendment of Fed. R. Evid. 701 to say that "lay opinion" testimony should not be allowed when the opinion was "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The Committee Note explains that this amendment was designed to defeat attempts to proffer an expert witness in "lay witness clothing." Although the main objective of the amendment was to ensure that the judge would act as a "gatekeeper" regarding such testimony, it also had significance for discovery obligations. Rule 26(a)(2) is phrased in terms of whether testimony is offered under Rules 702 et seq. The Fed. R. Evid. 701 change made it clearer that testimony offered by one who was partly (or mainly) a "fact" witness might still be subject to disclosure requirements, at least to the extent of identifying the person as one who would provide testimony under Fed. R. Evid. 702. The Committee Note to Rule 701 recognized that, "[b]y channelling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16."

(1) Exemption from report requirement for some employees

Mickum & Hajek, Guise, Contrivance, or Artful Dodging?: The Discovery Rules Governing Testifying Employee Experts, 24 Rev. Lit. 301 (2004), strongly argues that the exemption from the report requirement in current Rule 26(a)(2)(B) for employees who do not ordinarily testify as expert witnesses should be removed. In large measure the authors' premise is that, even with the right to take the deposition of such people, this exemption creates an unfair playing field. Thus, the article stresses "the importance of an expert report to a meaningful deposition" and asserts that "it is difficult to argue that an attorney deposing an expert without a report that sets forth the expert's opinions and data considered by an expert is not disadvantaged." Id. at 316. Contrasting what was available before 1993 -- no right to a deposition and only a very sketchy interrogatory answer -- one could raise questions about whether, given the right to take a deposition, it is also essential to have the sort of thorough report required by the rule.

The article asserts that this exemption has produced a "rising use of employees as testifying experts in litigation" (24 Rev. Lit. at 303), although it also seems to suggest that this increase has not happened yet but will happen unless this alleged loophole is closed. See id. at 304 ("Unless this is done, there is likely to be an explosion in the use of employees as testifying experts in litigation.") Although there are many, many cases involving the application of the 1993 expert discovery amendments, the number of cases raising this issue is very limited. But as set forth below, some courts resist the exemption plainly included in the rule.

The goal of the exemption seems to have been to excuse the preparation of the very detailed report required by Rule 26(a)(2)(B) in some instances, leaving it to the courts to require more if that seemed warranted. Thus, the Committee Note explains:

> The requirement of a written report in paragraph (2)(B) however, applies only to those experts who are retained or specially employed to provide such testimony [under Fed. R. Evid. 702] in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

The treating doctor is a prime example of the sort of problem the Committee was attempting to avoid -- if a party must get the doctor to prepare such a report to call the doctor, it may often be impossible to do so. As many cases have recognized, treating doctors do not ordinarily have to prepare such reports under Rule 26(a)(2). See 8 Fed. Prac. & Pro. § 2031.1 n.6 (Supp. 2006). But if the testimony goes beyond treatment, a report may be required. See Ordon v. Karpie, 223 F.R.D. 33 (D. Conn. 2004) (report required of treating doctor because testimony went to questions of causation that were beyond the scope of the facts made known to the doctor in his course of treatment).

Whether the treating doctor is suitably addressed by the "specially employed" language in the rule might thus be debated. The doctor's exemption depends on the conclusion that he or she was not so retained; the dividing line seems to be whether the doctor has done something more to prepare for litigation than would be true in the treatment role. There may be many instances in which an argument could be made that the doctor did not consider a certain aspect of the patient's situation until the lawyer asked about it. The question whether that would mean that the doctor was "specially employed" with regard to that insight could lead to arguments about whether a report was required. Perhaps something more explicit could be put into the rule to address the protection for treating doctors.[1] But specifying who is covered and in what circumstances could be difficult.

The need for the exemption for ordinary employees seems considerably less compelling than the one for the treating doctor, if the issue is the difficulty of getting such a report from such a person. It seems unlikely that most employers would find it difficult to get such a report. Hence, this is the point on which some courts have resisted the exemption in the rule. If the employee is "specially employed," the report requirement applies. But the use of this phrase raises potential difficulties because it is used in two places.

One situation is the one on which this memorandum focuses -- the exemption from the report requirement. That ceases to apply if the employee is "specially employed to provide expert testimony in the case." Perhaps this could be read to mean that an employee is "specially employed" whenever identified under Rule 26(a)(2)(A) as a testifying expert witness. One court seems inclined to this view:

> When a corporate party designates one of its employees as an expert, it typically authorizes the employee to perform special actions that fall outside of the employee's normal scope of employment. * * * Accordingly, the court finds that U.S. Can has "specially employed" McGowan by designating him as an expert opinion witness.

KW Plastics, Inc. v. United States Can Co., 199 F.R.D. 687, 690 (M.D. Ala. 2000); see also Day v. Consolidated Rail Corp., 1996 WL 257654 (S.D.N.Y., May 15, 1996) (adopting similar reasoning). In terms of the problem of getting a report, this reasoning makes sense because the employer can

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[1] Judge Mark Kravitz, a member of the Standing Committee, has expressed particular concern about the problems presented by uncertainty about whether and when a treating doctor is subject to the identification requirements of Rule 26(a)(2)(A) and the report requirements of Rule 26(a)(2)(B). Some lawyers, at least, appear to believe that a report is never required so long as the identity of the doctor is disclosed, raising issues about whether the doctor is allowed to testify about such things as causation or prognosis. And the issue is often raised on the eve of trial at the final pretrial conference. By that time, it is likely to be too late to solve the problem. Either one party is denied the doctor's testimony, or the other is deprived of a report on the opinions the doctor offers in testimony. A rule change might be a way to avoid such problems in the future.

readily get the report. But it does not seem to conform to what the rule says, because the rule exempts some employees who are designated as expert witnesses from preparing the report.

Putting aside the fealty of this interpretation to the language of Rule 26(a)(2)(B), a broad reading of "specially employed" could raise problems in a very different situation where the phrase is also used in relation to expert advice in litigation. Rule 26(b)(4)(B) provides very strong protections against discovery about the facts learned or opinions developed by anyone (including an employee) who is "specially employed * * * in anticipation of litigation or preparation for trial." In this instance, there is reason to resist a broad reading of "specially employed."[2] Thus, this language does not seem suited to solve the problem (if it is one) presented by the exemption from the Rule 26(a)(2) report requirement for employees who will offer expert testimony at trial.

A few courts, perhaps recognizing what the rule says, have not stressed the "specially employed" language but nevertheless resisted the exemption on the ground that it is inconsistent with the general thrust of the rules: "This Court joins in finding that requiring testifying experts to submit written reports is entirely consistent with the spirit of Rule 26(a)(2)(B). It is not only likely that such reports will serve to streamline or even eliminate the necessity for deposition testimony, but they will undoubtedly serve to minimize the element of surprise." Minnesota Min. & Manuf. Co. v. Signtech USA, Ltd., 177 F.R.D. 459, 461 (D. Minn. 1998). Contrast Duluth Lighthouse for the Blind v. C.G. Bretting Manuf. Co., 199 F.R.D. 320, 325 (D. Minn. 2000) ("While we agree with the Court, in *Signtech*, that it is undesirable for litigants to elude the automatic expert disclosure requirements by guise, contrivance, or artful dodging, we are not empowered to modify the plain language of the Federal Rules so as to secure a result we think is correct.").

Although the rule is not presently written this way, one might approach this question in terms of whether the proffered employee was a "pure" expert witness or a "fact" witness who (like a treating doctor) adds insights to testimony about historical facts on which the witness has percipient knowledge by employing specialized training. An example of such analysis is provided by Prieto v. Malgor, 361 F.3d 1313 (11th Cir. 2004), which includes considerable dicta about the issue. In that excessive force case against Miami-Dade County, the County called Rodriguez, one of its officers who trained others in the use of force, to testify about the propriety of the use of force on the occasion in suit. Defendant did not provide a report from Rodriguez on the ground that he was exempt, relying on the notion that Rodriguez was a "hybrid" witness, providing "factual" and "expert" testimony. The majority rejected defendant's view:

> [H]e functioned exactly as an expert witness normally does, providing a technical evaluation of evidence he had reviewed in preparation for trial. Because he had no direct, personal knowledge of any of these facts, his role was simply not analogous to that of a treating

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[2] 8 Fed. Prac. & Pro. § 2023 offers the following caution:

> There is a legitimate concern that a party may try to immunize its employees who are actors or viewers against proper discovery by designating them experts retained for work on the case. One of the tasks an employee of a party often perform is to assist the party's lawyers in work on the case. * * * Something more than this ordinary assistance to counsel ought ordinarily be required to establish that an expert who is a regular employee was "specially" retained to work on the litigation. Accordingly, courts should be exceedingly skeptical when employees who have otherwise discoverable information are designated "experts," and efforts must be made to preserve the opportunity for the opposing party to discover that information.

physician, the example offered by the Advisory Committee of an employee exempt from the written report requirement.

Id. at 1319. The majority therefore concluded that "the County was obligated to provide the expert witness report." Id. at 1319. But it also held that plaintiffs had withdrawn the objection and could not, in their appeal, challenge the district court's order permitting Rodriguez to testify. One judge refused to join the discussion of Rule 26(a)(2) on the ground that it was pure dicta and relied on a point not raised below. See id. at 1320-21 (Cox, J., specially concurring).

In sum, although there are few cases on point there are forceful arguments that in cases like *Prieto* the rule should be different, or at least that the reasons that apply to treating physicians do not apply there. Surely the County would have encountered no difficulty in getting a report from Rodriguez, and it could only have obtained similar testimony from a nonemployee expert by "specially employing" that person. But it is also true that courts have broad powers under the current rules to order preparation of reports -- whether or not required by Rule 26(a)(2)(B) -- when needed, and even to provide for such situations by local rule. Indeed, some cases cited as rejecting the limitation in Rule 26(a)(2)(B) actually involve sanctions for failure to obey such orders.[3]

There is another problem, however, which anticipates the second topic of this memorandum. In at least some instances, adopting the requirement that all materials provided to the witness automatically be turned over to the other side could intrude very dramatically on privilege and work product protection. This does not seem a significant difficulty in relation to a witness like Rodriguez in *Prieto*. But consider a hypothetical from mass tort litigation: The chief medical officer of a medical products company would be called as a witness in a suit alleging that a product was dangerous. As a witness, this person would likely offer testimony about the development and testing of the product, but also offer testimony under Evidence Rule 702 regarding whether the testing was adequate and whether the results indicated that the product was safe. Should such a person be required to prepare a report? The potential invasion of privilege could be very large. Often such a person will, by virtue of her position in the corporation, have ongoing interaction with in-house and perhaps outside counsel about the progress of the litigation. This interaction will likely involve both confidential attorney-client communications and the most sensitive tactical discussions of counsel. The effort involved in having such a person prepare a report might not be too substantial, but the invasion of privilege would be very serious.

The current rule avoids that predicament by excusing the preparation of a report. A lower level insider selected solely to provide "expert" testimony might be more analogous to an outsider hired for a similar purpose and not raise the same sort of issues. An example is that in the automobile industry some manufacturers have an in-house staff of testifying experts (who would probably have to provide reports under the current rule because their duties regularly include giving expert testimony). That's simply a cheaper and simpler way of providing the sort of evidence an outsider could otherwise provide.

With the chief medical officer example, imposing a report requirement presents a dilemma: It may be essential to call this person as a witness because the jury will expect to see her, but the price in invasion of privileged material is very large. Reportedly, in such situations the practice has been to identify the person as required by Rule 26(a)(2)(A) and state that no report will be forthcoming because of the exemption under Rule 26(a)(2)(B), leaving it to the other side to say

[3] See Applera Corp. v. MJ Research, Inc., 220 F.R.D. 13 (D. Conn. 2004) (excluding testimony of employee experts for failure to comply with scheduling order requiring that reports be submitted).

whether it takes the position that a report should be provided. If it takes that position, the matter is worked out.

During the Committee's meeting in Santa Rosa in October, 2005, there was some initial discussion of the current exclusion of employees from the report requirement, reflected in the minutes of that meeting as follows:

[Excerpt from Oct. 2005 minutes]

Rule 26(a)(2)(B): Employee Expert Witnesses

This topic was brought to the docket by a law review article submitted as a suggestion. Rule 26(a)(2)(B) clearly limits the obligation to disclose an expert witness report to an expert trial witness who is "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve the giving of expert testimony." That means that a report need not be provided for an employee who will testify as an expert witness but whose duties as an employee do not regularly involve the giving of expert testimony. Or so it seems. A majority of the reported cases dealing with this subject take a different approach. They say that disclosure of an expert report is a good thing because it facilitates deposition of the expert, and might at times make it unnecessary to depose the expert. The Committee Note extols the virtues of expert witness reports. In effect, the Committee did not really appreciate what it was doing when it wrote the rule text, so the rule should be read to require a report because an employee who does not regularly give expert testimony is specially retained or employed to give testimony in this case.

These cases fairly pose the question: if the 1993 rule had it right, something might be done to restore the intended meaning. But if the cases are right in believing that a report should be required, finding no worthy distinction based on the regularity with which a particular employee provides expert testimony, something might be done to adopt this revisionist view in the rule text.

Discussion began with the observation that this is a real problem in practice. The conflict in the cases may not be resolved in a particular case until it is too late to provide expert testimony in some other way. A careful response is to give notice to the other side that a particular witness is or is not required to give a report, inviting a response in case of disagreement. There is a particularly serious problem with privilege waiver.

It was noted that in 1997 the ABA Litigation Section offered a report, subsequently withdrawn, complaining that some courts were requiring treating physicians to give expert witness reports under 26(a)(2)(B) even though the Committee Note offers them as a clear illustration of expert witnesses who need not give a report and the cases recognize that a treating physician becomes specially retained or employed only if asked by a lawyer to do something in addition to regular treatment and testimony based on the treatment.

A further question may arise from the relationship to Rule 26(b)(4)(B), which severely limits the right to depose an expert who has been retained or specially employed in anticipation of litigation but who will not be used as a witness at trial.

The problem of privilege waiver is addressed in the Rule 26(a)(2)(B) Committee Note, where it is observed that "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Some lawyers continue to fight a rearguard argument

that work-product information need not be included in the report even though it was consulted in forming the expert's opinion.

It was asked whether, apart from possible problems of work-product and privilege, there is a good reason not to require a report?

One response was that the 1993 changes in the wording of Rules 26(b)(3) and (4) have introduced uncertainty about the extent of work-product protection for employees. There is a risk that some will be designated as nontestifying "retained" experts to shield against discovery.

A second response was that an employee may be designated as an expert witness under Evidence Rules 702, 703, or 705 because the party is not sure whether the testimony can be admitted as lay opinion testimony under Rule 701. Requiring an "expert" report in these circumstances may be too much.

Beyond opinion, moreover, employee witnesses often will be testifying to blends of historic fact and opinion quite different from the opinions typically provided by a professional expert witness. The universe of information considered by an employee may be far broader than the information provided to a professional expert witness. There may be compelling reasons to enable employee witnesses to talk with the employer's attorneys under shield of privilege. There was a lot of law to that effect before adoption of Rule 26(a)(2)(B).

Privilege was recognized as a problem, but with the suggestion that it tends to be raised early on in the litigation as the parties discuss deadlines for exchanging reports. The careful practitioner, moreover, will ask who has the burden: is it on the party offering a witness to give a report? Or on the other party to depose the witness? If there is no obligation to give a report, a trial-witness expert can be deposed without waiting for the report. Questions asked at deposition may be blocked by an assertion of privilege. Then the privilege question will need to be addressed.

This line was pursued further by asking why it should make any difference to privilege whether a report is required. If privilege and work-product protection should be waived by offering information to a witness for consideration in forming an expert opinion, adoption of an expert-report requirement does nothing more than advance the point at which the otherwise

protected information must be revealed. Examination at deposition or trial should be subject to the same waiver principle even though there was no requirement to disclose a report. If the Committee Note to Rule 26(a)(2)(B) got it right, it is not because there is a distinction with respect to privilege waiver between expert trial witnesses who are obliged to give a disclosure report and those who are not. The same holds true for the Evidence Rule 612 provisions on production of documents used by a witness to refresh recollection, provisions that may be invoked at deposition as well as at trial.

This discussion led to the question whether indeed privilege-waiver theories should distinguish between hired experts (and the functional equivalent in employees who regularly give expert testimony) and employees who occasionally are called upon to give expert testimony. There may be an important difference between the need to disclose a 10-page advocacy summary provided to a hired expert witness and the full range of information available to an employee who may of necessity be involved in helping to prepare the fact information required to try the case. Truly privileged information may deserve protection, being careful to distinguish merely "confidential" information that may deserve a protective order but not the absolute protection of privilege. This distinction may be implicit in the 1993 Committee Note to Rule 26(a)(2)(B), and in turn reflect on the reasons for distinguishing between employees whose duties regularly involve giving expert testimony and other employees sporadically called upon to provide expert testimony.

This thought was expressed more succinctly. The "hired gun" expert witness is a better subject for privilege waiver than the employee who is no more than an occasional trial expert witness. The rule is designed to focus on the independent expert.

A subtle variation was suggested: perhaps privilege should be waived only if the employee actually relied on the privileged information in forming an opinion. If it was merely considered but not relied upon, there would be no waiver.

It was noted that Professor Capra, Evidence Rules Committee Reporter, believes that there is a lot of confusion in this area and that it deserves further work.

Further discussion reiterated concern that several cases seem to disregard what the rule clearly says about reports from employees who do not regularly give expert testimony. It may be better to require reports from all expert trial witnesses, subject to protecting privilege and work-product information. On the other hand, protecting privilege and work product may prove particularly difficult with respect to employees. And it is important that a party know what are the consequences of designating an expert trial witness.

At the end of the discussion it was concluded that the 1993 rule may well have got it right, but that there are very difficult problems of privilege in addition to the question whether it is better to identify a category of employee expert trial witnesses subject to deposition directly without an obligation to first disclose an expert report. The question will be carried forward for discussion at the spring meeting. Among the materials to be considered may be a revision of Rule 26(a)(2)(B) that sharpens the distinction now drawn among categories of employee experts and that provides Committee Note discussion that further explains the problems of privilege and work-product waiver.

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(2) Disclosure of materials "considered" by expert

As noted above, before the adoption of Fed. R. Evid. 803(18) there had sometimes been difficulties obtaining from expert witnesses an acknowledgement that they had relied on certain materials in reaching their conclusions. Rule 26(a)(2) uses the term "considered" rather than limiting its effect to those materials on which the expert will profess to rely. As interpreted by the Committee Note, it broadly requires disclosure of anything "considered" by the expert witness.

But Rule 26(a)(2)'s incursion into privilege protection is tied to the report requirement. As noted in (1) above, there are valid arguments that disclosure of everything given to the expert witness should occur whether or not the witness also has to provide a report. Such a change to the rule would magnify its intrusion into privileged areas, however.

The Federal Practice Task Force of the ABA Section of Litigation has provided the Committee with a thorough report (included in these agenda materials) recommending a change in the other direction:

> We therefore recommend that federal and state rules be adopted or amended, consistent with American Bar Association policy, to protect from discovery draft expert reports and attorney-expert communications that are an integral part of the collaborative process in preparing an expert's report. Although this might bar opposing counsel from

inquiring into an expert's preliminary thought processes, we believe that the adverse consequences of allowing inquiry into these issues significantly outweigh their benefits.

Based on this concern with insulating the interaction between lawyers and experts, the Task Force offers the following specific proposals:

(i) an expert's draft reports should not be required to be produced to an opposing party;

(ii) communications, including notes reflecting communications, between an expert and attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;

(iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

Proposal (i) is addressed in (3) below. The argument in favor of the proposals regarding attorney-expert communications is that current practice intrudes too deeply into the relationship between attorney and expert, and is unnecessary to effective preparation to meet the expert's testimony. Although the Committee Note also recognizes that the attorney may assist the expert in preparing the report, this opportunity may be undercut by efforts to show that the expert is really the lawyer's mouthpiece. Moreover, the intrusiveness of the process with regard to testifying experts means that lawyers sometimes feel they must retain double sets of experts, one to counsel them on preparation of the case and the other to provide actual testimony. The lawyer can then interact fully with the consulting experts while carefully constraining communications with the testifying experts. But this process is both cumbersome and costly. According to the ABA Task Force, lawyers regularly recognize that the disclosure regime is inappropriate and stipulate around it by agreeing to exempt their cases from requirements for production of attorney-expert communications, or to limit disclosure to the materials relied upon by the expert rather than all considered by the expert. Moreover, where stipulations do not occur, extensive deposition questioning about the involvement of counsel in the preparation of the expert's report prolongs expert depositions with little corresponding benefit. As the ABA Task Force explains, "The expert will ultimately be gauged by the strength of the opinion and the facts or data on which the expert relies, not on the extent to which the opinion was influenced by counsel."

Besides urging specific rule changes on the merits, the ABA Task Force emphasizes the difficulties confronted by lawyers due to the variety of rules on these subjects in different places and before different judges. In part, those differences result from state-court rules or rulings, but they also result from the persistence of some disagreements among federal judges on the proper application of Rule 26(a)(2). This may be a topic on which regional differences persist.

That disagreement among federal courts prompted another proposal to the Committee on this same subject. In 2000, the New York State Bar Ass'n submitted a report making a very different recommendation -- that the rule be amended to make explicit what was in the 1993 Committee Note to Rule 26(a)(2), i.e., that everything the lawyer gives to the testifying expert will be discoverable. This submission (00-CV-E) is also included in these agenda materials. During the Advisory Committee's October, 2002, meeting, the Discovery Subcommittee considered this proposal. The memorandum analyzing the memorandum and the notes of that subcommittee discussion follow.

[Excerpt from Sep. 23, 2002, memo
analyzing N.Y. State Bar Ass'n report]

In a lengthy and thoughtful submission (00-CV-E), the Committee on Federal Procedure of the Commercial and Federal Litigation section of the New York State Bar Association has proposed that the discovery rules be amended to prescribe that any materials considered by a testifying expert be discoverable, whether "core" work product or not.

The basic problem identified by the New York Bar State Association committee is easy to describe: When a lawyer supplies materials to a testifying expert, can the other side obtain those materials even if they contain the lawyer's legal impressions? As noted below, the starting point in discussion probably should be whether the Subcommittee believes the rule should call for disclosure or not. If so, undertaking a rule change may be unnecessary because the courts seem to be reaching that result on their own more often than not, but there have been decisions that go the other way. If the Subcommittee believes that enhanced protection is warranted, a rule change might be seen as more important. Because both views are possible, this memorandum will begin by noting difficulties presented should the Subcommittee desire to ensure that protections are preserved after materials are supplied to a testifying expert.

Before 1993, this issue had arisen due to the provision in Fed. R. Evid. 612(2) that when a witness "uses a writing to refresh his memory for the purpose of testifying . . . before testifying," the court may in its discretion order that the adverse party may inspect the writing. In Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977), Judge Frankel concluded that under that rule "[t]here would appear, in short, to be room for allowing discovery on a theory of waiver or of qualified privilege, where an attempt is made to exceed decent limits of preparation on the one hand and concealment on the other." Id. at 617. Finding that, in the case before him, there was "no indication of a calculated plan to exploit the work product in a significant way for preparing the experts while planning to erect the shield of privilege," the judge declined to require that the materials defendant's lawyer provided the expert be provided to the plaintiff. He did sound a warning: "From now on, as the problem and pertinent legal materials become more familiar, there should be a sharp discounting of the concerns on which defendant is prevailing today." Id. One might question whether Rule 612(2) itself is directed to materials provided the expert before he reaches an opinion (as opposed to the preparation thereafter for a deposition or trial), but the situation before Judge Frankel involved background materials provided the expert to assist in forming an opinion.

As the attached New York State Bar Association memorandum outlines, the question whether materials provided to the expert could be withheld on the ground that they contained "core" work product divided the courts before the addition of the expert disclosure. A divided panel of the Third Circuit concluded that the second sentence of Rule 26(b)(3)'s protection of "core" work product would apply despite the caveat in Rule 26(b)(3) that its protections are "[s]ubject to the provisions of subdivision (b)(4)" concerning discovery regarding expert witnesses. Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984). The majority in that case also concluded that access to such materials was not particularly important to enable the adverse party to prepare for its cross-examination of the expert witness. Judge Becker disagreed, urging that "evidence demonstrating that an economist's theory did not originate or evolve as a result of his own research but rather as a result of the hiring lawyer's suggestion" could "critically alter the fact finder's assessment of the expert's testimony."

In Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991), the other leading case cited by the memorandum, Magistrate Judge Brazil concluded that the caveat in Rule 23(b)(3) applied to its second sentence (dealing with mental impressions of an attorney) because the second sentence referred to "such materials," a reference back to the first sentence, which itself says that its

protections are subject to (b)(4). He also agreed with Judge Becker about the need to grant access to such materials:

> The trier of fact has a right to know *who* is testifying. If it is the lawyer who really is testifying surreptitiously through the expert (i.e., if the expert is in any significant measure parroting views that are really the lawyer's), it would be fundamentally unfair to the truth-seeking process to lead the jury to believe that the background and personal attributes of the expert should be taken into account when the persuasive power of the testimony is assessed.

The adoption of Rule 26(a)(2) in 1993 potentially altered the situation, for it requires a testifying expert to submit a report that includes "a complete statement of . . . the data or other information considered by the witness in forming the opinions." The Committee Note seemed to speak directly to the problem presented:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. *Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions -- whether or not ultimately relied upon by the expert -- are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.* (emphasis added)

It might bear noting that Magistrate Judge Brazil was a member of the Advisory Committee at the time this amendment was under consideration.

Analyzing the amendment, Greg Joseph found that it had adopted a "'pay-to-play' approach to waiver -- that is, the Rule makes waiver an unavoidable cost of putting an expert forward to testify." Joseph, Emerging Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97 (1996). He argued, however, that the amendment's reference to "data" and "information" implied that the disclosure requirement applied only to "factual matter furnished by counsel to a testifying expert." "'Data' and 'information' connote subjects that are factual in nature, not ephemera like 'mental impressions,' conclusions, opinions or 'legal theories' of the sort protected by Rule 26(b)(3)." He thought that this interpretation was supported by the amendments' further focus on items "considered by" the witness, adding that "[n]othing in the Advisory Committee Note or in the text of the Rule reflects any intention to abrogate the protection afforded core work-product."

Since 1993, there has been a division in the lower courts about whether "core" work product supplied to a testifying expert may be withheld. For examples, see 8 Fed. Prac. & Pro. § 2016.2 at nn. 39-41 (Supp. 2002). Perhaps the leading case protecting against discovery of "core" work product is Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995), which held that an expert witness could not be questioned during a deposition about conversations with counsel due to the protection of "core" work product.[4]

In addition, the two leading treatises somewhat disagree on the point. Moore's Federal Practice (of which Greg Joseph is an editor) finds that the Haworth approach is correct. Federal Practice and Procedure (with which I am associated) cuts the other way. All of this may indicate that a rule clarification is warranted.

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[4] A 2006 shepardization of Haworth showed that it had been cited by 13 other courts, all seemingly negatively (e.g., "Rejected by," "Disagreed With by," "Declined to Follow by," and "Disapproval Recognized by").

A number of issues would arise if there were an effort to change the rules to clarify on this topic. These issues are more evident if one considers the possibility of strengthening the protections of "core" work product. First, the Civil Rules do not make any mention of "core" work product. To the contrary, the first sentence of Rule 26(b)(3) says that materials "prepared in anticipation of litigation or for trial" should be subject to discovery only upon a showing of "substantial need of the materials in the preparation of the party's case." The second sentence then says that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

As a consequence, any amendment to the rules to alter the treatment of "core" work product would have to define what that is. For purposes of cases like Haworth, it would presumably have to deal with a second feature of Rule 26(b)(3) -- the fact that it only limits discovery of "documents and tangible things" -- since the actual discovery sought there was of conversations with counsel. There is no protection anywhere in the Civil Rules for intangible work product; Hickman v. Taylor itself supplies whatever protection there is. That could certainly be modified by a Civil Rule, as Rule 26(b)(3) somewhat did where it applies, but it does seem that we are dealing here with a court-created phenomenon. Addressing it in the rules would require more considerable surgery because Rule 26(b)(3) currently is limited to documents and tangible things.

A third challenge, therefore, might be to make clear what the rule-based protection is. At present, Rule 26(b)(3) appears to direct the court to try to mask portions of documents or other tangible things that include "conclusions, opinions, or legal theories" in ordering production of those materials. Should more protection be required? A possibility that has been addressed by the lower courts is providing absolute protection.

Some states do afford virtually absolute protection to the sort of thing that seems to be involved here. See Cal. Code Civ. Proc. § 2018(c) ("Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.") And at the time it decided Hickman v. Taylor, the Supreme Court had pending before it a proposed rule amendment that would have provided protection like that afforded by the first sentence of current Rule 26(b)(3), but with nearly absolute protection instead of the more limited protection of current Rule 26(b)(3): "The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories." See Report of Proposed Amendments to Rules of Civil Procedure, 5 F.R.D. 433, 457 (1946). Instead of adopting this rule, the Court in Hickman said in dictum that no showing justifying discovery of such things had been made, and that such discovery should occur only in "rare situations."

In Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975), the court concluded that "no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or theories." Id. at 734. In a later case, the same court said such material "is immune to the same extent as an attorney-client communication." National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992); see also In re Grand Jury Proceedings, 473 F.3d 840, 848 (8th Cir. 1973) (no showing could justify ordering production of attorneys' personal recollections, notes and memoranda pertaining to conversations with witnesses); compare In re Grand Jury Investigations, 599 F.2d 1224, 1231 (3d Cir. 1979) ("special considerations" govern discovery of such documents, and they may be obtained only in a "rare situation"). The Supreme Court noted this disagreement about notes of oral statements from witnesses in Upjohn Co. v. United States, 449 U.S. 383, 401 (1981), but went on to say that "[w]e do not decide the issue at this time."

But in some circumstances courts have found that discovery of attorney work product is justified. For example, where the lawyer's opinion is directly at issue, it has been held subject to discovery. See Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7 (D. Mass. 1997); Frazier v. Southeastern Pennsylvania Transp. Auth., 161 F.R.D. 167 (E.D. Pa. 1995). Given the possibility that a lawyer could decide to provide *only* his opinion work product to an expert witness if that were absolutely protected, it would seem inappropriate to conclude that an absolute prohibition should apply. Judge Frankel's warning in 1977 about "exceeding decent limits" in using such material for expert preparation still deserves attention.

A fourth issue might be to determine whether this protection only applies to attorneys' "core" work product. On its face, it includes such opinions, etc., of somebody other than a lawyer. It is worth recalling that Rule 26(b)(3) provides initial protection for the litigation preparation activities not only of lawyers but also of the party itself, or its "consultant, surety, indemnitor, insurer, or agent." Other cases which deal with discovery of opinion work product find that it also is discoverable if directly at issue. See, e.g., Holmgren v. State Farm Mut. Ins. Co., 976 F.2d 573 (9th Cir. 1992). Yet the Fourth Circuit said that the same protection applies to nonlawyers' opinion work product. Se Duplan Corp., supra, 509 F.2d at 737.

Admittedly, these difficulties would be more pertinent to an effort to write into the rule the interpretation that Greg Joseph urges than the one that the N.Y. Bar section thinks should be correct. So far as that purpose is concerned, it seems more appropriate under the rules as currently written, and reading Rule 26(a)(2) as limited to "factual" material is a strain. Perhaps it could be revised somewhat as follows:

> the data or other information considered by the witness in forming the opinions <u>including any mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of the disclosing party</u>, . . .

That would leave undisturbed the various other issues mentioned above. But the existence of those issues, which are not the subject of any rule provision, suggests the possible delicacy of undertaking rule changes that might affect the interpretation of Rule 26(b)(3).

Accordingly, it would probably be best to determine at the outset whether the Subcommittee feels that the disclosure rule (the one favored by the N.Y. Bar Ass'n section) or the no-disclosure rule (favored by Greg Joseph) is preferable. Then the question could be whether that preference should be embodied in a rule amendment to disapprove of the cases that have embraced a different view. On that subject (and depending on the preference of the Subcommittee), the Subcommittee could take up some of the additional issues mentioned above.

Alternatively, the issue could be left to the courts. The appellate courts have until now been largely silent on these questions, and they might provide some additional direction. One has come to the pro-disclosure view. In re Pioneer Hi-Bred International, Inc., 238 F.2d 1370, 1375 (Fed. Cir. 2000) ("Indeed, we are unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party.") But it may be unusual for the appellate courts to be asked to deal with this problem, so that could be a reason for proceeding with a rule change. If the goal is to endorse the pro-disclosure approach, however, it may well be that the lower courts will reach that view in the absence of further rulemaking. A magistrate judge in the S.D.N.Y., for example, recently noted that the Second Circuit had not addressed the question and that there was a split among district courts, but added: "Notwithstanding Judge Orenstein's [1997 decision excluding "core" work product from disclosure], the overwhelming weight of authority in this Circuit -- including several recently decided cases -- indicates that the Rule 26(a)(2)(B) disclosure requirement trumps the substantial

protection otherwise accorded opinion work product under Rule 23(b)(3)." Aniero Concrete Co. v. New York City School Const. Auth., 2002 WL 257685 (S.D.N.Y., Feb. 22, 2002) (Maas, M.J.).

A final possibility is to put the question on hold along with the more general topic of privilege waiver, which remains on the Subcommittee's back burner. One could treat the question of attaching consequences to delivering materials to an expert as somewhat analogous to other waiver problems we have discussed in the past. And the consideration of e-discovery may cause us to return to privilege waiver in the foreseeable future. But the issues presented here are really quite different. The privilege waiver question considered in the past was limited to facilitating discovery without waiver consequences. This one has to do with facilitating interaction with experts by removing discoverability of certain privileged materials.

* * * * *

[Excerpt from Notes of Discovery
Subcommittee's Oct 3, 2002, discussion]

The Committee on Federal Procedure of the Commercial and Federal Litigation section of the New York State Bar Association submitted a proposal (00-CV-E) that there be rule changes to make clear that "core" work product provided to a testifying expert is subject to disclosure or discovery.

Prof. Lynk introduced the issue by noting that the 1993 amendments to Rule 26 included broad disclosure requirements with regard to witnesses who will testify as experts. Rule 26(a)(2) thus requires an expert witness to provide a report that includes "the data or other information considered by the witness in forming the opinions." Before 1993, there had been disagreement among courts about whether materials containing the mental impressions of counsel were discoverable if they had been provided to testifying experts in connection with their preparation for testifying. Although the Committee Note accompanying the 1993 amendments contained strong language about making available anything provided to the expert witness, whether or not privileged, there was some disagreement among courts about whether "core" work product remained immune to disclosure or discovery. The two leading treatises, indeed, seem to come out on different sides of the question.

At the outset, support was voiced for the pro-disclosure position of Judge Motley in B.C.F. Oil. Ref., Inc. v. Consolidated Edison Co., 171 F.R.D. 57 (S.D.N.Y. 1997), described at pp. 27-29 of the N.Y. Bar Ass'n submission. It was asked whether it would be suitable to examine the entire area of work product as protected by the rules. To this, it was responded that the coverage of the current rules is incomplete; Rule 26(b)(3) applies only to "documents and tangible things," and the rules themselves provide no protections with regard to opinion work product in other forms. But tackling that set of broader problems would involve overhauling Rule 26(b)(3). One member supported going into the whole question, and voiced support for the view that core work product should be insulated from disclosure even when provided to expert witnesses. Another voiced uneasiness about supplanting the appellate courts on this issue. There is division among the district courts, but the Committee might hesitate before "reversing" those that adopted the interpretation that it now wishes to disapprove.

It was noted that the issue raised by this submission is much narrower than a complete reconsideration of the handling of work product. The only question raised is about expert witnesses, and in that context there is considerable reason to worry about the role of the advocates in shaping the testimony and ensuring that the trier of fact gets an accurate picture of the role played by the lawyer in formation of the opinion being expressed by the expert witness. This is a focused problem

that need not call for revisiting the more general treatment of work product under the amendments adopted in 1970. And the question will not often reach the courts of appeals, so there may be no other way to resolve the differences among district courts except through action by this Committee.

Discussion then shifted to whether the Subcommittee would favor the "full disclosure" view proposed by the N.Y. Bar Ass'n Committee or the "no disclosure" position adopted by some district courts. One member said that he liked the "no disclosure" position but that he had assumed the reverse was true in his practice. Another said that careful lawyers don't give material to expert witnesses with the expectation that it can be withheld from the other side, and that amending Rule 26(a)(2) to say so more seemed an "easy fix." Another member also had assumed that there was disclosure.

The chair called the question on whether the Subcommittee should embrace the "full disclosure" position. Although some members were in favor of adopting that position, others were uneasy about taking a position at this time. Some were not prepared to vote and said they would like to know more about the problem. One member opposed the "full disclosure" position, saying that it creates serious problems for the lawyer in talking to the expert witness. The attorney is forced to hire a consultant on the side to try out ideas without revealing them to the expert who will ultimately testify.

Under the circumstances, it was resolved not to decide which position should be adopted and to keep the topic on the Subcommittee's agenda. The chair and the Special Reporter will discuss ways to develop more information on the subject. One possibility would be to ask the FJC to develop material, but it was cautioned that we need to be conservative in burdening the FJC, and observed that it may not be necessary to involve it in consideration of this problem. Seeking more input from the organized bar could amplify the Subcommittee's understanding of the issue.

* * * * *

The prevalent caselaw currently (2006) appears to favor the pro-disclosure view discerned in 2002. The ABA Task Force recognizes that "most federal courts and the more recent decisions have held that even attorney trial strategy, mental impressions, and other traditional work product, if turned over to a testifying expert, should be produced." (ABA report, p. 3) The article that challenges the exemption of employees not specially employed from the reporting requirement (item (1) above) says that "the vast majority of recent decisions" require disclosure. Mickum & Hajek, 24 Rev. Lit. at 360. Thus, it is not clear whether there would be reason to act on this issue to provide uniformity within the federal court system.

The basic policy judgment is whether the 1993 amendment package, as applied by the courts, has intruded too far into the interaction between lawyers and their experts. Compared to what was possible before 1993, and certainly to what was provided before 1970, that intrusion is very large. And the ongoing reality is that such disclosure and discovery are only intended to assist a party in cross-examining its adversary's expert, not otherwise to generate discoverable matter. So one could conclude that less intrusive disclosure requirements would suffice. Another consideration would be whether the intrusion into this relationship should only apply when a report is required, so that employees who don't have to prepare a report need not disclose their interactions with counsel either.

(3) Disclosure of experts' drafts

As part of its effort to insulate the lawyer/expert interaction, the ABA Task Force urges that Rule 26(a)(2) be amended to specify that a testifying expert's draft reports and related background work not be subject to disclosure. It reports that federal judges approach these issues in a variety of

ways, and that some even issue early case management orders requiring the preservation of all expert drafts. It also notes that the rise of E-Discovery has magnified the problem by opening the possibility of keystroke-by-keystroke examination of the expert's mental processes in developing the conclusions embodied in the report. "Requests for electronic versions of expert's reports, including 'meta-data' showing how the report evolved at each step, are now commonplace. The focus becomes not on the merit of the report but on the process by which the expert arrived at the final conclusions in the report." ABA Task Force report, p. 18. Altogether, it adds, this potential intrusion breeds a "clandestine environment" portrayed in the following example (id. at p. 16):

> One expert reported on his standard methodology. He never writes anything down that could be viewed as "even an appearance of opinion." He never prints a draft, and always takes care to overwrite or delete anything he is removing from the draft. If an attorney wants to review the draft, the expert takes his laptop to the attorney's office and they both make edits at the same time. He defragments his computer at least once a month using a Department of Defense quality "file scrubber" so there is no recoverable data other than well-organized files. Before preparing his actual report, the saves it in Rich Text Format, then defragments his hard disk, runs the file scrubber, then defragments it again. He then prints the report in "pdf" format, deletes it from his hard disk, and repeats the defragment-scrub-defragment process.

At one level, one could readily distinguish between disclosure of the information the lawyer gave the expert and disclosure of the expert's developing thought processes in evaluating that information. This is somewhat different from what the ABA report endorses, because that report focuses on the lawyer's interactions with the expert and this orientation focuses on the expert's activities outside the lawyer's sphere of influence. It is debatable whether a court should regard the expert's internal reflection and thought processes as "information considered by the witness in forming the opinions," which the rule requires to be disclosed. See, e.g., McDonald v. Sun Oil Co., 423 F.Supp.2d 1114, 1122 (D. Or. 2006) ("This rule [Rule 26(a)(2)(B)] does not require the production of an expert's working notes. * * * The only information not produced were some working notes that the experts failed to retain. This information is not subject to Rule 26 disclosure.").

Yet we are told that some judges do require disclosure of such information, even including provisions in case management orders requiring that it be preserved. As a starting point, it would not seem that a change to Rule 26(a)(2) would limit the power of a district judge to require preservation of such information. It might make clear that Rule 26(b)(3) or like protection should be applied to such information, which could prevent disclosure of the preserved material absent a showing of suitable need.

The policy issue, however, is whether it would be desirable to try to provide such protection for the expert's internal analytical activities. There may be much to be said for ensuring that the expert can operate with some privacy in formulating initial thoughts and opinions. Most lawyers would resist inquiry into each thought that went through their minds in developing the arguments presented in a brief, for example. The goal of permitting the opposing party to challenge the conclusions of the expert need not, it could be said, include such intrusion into the expert's nascent thoughts. A counter to this would stress the value of careful inquiry into the assumptions and thought processes the expert used to reach the conclusions in the report. Surely deposition questions about those mental processes would not be ruled improper so long as they reasonably bore on the reliability of the conclusions. Why, one might ask, shouldn't material that would provide a much more certain ground for tracing that development be made available? The answer may be, as would perhaps be the case with the lawyer writing the brief, that this would unduly deter full and disciplined consideration of matters in issue, and that it would also not significantly aid in the

assessment of the ultimate conclusion. But the lawyer preparing the brief is different, for the court is able to evaluate the arguments made in the brief without such background about how they were developed.

Assuming one is persuaded that the rule should be amended to provide the expert this degree of privacy in developing an opinion, such an amendment need not extend to excusing disclosure of material that the expert has received from the lawyer. The preparation-privacy component for the expert need not insulate that; once the opposing side can show what the lawyer gave the expert it is adequately able to explore whether the expert is parroting the theories of the lawyer or opinions developed by the expert.

But there could be a risk of compromising the goal of showing the influence of the lawyer if all "draft reports" were off limits. For example, if the lawyer reviewed the drafts before the final report was completed, that would seem to offer a much more direct way for the lawyer to influence the content of the report than by the selection of materials to provide to the expert before the analysis and report are begun. It could happen that the analysis and conclusions of the draft report changed greatly after input from the lawyer. Thus it may be that defining what is a "draft report" insulated from disclosure would prove difficult.

The 1993 Committee Note addressed the role of the lawyer:

> Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

At a minimum, this passage is designed to ensure that assistance from the lawyer is not a ground for striking the report or other adverse action. But does providing meaningful assistance require confidentiality? It has been urged that requiring disclosure of the lawyer's role undermines the lawyer's ability to participate meaningfully in the preparation of the report. Surely the possibility of later scrutiny of the nature of such assistance will sometimes constrain lawyers providing it, but the above passage does not say that the nature of the assistance should be immune to examination. Moreover, the Committee Note also emphasizes that the report should reflect the testimony of the witness, suggesting that attention properly may be given to the relative roles of the lawyer and the witness in preparing the report.

If it is important to provide an avenue for determining the role of the lawyer in the preparation of the final report, limiting disclosure to the final report may be unworkable. It may be that the great majority of final reports reach that status only after being reviewed and blessed by the lawyer. If that is the case, it is difficult to see how one could adequately evaluate the role of the lawyer without knowing at least what the expert said in the "draft" that preceded the lawyer's involvement. Yet if avoidance strategies like those described above will insulate the lawyer's role from examination, it may be that the rule only requires meaningful disclosure when a party is unable to afford those strategies or not sophisticated to use them.

Possible courses from this point

As pointed out at the beginning of this memorandum, the 1993 amendments constituted a major expansion of the expert discovery provisions, building on the 1970 expansion. Throughout, the challenge has been to calibrate the amount of disclosure that is needed to permit fair preparation for challenging the other side's expert testimony while avoiding undue discovery. Although there

might have been arguments that the idea of a required and detailed report was too intrusive and burdensome, those arguments have not been advanced.

Instead, the questions presented are (a) whether the report requirement should be amended, (b) whether amendments should be adopted to provide a zone of confidentiality for attorney-expert interaction, and (c) whether amendments should provide at least a zone of confidentiality for the expert's report preparation. These issues are interconnected, but a number of possible avenues for proceeding exist:

(1) Amending the Rule 26(a)(2)(B) report requirements: Various possible reactions to concerns about the operation of the report requirement might be addressed, together or separately:

(a) Removing the exemption to the report requirement for employee expert witnesses: This change would in some ways be easy to accomplish if one wanted simply to close the exemption for employees. But making a change would likely raise a number of issues concerning nonemployee expert witnesses like treating physicians and privilege waiver consequences. Perhaps a lesser change would be to preserve the exemption for "hybrid" employee witnesses who were actors or viewers, but who can bring their expertise to bear on explaining what they did or saw.

(b) Handling the treating physician problem: Deleting the exemption for employees would raise questions about how best to handle treating physicians, and whether there are other categories deserving exemption from the report requirement. It might be possible that this exemption could include the "hybrid" employee witness who was an actor or viewer but will testify about those matters through the prism of some expertise. One idea might be to try to include a provision in the text of the rule exempting treating physicians (and others?), but that could prove difficult to articulate in a way that both includes all one wants to include and deals with the possibility that such a person might undertake additional litigation-preparation work at the behest of the lawyer that should be subject to the report requirement.

(c) Severing the link between the report requirement and the loss of privilege or work product protection for materials considered by expert witnesses: The uneasy link between the report requirement and the abrogation of privilege protection could be undone, with the report applying to all expert witnesses (except treating physicians and the like), and privilege protection handled separately. That would raise the challenge of deciding what that protection should be (treated also in (2) below) with regard to privilege waiver. A number of possibilities exist, including:

(i) Limiting the disclosure requirement to information "relied upon" by the expert, rather than information "considered by" the expert: This change could very significantly contract the disclosure obligation, assuming that experts would take a narrow view of what they relied upon in forming their opinions. And it would often excuse revelation of materials for which no privilege or work product protection could be claimed.

(ii) Excluding "core" work product from the disclosure requirement: This would seem to respond to a major concern of segments of the bar, but would present the challenge of defining "core" work product in the rules. As noted again in (2) below, this could entail revisions to Rule 26(b)(3).

(iii) Excepting certain employee experts from the obligation to reveal privileged or work product materials: For other purposes, the discovery rules do treat some employee witnesses differently from others. Thus, Rule 30(b)(6) singles out officers, directors, and managing agents. Perhaps some similar effort could be fashioned to protect against privilege waiver for the sorts of employees whose positions present the most troubling possibilities.

(iv) Excluding from disclosure information that an employee received in the normal course of his or her duties: A main concern with overbroad waiver for employee expert witnesses is about privileged information an employee receives as part of ordinary work. Perhaps the rule could require only that information provided by the lawyer be subject to disclosure, or exempt disclosure of information the employee received in the normal course of his or her duties. Both those ideas could prove challenging to implement in rule language. If the employee's ordinary work includes interacting with the lawyer, drawing lines may be particularly difficult. And there might be some risk of circumvention if the information were passed from the lawyer to organization higher-ups who then provided it to the employee, raising a question about what was within the employee's normal course of duties.

(2) Amending Rule 26(a)(2)(B) to address work product and other privileged materials explicitly: The current Committee Note speaks aggressively of the need to disclose such material, but the rule does not deal explicitly with whether its command overrides work product or other protections that would otherwise apply to materials shared with expert witnesses. In particular, in light of a number of expressed concerns, it might be desirable to deal expressly in the rule with whether "core" work product must be disclosed. Requiring disclosure appears to be the dominant view of the courts under the rule and Note as presently written, so an amendment might not be worthwhile to make it clear that disclosure is the rule. If the desire is to change that rule, it may prove difficult to define what would suffice to require disclosure, for it could happen that all information provided to an expert would be claimed to be subject to a privilege. These issues raised by the ABA present two possible courses for proceeding:

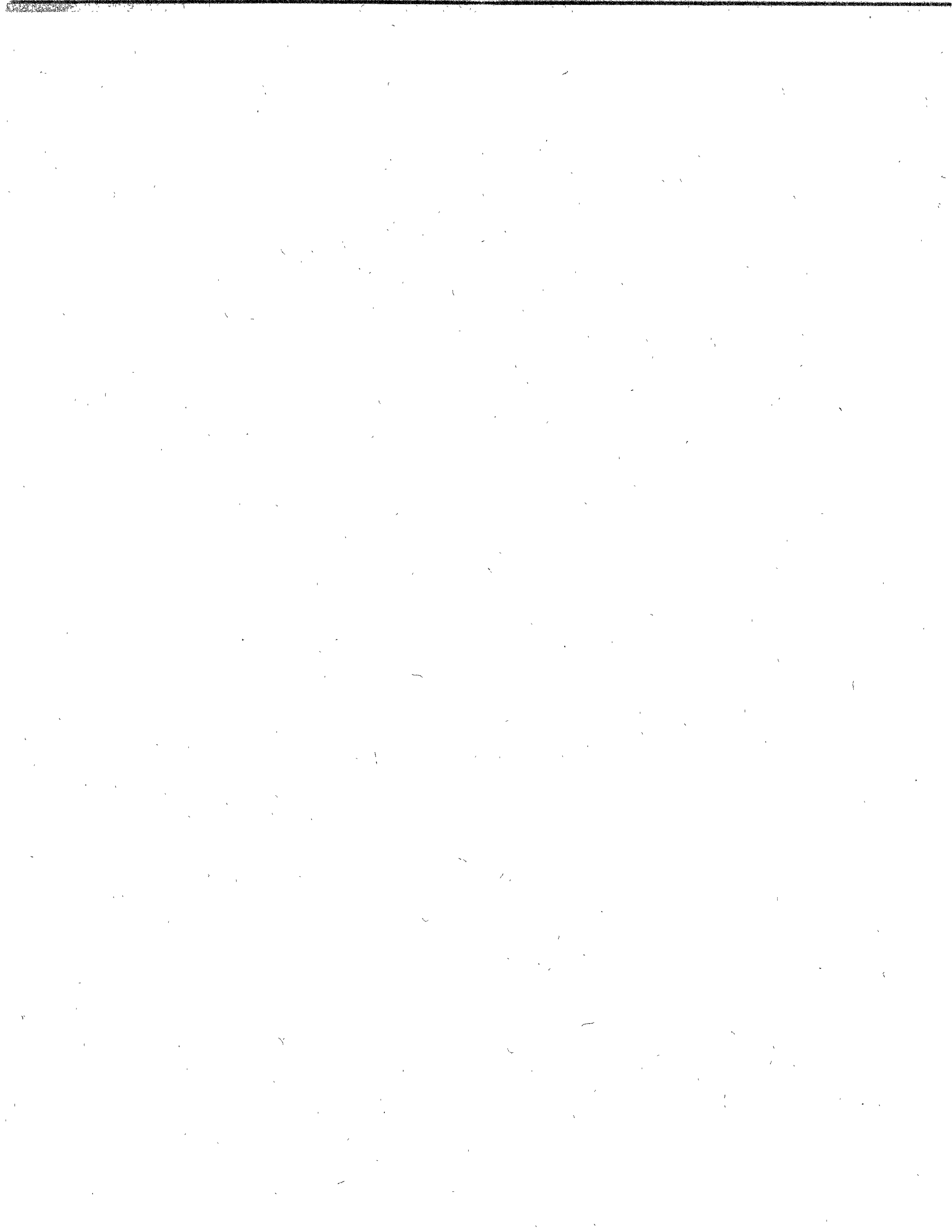
(a) Amending Rule 26(a)(2) to provide protection for the interaction between the lawyer and the expert witness: This effort would likely be a challenge. The ABA's own proposed approach calls for an adequate opportunity to develop cross-examination. Ensuring that opportunity while providing the protection desired may prove difficult. Some of the routes that might be used have already been mentioned in (1) above -- limiting disclosure to material "relied upon" by the expert, or excluding disclosure of "core" product, for example.

(b) Broadening attention to include Rule 26(b)(3): If the main concern is work product protection, and particularly "core" work product, it may be that a rule-based definition of that concept would be necessary. A logical place to provide such a definition would be in Rule 26(b)(3). In addition, other features of Rule 26(b)(3) might bear on an effort to deal with the expert witness problem. For example, the rule provides protection for litigation preparation (whether "core" or ordinary) only with regard to "documents and tangible things." That does not include oral interaction between the lawyer and the expert witness, which receives no protection from current Rule 26(b)(3). And that definition of the rule's protection presents potential difficulties in handling of electronically stored information, which some might urge is neither a "document" nor "tangible" for purposes of Rule 26(b)(3) protection. So it might be timely to re-examine the limitation of Rule 26(b)(3) to "documents and tangible things." Other features of Rule 26(b)(3) might bear scrutiny as well. But any substantial effort to revise Rule 26(b)(3) would raise a host of issues about settled caselaw and practice.

(3) Amending Rule 26(a)(2)(B) to provide that "draft" reports need not be disclosed: This could present some difficulties in defining "draft" reports. It would also raise the issue whether, after amendment, courts could ever order disclosure (or perhaps even preservation) of such materials unless the party seeking them has satisfied the standards of Rule 26(b)(3).

(4) Leaving Rule 26(a)(2) as it is and relying on sensible district court decisions: This avenue may be the wisest given the difficulties and contending policies mentioned above. With regard to the first issue -- reports by employees -- the 1993 Committee Note explicitly invites such

rulings. More generally, it may be that the range of circumstances that bear on the sensible determination of individual cases makes effective line-drawing by rule impossible.



MEMORANDUM

To: Participants in Jan. 13, 2007, discussion of discovery and disclosure regarding expert witnesses
From: Rick Marcus, Special Reporter, Advisory Committee on Civil Rules
Date: Dec. 11, 2006
Re: Possible rule amendment ideas offered to provide concreteness for Jan. 13 discussion

This memorandum is designed to provide ideas about some possible specific rule amendment approaches that might be pursued if it seems advisable to proceed toward amending the rules to address concerns raised about Rule 26(a)(2). These ideas are provided here in hopes that they may provide concreteness that would be of value as background for the January, 13, 2007, meeting being held by the Discovery Subcommittee of the Advisory Committee on Civil Rules. **Neither the Advisory Committee nor its Discovery Subcommittee has made any decision whether to proceed with any proposal for a rule amendment, or considered the specific content of any such possible proposed amendment.**

As Judge Campbell's letter of invitation to the meeting says, the Jan. 13 discussion will focus on the policy concerns raised by four main issues. This memorandum therefore presents the issues in the same order: (1) Insulating attorney-expert interaction; (2) Draft expert reports; (3) Treating physicians; and (4) Eliminating the exemption from the report requirement for a party's regular employees.

It seems worthwhile also to mention that the amendment ideas sketched here are presented as possible amendments to the restyled rules now pending for approval before the Supreme Court. Although it cannot be said whether these amendments will ultimately be adopted, if they are adopted they probably will go into effect on Dec. 1, 2007, long before any amendments could be made to Rule 26(a)(2).

(1) Insulating attorney-expert interaction

The purpose of this section is to identify some ways in which protection of attorney-expert communications might be afforded by a rule change. The ABA has urged rule changes on this point.[1] The approaches of three states to these issues have been brought to our attention, and can provide a starting point. Perhaps the most pertinent is the New Jersey approach, which is tied to a variation of what was previously in Rule 26(b)(4)(A).[2]

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[1] The Sedona Conference Working Group on the Role of Economics in Antitrust adopted recommendations in February, 2006, including Principle II-4, which is: "An economic expert's opinion, including the factual and experiential basis on which that opinion is based, should be fully disclosed." The Comment accompanying this Principle includes the following:

> The information reviewed by the economist in reaching the opinion should also be disclosed. Specifically disclosed should be the models that the economist used and the reasons for using those models, and the source of the data or other information put into those models, in enough detail to enable the adversary to duplicate the calculations and probe the analysis. Where necessary to an understanding of the models and methods employed by the economic expert, there should also be disclosure of relevant economic literature on which the expert is specifically relying. The expert's understanding of or assumptions concerning the facts and the effect of those understandings or assumptions on the opinion expressed should also be specifically disclosed. Moreover, the facts relied on by the expert should be disclosed, as well as the sources for those facts. When data is relied upon, the expert should either produce it, or provide references to available sources from which to obtain it.

[2] Specifically, New Jersey Rule 4:10-2 contains provisions analogous to Civil Rule 26(b)(1) [Rule 4:10-2(a)], 26(b)(3) [Rule 4:10-2(c)], and 26(b)(4) [Rule 4:10-2(d)]. Rule 4:10-2(d)(1) resembles Rule 26(b)(4)(A) before its 1993 amendment, and provides (emphasis added):

> A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness, including a treating physician who is expected to testify and, whether or not expected to testify, of an

The Texas provisions take yet another approach, which does not seem to provide the sort of protection that the ABA resolution endorses or that New Jersey affords.[3] Massachusetts appears to

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> expert who has conducted an examination pursuant to R. 4:19 or to whom a party making a claim for personal injury has voluntarily submitted for examination without court order. The interrogatories may also require, as provided by R. 4:17(a), the furnishing of a copy of that person's report. *Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by R. 4:17-4(e) [described below], all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule [comparable to Rule 26(b)(3)].*

Rule 4:17-4(e) permits a party by interrogatory to request a copy of the report and provides the following directives about what the report must contain:

> The report shall contain a complete statement of that person's opinions and the basis therefor; the facts and data considered in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and whether compensation has been or is to be paid for the report and testimony and, if so, the terms of the compensation.

Thus, the New Jersey setup does not have any disclosure requirement, and inserts the protection regarding interaction between the expert and the attorney into its analogue to Rule 26(a)(4).

[3] Tex. R. Civ. P. 192.3 contains the general scope of discovery provisions. Rule 192.3(e) provides as follows (emphasis added to subsection (6)):

> *Testifying and consulting experts.* -- The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions that have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a

have retained provisions more analogous in content -- as well as form -- to the pre-1993 provisions in Rule 26(b)(4).[4]

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testifying expert:

> (1) the expert's name, address, and telephone number;
>
> (2) the subject matter on which the expert will testify;
>
> (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;
>
> (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
>
> (5) any bias of the witness;
>
> (6) *all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by or for the expert in anticipation of a testifying expert's testimony;*
>
> (7) the expert's current resume and a bibliography.

As the italicized language above suggests, this provision appears to require fairly broad disclosure.

[4] Thus, Massachusetts Rule 26(b)(4) provides:

> **Trial Preparation. Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> > **(A)(i)** A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. **(ii)** Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to

A variety of amendment approaches to current Rule 26(a)(2) might, separately or in combination, introduce limitations into the Civil Rules.

(a) Narrowing the language in the report requirement to limit it more clearly to "factual" material, or to protect work product, particularly opinion work product

The starting point for the current controversy about the over-intrusion into lawyer-expert interaction is the report requirement, which was the basis for the strong statement in the 1993 Committee Note about having to disclose whatever is given to the testifying expert, whether or not it is privileged or work product. We have heard that the drafters of the 1993 amendments probably did not foresee that the language they used would be interpreted to include such a wide range of information. Perhaps a satisfactory change could be made to Rule 26(a)(2)(B)(ii):

Rule 26. Duty to Disclose:
General Provision Governing Discovery

(a) Required Disclosures

* * *

(2) ***Disclosure of Expert Testimony***

* * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

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subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

Alternative 1

(ii) the data or other information considered by the witness in forming them, unless [privileged or] protected under Rule 26(b)(3);

Alternative 2

(ii) the data or other information considered by the witness in forming them, except to the extent that disclosure would reveal the mental impressions, conclusion, opinions, or legal theories of the disclosing party's attorney or other representative concerning the litigation;

Alternative 3

(ii) the factual data ~~or other information~~ considered by the witness in forming them;

Alternative 4

(ii) the data or other information considered by the witness in forming them, but no disclosure or discovery may be had regarding any communications between the expert witness and retaining counsel unless the court finds that such disclosure or discovery is warranted by the standards of [Rule 26(b)(3)(A)(ii)] {Rule 26(b)(4)(B)(ii)};

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Surely there are additional approaches to this set of issues, but this array of alternative amendment starting points will hopefully provide a basis for discussion.

Alternative 1 provides broad protection for all work product provided to the expert witness. But it raises the question how the "data or other information" itself was subject to protection under 26(b)(3), for that protection does not go to facts.

Alternative 2 is an effort to accomplish what is seemingly urged as the strongest reason for making a change -- to protect core work product. It borrows the terminology of Rule 26(b)(3) regarding what that is.

Alternative 3 tries a different approach -- can some reformation of the language of the disclosure rule restore what the Advisory Committee was reportedly thinking about in 1991? Perhaps "or other information" is the invitation to go beyond factual data, and "factual data" is broad enough to capture all that is needed in a disclosure rule. But would opinions, etc., be within "factual data" when an expert witness relied on somebody else's opinion? (Note the careful attention in the Texas rule to a testifying expert who relies on the opinion of a nontestifying expert.)

Finally, Alternative 4 is prompted by the ABA resolution.[5] It offers two alternative standards for intruding into the

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[5] Alternative 4 does not include something that is in New Jersey Rule 4:10-2(d)(1), which protects "all other communications between counsel and the expert *constituting the collaborative process in preparation of the report*." Although Committee Note language regarding the need to protect this collaboration might well be useful to explain what the amendment is designed to accomplish, the italicized language might seem odd in a rule.

communications between the lawyer and the expert witness. The Rule 26(b)(3) standard, which is easier to satisfy, appears to be what the New Jersey rule invokes. The Rule 26(b)(4)(B) standard, which is very hard to satisfy, appears to be what the ABA resolution has in mind.

It might be useful to add that, should any of these approaches go forward, it is likely that a Committee Note would say that the Advisory Committee had concluded that the broad sweep of the 1993 provision -- at least as interpreted by the majority of courts -- had proved counterproductive. Discovery about every contact between counsel and the expert witness might provide some benefit. But particularly in an era of e-mail and embedded data this benefit is outweighed by the burdens of such discovery and the surreal atmosphere it introduces for dealings between experts and lawyers. The goal is to permit a fair opportunity for cross-examination, not to create a whole new arena of intricate and costly discovery maneuvering. That maneuvering, moreover, may be so costly that only very rich litigants can play the game to the hilt.

Another point to keep in mind with regard to these approaches is that the general concern about discovery into the interaction between the expert witness and the lawyer goes back before the 1993 adoption of Rule 26(a)(2)(B). Some fifteen years before that amendment, Judge Frankel concluded that Fed. R. Evid. 612(2) authorized discovery into what the lawyer gave the witness, even though seemingly core work product. If one wants to clear the field, therefore, some consideration should probably be given to how the Civil Rules provisions on this topic jibe with the Evidence Rules' provisions. For example, if the civil rules say that discovery may be had only on a very exacting showing, does that trump (or at least inform) a determination whether production should be ordered pursuant to Evidence Rule 612(2) because "it is necessary in the interests of justice"?

There is, of course, a very good argument that Rule 612 is not at all about the situation we are addressing in our discussion because the expert witness is not using the sort of materials the lawyer is likely to provide "to refresh memory for the purpose of testifying," which is what Rule 612 is focused upon. We are talking here mainly of materials the lawyer provides to the potential expert witness to orient her to the issues in the case, long before the expert testifies and often long before a decision whether this person will be identified as a witness is made. Maybe, indeed, it would make sense for Rule 612(2) to apply (in civil cases) only to materials used by the expert witness after she has been identified under Rule 26(a)(2)(A). It could thus well be argued that Evidence Rule 612(2) could easily co-exist with this regime, and that a revision to Rule 26(a)(2) could be pursued without a glance at Rule 612. Given the actual circumstances before 1993, however, it may be unwise to assume that it will. A Committee Note to an amendment to Rule 26(a)(2)(B) could presumably recognize these issues, but it is not at all clear that it could do much about the interpretation to be given to an Evidence Rule.

(b) <u>Changing from "considered by" to "relied upon"</u>

Rule 26. Duty to Disclose:
General Provision Governing Discovery

(a) Required Disclosures

* * *

(2) ***Disclosure of Expert Testimony***

* * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the

party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information ~~considered by~~ the witness relied upon in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

This change would narrow considerably the intrusion called for under the current rule. As discussed in the agenda materials for the Advisory Committee's September meeting, it also would introduce possible game-playing on what an expert relied upon, which was seemingly on the mind of the Advisory Committee in 1991 when it selected "considered by." Whether this narrowing of the standard would make unnecessary the sorts of changes mentioned in subsection (a) could be debated. If the expert witness says that she relied upon work product materials, should those nonetheless be exempt from disclosure? Should they at least be exempt from disclosure when they constitute core work product, or is that the time when the argument for disclosure is strongest?

(c) Severing the connection between "waiver" and the report requirement

The early consideration of the exemption from the report

requirement for regular employees who will give expert testimony raised a point that may not have been considered in 1991. For whatever reason, the opportunity to obtain disclosure (and perhaps discovery) regarding what was "considered by" the expert witness was tied to the report requirement. An interesting question is whether that link has been faithfully adhered to. Presumably deposition questions of an expert who has prepared a report could inquire into what the expert considered as a way of probing the sufficiency of the report. When an expert is deposed who did not have to prepare a report, do lawyers similarly inquire into what the expert considered in reaching her opinion? Is that inquiry viewed as controlled by the provisions of Rule 26(a)(2)(B)?

To the extent that the Rule 26(b)(2)(B) provisions are taken to govern depositions of expert witnesses who don't have to prepare reports, the proposed ways of dealing with these issues in subsection (a) above may be sufficient. Indeed, Alternative 4 in subsection (a) tries to link the disclosure provision to formal discovery by proclaiming that neither discovery nor disclosure may be had of communications between the lawyer and the expert. But if there is to be a new protection for that interaction, it may be worthwhile considering a provision in Rule 26(b)(4), where it might more logically belong.

Rule 26. Duty to Disclose:
General Provision Governing Discovery

* * *

(b) Discovery Scope and Limits.

* * *

(3) *Trial Preparation; Experts.*

* * *

<u>(D)</u> *<u>Discovery or disclosure regarding communications</u>*

> *between counsel and an expert witness.* A party may obtain discovery or disclosure regarding communications between a person who has been identified as an expert whose opinions may be presented at trial and retaining counsel only if such disclosure or discovery is warranted by the standards of [Rule 26(b)(3)(A)(ii)] {Rule 26(b)(4)(B)(ii)}.

If one wants to create effective protection for communications between testifying experts and counsel, this may be the more direct way of doing so. But creating a new "privilege" is strong medicine, and perhaps another reason for interacting with the Evidence Rules Committee. Because we are discussing a requirement that originated in the Civil Rules in 1993, adjusting it in Rule 26(a)(2) should not produce friction (except, perhaps, due to the Evidence Rule 612(2) issue discussed above), but announcing a more pervasive change like the one suggested for Rule 26(b)(4) could raise different issues. For example, should a similar shield apply to expert witnesses retained to testify in criminal cases? The Advisory Committee has not given any attention to these sorts of concerns, and it is not clear that they would be a fruitful topic of discussion on Jan. 13. But it would be useful to talk then about whether something like this approach would be desirable enough to justify addressing these other issues.

(2) Draft expert reports

It may be that draft expert reports could be folded into some of the amendment proposals included in section (1) above. The New Jersey approach regards them as covered by its protection of communications and the "collaborative process" between counsel and the expert witness "including all preliminary or draft reports produced during this process." But preliminary or draft reports might be produced by the expert witness all by herself, so it is not clear that they are only a part of the collaboration. And whether or not an amendment is pursued to insulate the communication between the expert witness and the lawyer, there may be considerable grounds for insulating against the quest for all variations in the expert's report as it evolved toward its final state (conceivably without significant involvement of the lawyer, at least if a protection like this one is adopted). Accordingly, the topic has been broken out for separate treatment, as the ABA's resolution seemed to propose.[6]

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[6] The Sedona Conference Working Group on the Role of Economics in Antitrust includes in its February, 2006, proposal Principle II-5: "The process by which an economic opinion is reached can and should be shielded from discovery."

This Comment on this proposal proceeds from the assumption that "[c]urrently each draft of the testifying expert's report and the expert's notes are required to be disclosed. This obligation contrasts markedly with an attorney's review of a claim, where the work product doctrine applies to provide a zone of privacy to the process of reviewing the facts and law relating to the claim. An economist, on the other hand, arguably has no zone of privacy for the process of reviewing the facts and economics relating to the claim."

The Comment urges that discovery of these materials is counterproductive:

> When drafts are discoverable, parties may engage in non-productive strategic behavior because drafts allow adversaries to argue that any differences illustrate that the final expert opinion is faulty, false, or the result of undue attorney influence. Disclosure of drafts fosters

Rule 26. Duty to Disclose:
General Provision Governing Discovery

(a) Required Disclosures

* * *

(2) *~~Disclosure of~~ Expert Testimony*

* * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written final report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. Disclosure or discovery of any preliminary or draft report prepared by the witness may be ordered only if such disclosure or discovery is warranted by the standards of [Rule 26(b)(3)(A)(ii)] {Rule 26(b)(4)(B)(ii)}. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by

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unproductive depositions focused on immaterial details. Economists can lessen this strategic behavior by lessening their interaction with others who review the factual or legal issues, with the effect of distancing the economic analysis from the other analyses of the claim. Lawyers can retain non-testifying economists to combine the economic and legal review, without giving rise to disclosure obligations. Testifying economists learn not to keep drafts or not to take notes, even if taking notes or keeping drafts would improve the economic analysis. Testifying economists sometimes rely on others to draft their report and to combine the economic analysis with the factual analysis.

Parties and the court can and should foster improved economic analysis by avoiding the averse consequences of disclosure of drafts. Not allowing discovery of drafts will permit the expert to develop opinions, without worrying about defending each written word and each idea considered in the course of the work.

the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

The policy questions about whether to prohibit (or at least to significantly limit) disclosure or discovery of draft reports should be the principal focus of the Jan. 13 discussion of this topic, rather than the rulemaking methodology for accomplishing that purpose. But the choice between the less-rigorous standard for discovery provided in Rule 26(b)(3) and the very demanding "exceptional circumstances" standard of Rule 26(b)(4)(B) here might be important, for it bears on the wisdom of insulating communications between the lawyer and the expert from discovery. How does one obtain information needed to make the showing that would justify discovery? Consider the hypothetical possibility that the lawyer actually wrote the report and told the expert to sign it, or rewrote the expert's "draft" to change it entirely. Perhaps there is no absolute solution to these issues, but they seem pertinent to the question whether (and how) to proceed down this line.

There has been at least one case presenting a variant of this sort of problem, decided in federal court in New Jersey before Rule 26(a)(2) was adopted in 1993. In Occulto v. Amadar of New Jersey, Inc., 125 F.R.D. 611 (D.N.J. 1989), a personal injury action, one of plaintiff's medical experts produced his

entire file, which included a draft report that was verbatim the same as the report the expert officially submitted, but without the doctor's letterhead and bearing the following notation on top: "Please have retyped on your own stationery. Thank you." It appears that counsel for plaintiff did not screen the materials in the file before they were turned over to defendant during the deposition. When defendant sought to probe into this matter, plaintiff's lawyer falsely denied drafting the report, but later a work product objection was raised. The court held that although the document was work product there was a sufficient justification for discovery, in part because the document had already been disclosed. Judge Simandle noted that "this same result would not obtain for tactics or advice contained in a letter from counsel to the expert," (id. at 616), but found the circumstances remarkable (id. at 615-16):

> One searches in vain for precedent discussing the situation where an attorney has completely drafted the expert's opinion letter, to which the expert then signed his name, and denied doing so upon the record of the expert's deposition. Notwithstanding [plaintiff counsel's] allegation that this is his normal practice, I have not become aware of another case in which the attorney has done so in a verbatim self-addressed expert report.
>
> A party receiving an adversary's expert's signed report has a right to rely upon the document for what it purports to be -- the expert's considered analysis of facts and statement of opinions applying the expert's special education, training, and experience. Experts participate in a case because, ultimately, the trier of fact will be assisted by their opinions, pursuant to Rule 702, Fed.R.Ev. They do not participate as the alter-ego for the attorney who will be trying the case.

One hopes that this example is extraordinary, and therefore not the stuff to justify rulemaking. But it raises the question whether such conduct is more common, and whether this possibility cuts against insulating against production of draft reports. In this New Jersey case, the Rule 26(b)(3) standard was found to permit discovery, but that conclusion seems to have been reached only because of the coincidence that the doctor produced the directive from the lawyer in his file. If such directives are more common, the might include an additional instruction -- "Discard this after you have prepared your report."

That possibility offers a segue to another issue that has arisen. The ABA report points out that some courts require that all draft expert reports be retained. Unless there is never a circumstance in which the court can order production, it would seem that preservation may sometimes be in order to ensure that the court can make the determination whether to order discovery. This preservation question somewhat resembles an issue that arose in connection with the recent public comment on the E-Discovery amendments. Those amendments excuse production from sources that are not reasonably accessible, and also include a protection against sanctions for loss of electronically stored information in some circumstances. A number of witnesses in the hearings on those amendment proposals assumed that these two were linked, and that the provision excusing initial production of inaccessible information meant also that there was no limitation on discarding it. In reaction to that possible argument, Committee Note passages were added at two points noting that the two points are not the same; indeed, if the court has authority to order production of "inaccessible" electronically stored information, it is hard to understand why the rules would approve of defeating the exercise of that authority by a party who discards the information. So here, it might be a good idea to include something in a Committee Note saying that the question whether to retain draft reports must be considered separately from the

question whether they are initially subject to discovery.

(3) <u>Treating physicians</u>

This section introduces an issue that relates in some ways to the question of the regular employee currently exempted from preparing a report (covered in section (4) below). It must be stressed at the outset that the Discovery Subcommittee has to date spent less time and energy on the issues covered in this section than on the other topics covered in this memorandum. As a result, the caution that the Jan. 13 discussion is entirely preliminary applies with special force to this topic. In the same vein, the discussion of this topic on Jan. 13 can be especially useful because it involves issues the Subcommittee has not extensively discussed before.

The treating physician problem is linked to the regular employee issue because they are both currently shielded under the same exemption in current Rule 26(a)(2)(B) -- the limitation of the report requirement to those "specially employed to provide expert testimony in the case." In section (4), a possible amendment to close that exemption is presented. That amendment possibility makes no change with regard to treating physicians or anyone but regular employees of a party. The Committee Note accompanying Rule 26(a)(2)(B) in 1993 tried to emphasize that treating physicians should not have to prepare reports. A separate problem is whether they have to be identified as testifying experts. They are prime examples of something discussed in somewhat more detail in section (4) below -- actor and viewer witnesses who bring special expertise to bear on their observations that may matter a lot to the resolution of the lawsuit -- so there may be an argument for saying that they usually should be identified under Rule 26(a)(2)(A). But at the same time, it is difficult to believe that when their depositions are taken they are not questioned about diagnosis, prognosis and the like. If that's correct, it would seem that all their opinions would might well be fully explored well before the time

for expert witness identification arrives unless additional opinions are developed shortly before trial at the behest of counsel. Is it really true that treating doctors are routinely identified under Rule 26(a)(2)(A)?

The report requirement of Rule 26(a)(2)(B) seems a greater sticking point. The abiding problem is that it is not true that treating physicians are exempted from the report requirement with regard to <u>everything</u> they say from the witness stand. If, in return for payment from counsel, they develop extensive additional analysis solely for purposes of trial, it would seem that they should be identified under Rule 26(a)(2)(A) and probably should provide a report -- just like any other testifying experts -- about that trial-preparation work on which they intend to base their testimony.

Some have found the current rule and Committee Note insufficient to deal with the issues presented by treating physicians. It may be useful to provide a significant portion of the court's explanation of these difficulties from Kirkham v. Societe Air France, 236 F.R.D. 9, 10-11 (D.D.C. 2006):

> The 1993 advisory committee note to Rule 26 reiterates that the requirement of a written expert report "applies only to those experts who are retained or specially employed" to provide expert testimony, and concludes that "a treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report." The advisory committee note recognizes the common sense proposition that a treating physician has a relationship with the patient that is typically separate from the case, based on his care and treatment of the patient, and thus he should not be deemed "retained" solely on that relationship. It also recognizes that a treating physician will, like a fact witness, have personal knowledge based on his care and

treatment, and to the extent fact testimony is being provided, it should not be subject to the requirement of a written report.

Although the language of the rule and the advisory committee note would, at first glance, appear straightforward, the application of the written report requirement to treating physicians who provide expert testimony is unclear because, in practice, the testimony of treating physicians often departs from its traditional scope -- the physician's personal observations, diagnosis, and treatment of a plaintiff -- and addresses causation and predictions about the permanency of a plaintiff's injuries, matters that cross the line into classic expert testimony. Thus, there are widely divergent views within the federal courts on whether a treating physician providing expert testimony is required to provide an expert report in advance of testifying under Rule 26(a)(2)(B).

The primary area of disagreement among the decisions cited above is whether a treating physician may offer opinion testimony on causation, prognosis, and permanency, even if she bases her opinions solely on the information she obtained from her treatment of plaintiff (and her own expert training).

The judge opined that the "majority" view is that opinions on causation and prognosis are encompassed within the ordinary care of the patient, but that there is a minority view saying that opinions about causation (particularly as pertinent to legal liability) go beyond the provision of medical services. See id. at 11, n.3; compare Fed. R. Evid. 803(4) (limiting the hearsay exception for statements for purposes of medical treatment or diagnosis to those "reasonably pertinent to diagnosis or treatment"). To resolve the issues in that case, the judge

directed that the plaintiff provide more information.[7]

The Advisory Committee has not spent significant time addressing these issues, except to recognize that they exist. There may be a serious question about what the dividing line between treating physician testimony exempt from the report requirement and that which triggers the requirement should be in individual cases. If we could provide guidance on that point, it would seem helpful. But even if a correct determination of the handling of individual cases can be agreed upon in some general way, it may be difficult to devise rule language that would improve on what is in the current rule -- "retained or specially employed to provide expert testimony in the case." Some possibilities that come to mind are:

> A treating physician must provide a report with regard to any facts or opinions developed in anticipation of litigation or for the trial of the action.
>
> A treating physician must provide a report with regard to any facts or opinions developed in response to a request

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[7] The judge directed that plaintiff provide information in response to the following questions with regard to each doctor (id. at 13):

> Is he receiving compensation, or does he expect to receive compensation, for time spent preparing for testimony and/or providing testimony?
>
> When did he commence treatment of plaintiff?
>
> Has he prepared an opinion at the request of counsel or in connection with the litigation?
>
> Did he review the medical records of another care provider or information supplied by counsel in order to prepare this opinion?
>
> Is his opinion based solely on information learned from his actual treatment and care of plaintiff?

from [retaining][8] counsel.

A treating physician need not provide a report unless the physician has [developed facts or opinions in anticipation of litigation or for the trial of the action] {developed any facts or opinions in response to a request from [retaining] counsel}.

Alternatively or additionally, it might be desirable to amplify the disclosure requirements with regard to treating physicians by amending Rule 26(a)(2)(A):

Rule 26. Duty to Disclose:
General Provision Governing Discovery

(a) Required Disclosures

* * *

(2) ***Disclosure of Expert Testimony***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. <u>For a treating physician, this disclosure must include a statement whether the physician has developed any facts or opinions [in anticipation of litigation or for the trial of the action] {in response to a request from [retaining] counsel}.</u>

This approach may be overkill. But it might be desirable to state clearly that a treating physician ordinarily should be identified under Rule 26(a)(2)(A). We have heard that the

[8] Would this word be useful? It's designed to make it clear that this requirement would not apply were opposing counsel to ask the doctor to make diagnostic or prognostic observations. But presumably that would occur in a deposition, and the diagnostic or prognostic observations of the witness would be immediately "disclosed."

failure to make such a designation has on occasion caused problems. Would an amendment to make this point clearly be worthwhile? Is there really any question that these witnesses will draw on expertise for part of their testimony? Beyond that, this approach could elicit the sort of details one would like to have to determine whether a report should be required; perhaps the failure of the other side to demand one in light of what's disclosed would suffice to foreclose objection to later testimony about the subjects disclosed, and excluding testimony that was developed for litigation rather than for treatment would seem much easier to justify than would be the case if, under the current rule, the problem simply arises at (or just before) trial with regard to expert insights that flow from the treatment relationship.

As the tentative nature of the introduction to this section of the memorandum tries to emphasize, this is a topic to which the Advisory Committee has not yet given substantial attention. Accordingly, the discussion above is intended solely as a stimulus for discussion, and not as a suggestion that any amendment to deal with treating physicians would be desirable.

At the same time, it is worth noting that -- either with or without such an amendment to address treating physicians in the text of the rule -- it is likely that some observations about treating physician testimony could be made in a Committee Note addressing an amendment along the lines sketched out in section (4) of this memorandum. The question then, however, would be what such a discussion should say, and whether it would be sufficient to put the point in a Committee Note.

(4) <u>Eliminating the exemption from the report requirement for regular employees</u>

Rule 26. Duty to Disclose: General Provision Governing Discovery

(a) Required Disclosures

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(2) *Disclosure of Expert Testimony*

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(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report -- prepared and signed by the witness -- if the witness is <u>a party's employee or has been</u> ~~one~~ retained or specially employed to provide expert testimony in the case ~~or one whose duties as the party's employee regularly involve giving expert testimony~~. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Possible Committee Note[9]

Rule 26(a)(2) is amended to remove the exemption from preparing a written report formerly provided for employees of a party whose duties do not regularly involve the giving of expert testimony. The Committee concluded that this exemption imposed unwarranted burdens on other parties, because they would not be able to use such reports to prepare to meet the testimony of these expert witnesses.[10] The exemption might even prompt parties to designate their own employees as expert witnesses in order to deny other parties the use of such a report in their trial preparation.[11] To the extent the exemption was justified because some experts -- such as treating physicians -- might resist providing written reports, that concern does not apply to a party's ordinary employees. Thus, the exemption threatened to undermine the basic purpose of the report requirement, as some courts recognized. See Minnesota Min. & Manuf. Co. v. Signtech USA, Ltd., 177 F.R.D. 459, 461 (D. Minn. 1998) ("This Court joins in finding that requiring testifying experts to submit written

[9] The fact this presentation treats this discussion as a possible Committee Note is not intended to suggest that this amendment proposal should go forward. There are significant questions about whether such a change would be desirable. Instead, the thought is that presenting the issues as a Committee Note could put the arguments for making the change, leaving participants in the Jan. 13 discussion to assess the factual premises and whether those arguments support making the change indicated.

[10] How serious is this deprivation? Before 1993, there was no written report requirement for any expert witnesses, and the only assured discovery was an interrogatory inquiring somewhat generally about the opinions that would be offered. After those interrogatory answers were provided, parties could seek a deposition by agreement or court order. Whether they were then much better off than those now taking the deposition of an employee expert who has not provided a report is not clear. Is it crucial that the party have a report before the deposition?

[11] Is this concern a significant one?

reports is entirely consistent with the spirit of Rule 26(a)(2)(B). It is not only likely that such reports will serve to streamline or even eliminate the necessity for deposition testimony, but they will undoubtedly serve to minimize the element of surprise."); Duluth Lighthouse for the Blind v. C.G. Bretting Manuf. Co., 199 F.R.D. 320, 325 (D. Minn. 2000) ("[I]t is undesirable for litigants to elude the automatic expert disclosure requirements by guise, contrivance, or artful dodging").

Although Rule 26(b)(4)(A) directs that the deposition of an expert rule may not occur until after the report is provided, that rule should not delay the deposition of an employee who is an actor or viewer witness. It may happen that an employee who was an actor or viewer has special expertise that permits him or her to interpret or explain these events in ways that ordinary witnesses would not be able or permitted to do. That explanatory information may be admissible as lay opinion under Fed. R. Evid. 701, but in some instances it would be admissible only under Fed. R. Evid. 702, and therefore subject to the provisions of Rule 26(a)(2). Counsel must be alert to the need to identify such persons as expert witnesses under Rule 26(b)(2)(A) at the time such designations are due even if they have already been identified as fact witnesses.[12] Rule 26(a)(2) ordinarily does not require that expert witnesses be identified until after other discovery has been undertaken, and the possibility that there might such a designation later should not delay the deposition of a witness concerning what he or she observed.[13] Similarly, if a

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[12] This admonition is included on the theory that it is desirable to make this point clear to lawyers. As noted below, it relates also to the question how the timing and multiple deposition problems should be handled with such witnesses.

[13] Is there any argument for trying to devise an amendment to Rule 26(b)(4)(A) to address this point? This issue seems straightforward enough since Rule 26(b)(4)(A) says that its

person whose deposition has been completed with regard to actor/viewer knowledge is later identified as an expert witness as well, it is expected that the parties will be flexible about resumption of the deposition of that person despite the provisions of Rule 30(a)(2)(A)(ii). If they are unable to reach agreement, the court can resolve the matter, considering among other things the extent to which the report provided under Rule 26(a)(2)(B) differs from or adds to what the witness already said in deposition.[14]

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timing postponement requirement applies only after a witness has been identified as an expert witness for trial, so something in a Committee Note to a Rule 26(a)(2) amendment could suffice to make the point that the postponement requirement does not bear on the timing of a deposition of a witness who might later be designated under Rule 26(a)(2)(A). It might also be a challenge to devise an amendment to Rule 26(b)(4)(A) that would be suitable. Presumably the delay problem could only arise if a party designated an actor/viewer witness as an expert witness before the actor/viewer deposition occurred. Should the deposition then go forward nonetheless as to actor/viewer topics, and before the report is prepared? If so, the interrogating lawyer might spend a lot of time trying to tie the witness down about opinions. If not, it could be that such a designation as an expert witness might be used as a delaying tactic to prevent the taking of the depositions of certain actors or viewers. But one would think that the need to prepare a report would deter such tactics to delay a deposition. Would it be desirable to amend Rule 26(b)(4)(A) to deal with these issues?

On the possibility of amending Rule 26(b)(4)(A), another consideration is that the rule does not explicitly authorize the court to direct that a deposition proceed after the witness is identified as an expert and before the report is provided, so an amendment could make it clear the court may do so. It seems doubtful, however, that a court would conclude that it is entirely powerless to deal with strategic behavior if it perceives that to be going on. Is there any reason to consider an amendment to Rule 26(b)(4)(A) for this reason?

[14] Should an amendment to Rule 30(a)(2)(A)(ii) be considered to address this problem? At first blush, it seems that amending Rule 30(a)(2) would be difficult because there would be no overarching rule on when resumption of the deposition is warranted. The range of circumstances is potentially quite large. In some instances, the Rule 26(a)(2)(A) designation may be a protective measure to foreclose any argument that certain

[The above discussion does not address a serious concern that has arisen in connection with consideration of this possible amendment -- the expanded importance of the "waiver" provisions of Rule 26(a)(2)(B) regarding any material "considered by" the expert witness in reaching the opinions in question. That concern is addressed in section (1) of this memorandum. If an amendment like the ones discussed in section (1) were made, the Committee Note regarding the amendment proposed in this section could mention that this potential problem should be solved by the section (1) amendment. This point would be particularly pertinent if an amendment addressing the waiver topic were to decouple the report requirement and the waiver consequence. The question for discussion on Jan. 13 is, in part, whether the amendment proposed in this section is generally attractive but should be shelved unless the problem addressed in section (1) can be solved be some appropriate amendment.]

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testimony should be excluded because it can only come in under Rule 702 and might be excluded under Rule 37(c)(1) if the witness were not identified. It may be that the testimony is exactly what the witness said during the deposition. Insisting on a second deposition in such a case would be unwarranted. On the other hand, it may be that the witness's deposition testimony has nothing to do with the expert testimony. For example, if a high-ranking engineer for GM saw a car crash and was deposed about what she saw in the resulting suit against GM, that might have nothing to do with her later proposed expert testimony about why the steering design was proper. It would be very difficult for rule language to be helpful on such matters.

RESOLUTION

Resolved that the American Bar Association recommends that consistent rules should be established throughout the federal and state courts to govern the scope of required disclosures or discovery of testifying experts and their reports.

Further resolved that the American Bar Association recommends that applicable federal and state rules and statutes governing civil procedure be amended or adopted to protect from discovery draft expert reports and attorney-expert communications relating to an expert's report, as follows:

(i) an expert's draft reports should not be required to be produced to an opposing party;

(ii) communications, including notes reflecting communications, between an expert and the attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;

(iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

Further resolved that the American Bar Association recommends that, until federal and state rule and statutory amendments are adopted, counsel should enter stipulations protecting from discovery draft expert reports and communications between attorney and expert relating to an expert's report.

REPORT OF THE FEDERAL PRACTICE TASK FORCE

FEDERAL AND STATE RULES OF PROCEDURE SHOULD BE AMENDED OR ADOPTED SO THAT DRAFT EXPERT REPORTS AND COMMUNICATIONS BETWEEN AN ATTORNEY AND AN EXPERT REGARDING THE EXPERT'S REPORT ARE PROTECTED AS ATTORNEY WORK PRODUCT AND NOT DISCOVERABLE

Introduction

The law in the federal courts and in state courts on expert witness discovery is both uncertain and varied. Many federal courts require the production of all draft reports, the expert's handwritten notes and all attorney-expert communications. A few judges issue early case management orders to require the preservation of all expert drafts and other work product materials to counter the practice of experts who avoid generating draft reports or discard them in the ordinary course.

Other federal courts and judges continue to hold that these drafts and communications are attorney work product and are not discoverable. Other judges have individual "local local" rules with different requirements. The practice among the states also varies considerably, even in those states that ordinarily adopt federal procedural rules as the norm.

This uncertainty has produced practices that, among other things, (1) impede the collaborative process between attorney and testifying expert, (2) make litigation considerably more expensive, (3) impose unnecessary burdens on preparing expert reports and (4) provide a distinct advantage to the well-heeled litigant. The uncertainty and varied requirements among different courts are themselves problematic.

This uncertainty stems from the 1993 amendment to Fed. R. Civ. P. 26(a)(2), (and state analogues), that expanded expert discovery from the materials *relied on* by an expert to any "data or other information" *considered* by an expert in forming his or her opinion. Some courts have

defined "other information considered" to include not only facts or data provided to the expert, but also all draft expert reports and all attorney communications with the expert. Others continue to protect this information as attorney work product under Rule 26(b)(3).

We believe counsel and experts should be subject to consistent rules and court expectations around the country. This will minimize unnecessary expense and properly focus discovery on the soundness of the expert's opinion by itself, rather than on the preliminary mental thought processes and experimentation that led up to it.

We therefore recommend that federal and state rules be adopted or amended, consistent with American Bar Association policy, to protect from discovery draft expert reports and attorney-expert communications that are an integral part of the collaborative process in preparing an expert's report. Although this might bar opposing counsel from inquiring into an expert's preliminary thought processes, we believe that the adverse consequences of allowing inquiry into these issues significantly outweigh their benefits. Nothing in our proposed formulation would preclude counsel from fully exploring the bases for the expert's opinions, including whether the expert considered alternative approaches and views, just as counsel did before the 1993 amendments were adopted.

Background

Fed. R. Civ. P. 26(a)(2) was amended in 1993 to require a party to provide the other parties with a written report from "a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony."

Rule 26(a)(2) was also amended to require that the expert's report disclose not only data or facts *relied on* by the expert in formulating his or her opinion, but also that the report contain

"the data or other information *considered by* the witness in forming the opinions" given in the report (emphasis added).

This change was intended to require experts to disclose the data and facts they had available to them for "consideration," not merely those that they ultimately believe they "relied on."

As the 1993 Advisory Committee Note states:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts and summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

But at the same time, the 1993 Advisory Committee Note also recognizes counsel will normally need to assist experts in preparing their reports:

> Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

Given the language in Rule 26(a)(2)(B) that the report must "disclose the data and other information considered by the expert," most federal courts and the more recent decisions have held that even attorney trial strategy, mental impressions and other traditional work product, if turned over to a testifying expert, should be produced.

A minority of federal courts have held that this language was not intended to trump the work product protections of Rule 26(b)(3).

As a practical matter, the proviso in the Note that "Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports" has become illusory and offers no protection. Anything the expert looks at or hears, including an attorney's input, is

deemed to have been "considered by the expert" and has become fair game for discovery by the other side. This includes (i) any communications (e-mail, notes of phone conversations, etc.) between counsel and the expert, (ii) counsel's review of spread sheets or other preliminary or tentative calculations and (iii) preliminary drafts that may have been exchanged between them.

The result, whether intended or not, has been to make virtually every case where an expert is retained both (a) more cumbersome and (b) more expensive. In many cases, particularly ones involving significant dollars or issues, it has also required counsel to retain two sets of experts. The first set are "consulting" experts with whom counsel can freely explore his or her theories of the case or the evidence – without fear that this traditional "work product" will have to be disclosed to the other side. The second set of experts are "testifying" experts whose thought processes are not "tainted" with the input of trial counsel's thoughts and strategies.

Even this expensive practice does not solve the problem. The "testifying" expert still has to communicate with counsel and, except in rare cases, has to prepare a draft that will (and properly should) reflect both the expert's and counsel's mental processes – bringing the issue back to square one.

Where only "testifying" experts are retained, the rule has had other unwarranted consequences. Some courts or judges require that experts preserve all drafts (as well as e-mails and other communications with counsel) and make them available to the other side – because they constitute "information considered by the expert." Carried to its logical conclusion, every keystroke an expert enters into his or her report could arguably be made available to the opposing party because it was considered in arriving at the expert's final views.

The wary testifying expert thinks long and hard about what he or she puts down on "electronic" paper. It is difficult to try out different theories or calculations when the expert (and

counsel) knows that they are going to be fair game for the opposing side to use in attempting to discredit or challenge the expert's testimony.

The draft of a "report" is an iterative process by which the expert's analysis is refined, often with false starts. What should matter in litigation is not how the expert arrived at his or her final conclusion, but whether that conclusion holds water and can stand scrutiny tested on its merits.

It has therefore now become common practice for an expert to try to avoid having to keep and then produce information "considered" in arriving at a final opinion.

Experts typically commit to the computer only an unsaved draft, and then to have counsel come to the expert's office (or bring a laptop to counsel's office) so they both can work on the opinion and have it appear as the first – and only – report that is then produced to the other side. The result is that an expert may not realistically have an opportunity to test his or her views before being required to share them with counsel who retained the expert, much less before being required to produce his or her "initial" draft to the other side for scrutiny.

This is not simply a "large case" problem. Nor is it an issue that affects only defendants or plaintiffs. It directly impacts every case in which an expert is being used. It is also a problem on two levels.

First, it places artificial restrictions on both (i) the relationship between counsel and the expert and (ii) their collaborative search for not only the most persuasive view of the issue, but also the expert's ability to fashion an opinion that has a solid empirical basis.

Second, it pushes lawyers and experts alike toward intellectual dishonesty both in the process used to arrive at an opinion and the ultimate opinion itself.

We are aware of no evidence, empirical or otherwise, that suggests that the requirement to produce drafts, to the extent they exist, provides a better method for presenting and assessing an expert's trial testimony. There are significant countervailing reasons why it should be changed.

Proposed Rule Provisions

Consistent rules should therefore be established throughout the federal and state courts to govern the scope of required disclosures or discovery of experts and expert reports.

In particular, applicable federal and state rules and statutes governing civil procedure should be amended or adopted to protect from discovery draft expert reports and attorney-expert communications relating to an expert's report so that:

> (i) an expert's draft reports should not be required to be produced to an opposing party;
>
> (ii) communications, including notes reflecting communications, between an expert and attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;
>
> (iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

Until federal and state rule and statutory amendments are adopted, and consistent with the policy expressed in the Association's Civil Discovery Standards (August 2004), counsel should enter stipulations protecting from discovery draft expert reports and communications between attorney and expert relating to an expert's report.

American Bar Association Policy

In August 1999, the American Bar Association's House of Delegates adopted the Association's Civil Discovery Standards. The Standards recognize a need to protect

communications between counsel and their testifying experts that convey the attorney's trial strategy or constitute strategic litigation planning.

Civil Discovery Standard 21 provides in pertinent part:

e. **No Waiver of Attorney Work Product. The provision in section 21(b)(iii) above that an expert's report describe "the data or information the expert is relying on in formulating [his or her] opinion" does not require the disclosure of communications that would reveal an attorney's mental impressions, opinions or trial strategy protected under the attorney work product doctrine. The report should disclose, however, any data or information, including that coming from counsel, that the expert is relying on in forming his or her opinion. In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.**

The Comment to this Standard explains that

> Subsection (e). Other than court-appointed experts, which *are sui generis, an* expert *is* retained to provide testimony to assist one side in the case. The expert is entitled to have the benefit of the theories, however tentative or preliminary they may be, of the counsel that has retained the expert. Experts logically come within the "zone of privacy for strategic litigation planning" that is the rationale for the attorney work product doctrine. *See United States v. Adlman,* 68 F.3d 1495, 1501 (2d Cir. 1995) (construing Fed. R. Civ. P. 26(b)(3) in an unrelated context). Counsel should be able to explore counsel's theories or ideas about the litigation with an expert without the worry that the discussion is tantamount to disclosure to the other side.
>
> At least in federal practice, however, there is a split of authority as to whether communications to an expert of an attorney's "core" or "opinion" work product are immune from disclosure after the 1993 amendments to Rule 26.
>
> For cases holding that all work product is now discoverable under Fed. R. Civ. P. 26(a)(2)(B), *see, e.g., Musselman v. Phillips,* 176 F.R.D. 194 (D. Md. 1997); *Bama v. United States,* No. 95 C 6552, 1997 U.S. Dist. LEXIS 10853 (N.D. Ill. July 23, 1997); *B.C.F. Oil Ref. v. Consolidated Edison Co.,* 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *Kam v. Ingersoll Rand,* 168 F.R.D. 633, 639-40 (N.D. Ind. 1996).
>
> For cases holding otherwise, *see, e.g., Magee v. Paul Revere Life Ins. Co.,* 172 F.R.D. 627, 642 (E.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.,* 162 F.R.D. 289 (W.D. Mich. 1995); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.,* 152 F.R.D. 634 (D. Kan. 1993); *see also* Gregory P. Joseph, *Emerging Expert issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil*

Procedure, 164 F.R.D. 97, 101-04 (1996) (collecting cases, and outlining reasons why the continuing recognition of protection for opinion work product is appropriate after recent amendments to Rule 26).

Particularly where an expert is acting as a consultant, the expert's report is likely to reflect counsel's mental processes and legal theories. The court may, however, assess whether there is "substantial need" for using the report to impeach the expert that would outweigh the policy of protecting work product. *National Steel Prods. Co. v. Superior Court*, 210 Cal. Rptr. 535, 543 (Ct. App. 1985).

An attorney's mental impressions, theories and strategies – archetypal "work product" – that have been conveyed to an expert should not have to be disclosed if the expert is not relying on them in his or her testimony. The ability to have untrammeled access to the process by which an expert has formulated his or her final opinion(s) in the case is outweighed by (1) the undesirability of placing substantial barriers to a full and free exchange of ideas and theories between counsel and the expert; (2) the fact that the expert has been retained to advise and assist one side in an adversary trial system; (3) the added, unnecessary expense of having to retain two experts – one to testify and the other to consult – if a lawyer wants to maintain the confidentiality of his or her work product, and (4) the ability of counsel to obtain and cross-examine the expert on anything the expert is actually relying on in his or her opinion.

If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) ("It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed."). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Although a stipulation that there will be no waiver by sharing work product with an expert would probably protect the information in the particular case, there is no guarantee that it would protect it against nonparties in another setting. *E.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (the test is whether disclosure is done in a way that "substantially increases the likelihood that the work product will fail into the hands of the adversary").

Other parts of the Civil Discovery Standards were amended by the House of Delegates in August 2004, but Standard 21 remains in the 2004 version unchanged from its 1999 text.

Why Federal and State Rules Should Be Amended

There are seven basic reasons why federal and state rules should be amended or adopted to protect draft expert reports and attorney-expert communications in preparing an expert's report.

First, the policy underlying the work-product doctrine is that counsel should be free to explore different theories and options in preparing his or her case. This is archetypal work product – a lawyer's mental impressions – and a rule requiring their disclosure makes it difficult for counsel to strategize, theorize and develop the client's case and the expert's testimony to support it.

Second, the current version of the rule hampers an expert's ability to arrive at a carefully considered opinion by testing different hypotheses, permutations and calculations.

Third, there is no evidence, empirical or otherwise, that we are aware of that disclosure of preliminary analyses and attorney-expert communications improves the quality of justice.

Fourth, because of the uncertainty attached to the discoverability of drafts and the expert's mental processes – and the now-universal ability to track editorial changes in a word processing program – lawyers and experts typically avoid "creating tracks" or producing discoverable drafts and attorney-expert communications that the opposing side can use in attacking the report.

Fifth, a disclosure requirement imposes unnecessary costs on the litigation process and advantages the well-heeled litigant who can afford two experts. It therefore runs contrary to the cardinal principle of Fed. R. Civ. P. 1 – "to secure the just, speedy, and inexpensive determination of every action" – and similar state provisions.

Sixth (and consistent with established American Bar Association policy in the Civil Discovery Standards), experienced counsel are simply stipulating around the current version of the rule by agreeing to exempt their case from the requirements to produce draft reports and attorney-expert communications.

Seventh, some states have either not adopted the federal rule or are now adopting rules that depart from it and keep preliminary drafts and attorney-expert communications from being discoverable. The practice in federal courts also varies considerably from court to court and judge to judge. A rule of discovery and disclosure should be consistent around the country so that litigants, counsel and experts know what the ground rules are, regardless of what court they are in or which judge they are before.

A. Public Policy Favors Encouraging a Collaborative Effort Between Expert and Attorney and a Disclosure Rule Hinders that Effort

Uncertainty in the legal requirement for discovery of draft expert reports and attorney-expert communications that reveal an attorney's mental impressions and trial strategy hinders the collaborative effort between attorney and testifying expert.

Rule 26 was amended in 1993 to require experts retained or specially employed to give expert testimony to submit written reports to the opposing side as a matter of course. The written report was never intended as a substitute for testimony at trial. Its sole purpose is to give the other fair side notice of the expected testimony. This allows counsel to decide whether (a) he or she wants to take the expert's deposition (or simply cross-examine at trial) or (b) he or she needs to retain his own expert, either to challenge the validity of the other side's expert's opinion or to offer another one.

Rule 26, both before and after the 1993 amendment, continued to protect an attorney's work product, including legal theories, mental impressions and strategies disclosed to the attorney's consultants and other agents. Fed. R. Civ. P. 26(b)(3) provides that:

> [s]ubject to the provisions of subdivision (b)(4) of this rule [which deals with expert depositions, discovery of the opinions of non-testifying experts, and cost shifting], a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, *consultant*, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. (Emphasis added.)

These provisions incorporate the work product doctrine articulated in *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981). They recognize the special protection given to counsel's mental impressions ("core" work product) and that work product is not limited to counsel (material can be prepared by or for a "party's representative").

In *Nexxus Producs. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999), the defendant moved to compel the production of documents the other side's experts had relied on, including materials related to "exclusively draft versions of the expert reports." After discussing the split among courts and commentators, *id.* at 8-9, the court denied the motion to compel, relying in large part on Advisory Committee Notes to the 1993 amendment that the Rule "does not preclude counsel from providing assistance to experts in preparing the report, and indeed, . . . this assistance may be needed." *Id.* at 8, 10. The court also relied on *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-95 (W.D. Mich. 1994) ("For the high privilege accorded

attorney opinion work product not to apply would require clear and unambiguous language in a statute").[1]

6 Moore's Federal Practice, § 26.80[1][a] (2005) takes this view, stating that "nothing in the advisory committee notes to the 1993 amendments . . . suggests that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product [in *Upjohn*]. Moore's also notes that "the *Haworth* rule has 'three additional benefits: (1) it does not favor wealthy parties who can afford to hire both testifying and non–testifying experts, (2) it discourages the use of strained hypotheticals between expert and counsel in order to avoid disclosure, and (3) it avoids a potential conflict with the Rules Enabling Act by not abolishing or modifying an arguably evidentiary privilege.'" *Id.*

As a practical matter, many federal courts require the disclosure of anything an expert "considers" – including the input of counsel.[2] In these courts, counsel would have to be very

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[1] *See also Kennedy v. Baptist Memorial Hospital-Boonville, Inc.*, 179 F.R.D. 520 (N.D. Mi 1998) (protecting as work product attorney-expert communications before first expert report but permitting discovery of such communications after report's amendment); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984) (pre-1993 case protecting attorney work product) ("Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory." 738 F.2d at 595); *Magree v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642-643 (E.D.N.Y. 1997); *All West Pet Supply Co. v. Hill's Pet Prod.*, 152 F.R.D. 634, 638 (D. Kan. 1993).

[2] *See, e.g., In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) ("the Federal Rules of Civil Procedure make clear that documents and information disclosed to an expert in connection with his testimony are discoverable by the opposing party"); *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 29 (W.D.N.Y. 2002) ("the overwhelming majority of district courts in this Circuit as well as in other jurisdictions have concurred" that "Rule 26(a)(2)(b) requires a party to disclose core work product, or other privileged or protected material supplied by the party to its testifying expert"); *Aniero Concerte Co, Inc. v. New York City School Constr. Auth.*, No. 94CIV.9111CSHFM, 2002 WL 257685, at *3 (S.D.N.Y. Feb. 22, 2002) ("any documents 'that were provided to and reviewed by the expert,'" including core attorney work product found in counsel's letter to expert, were discoverable); *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 282 (E.D. Va. 2001) ("[a]ny information reviewed by an expert will be (footnote continued)

unwise to "provide assistance" to an expert, whether an auto mechanic or anyone else, because opposing counsel will use this discovery to try to show that the expert is really the other side's lawyer's mouthpiece. The idea that counsel can assist the mechanic in making his or her report comprehensible to the finder of fact, when that this assistance will become discoverable, is an illusion. The rule also makes it difficult for counsel to explore alternative theories with a testifying expert. This hurts the plaintiff in a car accident just as much as it hurts the defendant in a multi-million dollar antitrust case.

B. The Current Rule Hampers an Expert's Ability to Arrive at a Carefully Considered Opinion

The risk that drafts and attorney-expert communications will face discovery makes it very difficult for the expert to do the necessary independent thinking and testing to arrive at a considered opinion. One leading expert consulting firm has noted that "when there are rules setting forth what is discoverable, there is a good chance that the potentially discoverable material simply will not be created."

This creates at least four significant problems:

- Counsel may be hesitant in asking the expert to prepare analyses for settlement purposes.

subject to disclosure including drafts of reports sent from and to the testifying experts"); *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997) ("when an attorney communicates otherwise protected work product to an expert witness retained for the purposes of providing opinion testimony at trial – whether factual in nature or containing the attorney's opinions or impressions – that information is discoverable"); *Fidelity National Title Ins. Co. of N.Y. v. Intercounty National Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005) (requiring production of expert's notes even if he did not rely upon them); *Lacy v. K.L. Villenueve*, 2005 U.S. Dist. LEXIS 31639 (W.D. Wa. 2005) (requiring production of e-mail conversations between counsel and testifying expert); *Colindres v. Quietflex Mfg.*, 228 F.R.D. 567 (S.D. Tex. 2005) (requiring production of counsel-expert e-mails); *American Fidelity Assurance Co. v. Bayer*, 229 F.R.D. 520 (D.S.C. 2004); *Synthes Spine Co., L.P. v. Walden*, 2005 U.S. Dist. LEXIS 34974 (E.D. Pa. 2005); *In re Omeprazole Patent Litigation*, 2005 U.S. Dist. LEXIS 6112 (S.D.N.Y. 2005).

- Counsel may also be hesitant in asking the expert to prepare a critique of the opposing expert for fear that it would have to be disclosed in discovery and forewarn the other side of questions that might be asked in deposition or at trial.
- The expert will take pains to avoid creating anything that might be used to trap him or her or confuse the issues.
- Most important, counsel may be hesitant to explore alternative analyses with their experts for fear that, if disclosed, they could be used to cast doubt on the strength of the expert's convictions and the methodology ultimately used in the expert's report. Just as important, counsel, who have lived with their cases longer than the experts, may be more hesitant to focus the experts or their reports on the critical issues in the case for fear that this focusing will be perceived as "testifying" for the experts.

C. There Is No Evidence that Disclosure of Draft Reports and Attorney-Expert Communications Improves the Quality of Justice

Although counsel may have strong views based on their own practices or experiences, there is no empirical evidence of which we are aware that disclosure of draft expert reports and attorney-expert communications has improved the quality of justice, or that without that disclosure, counsel or the trier of fact has been hindered in the ability to test the merits of an expert's opinion.

Many attorneys, aware of court requirements to require disclosure of draft reports, routinely ask for their production. There is considerable disparity in the extent to which draft reports are produced. Drafts are often destroyed in the ordinary course and most rules do not forbid this practice. Drafts are usually available only from the unwary or the careless expert.

In jurisdictions where drafts are required to be produced, even if none exists, attorneys almost uniformly ask questions of experts in depositions about their preparation of drafts, their

retention of them and the extent to which counsel has had input in the preparation of the expert's report. This questioning almost always prolongs expert depositions, frequently with little corresponding benefit. The expert will ultimately be gauged by the strength of the opinion and the facts or data on which the expert relies, not on the extent to which the opinion was influenced by counsel or on the mechanics of the report preparation process.

In 2002 the State of New Jersey therefore changed its rule to protect from discovery draft expert reports and communications between expert and attorney that constitute the collaborative process in preparing the expert's report. After careful consideration, the subcommittee's report supporting the rule change found as follows:

> The subcommittee believes that the desirability of the retaining attorney and expert discussing the contents and format of an expert's report substantially outweighs the potential loss of information which might have been used to attack an expert's credibility and particularly his or her independence. After all, the value of an expert's opinion is based on the facts assessed and/or assumed and the reasoning process used to analyze them. Too much time is now spent on discovery with little benefit gained in examining the report preparation process. In the subcommittee's view, a bright line standard reflected in this safe harbor recommendation should simplify discovery, streamline judicial review and focus the cross-examination on the veracity of an expert's opinion rather than the attorney's role in the production of the final report.

Report of the Subcommittee of the Civil Practice Committee on The Discoverability of Experts' Draft Reports to the Supreme Court Civil Practice Committee (September 5, 2001).

To arrive at a considered opinion, experts should therefore be free to think about their analysis as broadly as possible without the artificial constraints placed on them by having to turn them over as part of discovery.

D. Seasoned Experts and Counsel Now Go to Great Lengths to Avoid Creating Discoverable Drafts and Communications

Although we have not conducted exhaustive research, it appears that it is standard operating procedure for experienced experts to go to great lengths to avoid creating a "trail" that would disclose how they arrived at their opinions or to reveal counsel's input.

One expert reported on his standard methodology. He never writes anything down that could be viewed as "even an appearance of opinion." He never prints a draft, and always takes care to overwrite or delete anything he is removing from the draft. If an attorney wants to review the draft, the expert takes his laptop to the attorney's office and they both make edits at the same time. He defragments his computer at least once a month using a Department of Defense quality "file scrubber" so there is no recoverable data other than well-organized files. Before preparing his actual expert report, he saves it in Rich Text Format, then defragments his hard disk, runs the file scrubber, and then defragments it again. He then prints the report in "pdf" format, deletes it from his hard disk, and repeats the defragment-scrub-defragment process.

Some may argue this procedure should not be viewed as within the spirit if not the letter of the requirement to disclose all drafts and other information considered by the witness in forming the opinions. And given modern computer forensics, it is not at all clear that it would succeed. But it does show the lengths to which the rule now drives experts in the preparation of their opinions.

A leading expert consulting firm has commented that the current version of the rule not only fosters the kind of clandestine environment described above, but cautious counsel will studiously avoid sending any "bad documents" to their testifying experts, even if they will not impact the experts' conclusions. This often results in the expert's not seeing certain documents until their deposition or when they testify at trial. As they put it, "surprising an expert with new

information serves no purpose for the court, if the expert could have taken account of that information when forming the opinions."

The same firm noted that "experts make a habit and a virtue of not taking notes during meetings or conference calls. This means that the expert's final opinions will be based on their recollection of information . . . rather than on notes or records." And "notes and summaries of materials reviewed are not prepared, even if [they] would assist the expert in more efficiently preparing for trial."

In the "old days" an expert would write or type a draft, consider it and revise it. Only when the expert was satisfied that it truly reflected his or her views would it be given to counsel. And counsel could then comment on it and make sure that it was based on accurate information. When both counsel and expert were satisfied, the report would then be put in final and given to the opposing side, who would be able to probe its strength and weaknesses based on what the expert was relying on to support it.

The advent of electronic discovery – with its ability to track not only the existence of a document, but every stroke of the word processor and an expert's every thought (at least if he or she commits it to the keyboard) – has dramatically changed the equation. Every iteration can now be viewed – literally – by the other side. Those who believe they have protected drafts, by overwriting them, may nevertheless have them disclosed by zealous adversaries willing to spend what may be needed in forensic experts. The written report, designed to give fair notice of testimony at trial, without a rule change, may become the focus of a trial within a trial – the trial of the expert's tentative thought processes leading to his expert conclusions.

E. The Requirement to Produce Draft Expert Reports and Attorney- Expert Communications Imposes Unnecessary Costs on the Litigation Process and Advantages the Well-Heeled Litigant Who Can Afford Two Experts

To avoid revealing counsel's and the expert's mental processes – *i.e.,* work product – well-heeled litigants frequently retain two sets of experts. One set is used to formulate the expert opinions, with the usual free exchange between counsel and the experts that is not discoverable. Once they have arrived at those opinions, counsel then has to retain another set of experts to testify. They are then carefully spoon fed only the "the data or other information considered by the witness in forming the opinions" within the meaning of Rule 26(a)(2)(B) to be used in the case.

This is expensive. It goes against the fundamental premise of the Federal Rules of Civil Procedure articulated in Rule 1: "to secure the just, speedy, and inexpensive determination of every action." *See also* Fed. R. Civ. P. 16(a)(3) ("discouraging wasteful pretrial activities"); 26(c) (authorizing a protective order to avoid "undue burden or expense").

Less well-heeled parties may not be able to afford the luxury of two experts and they risk greater exposure of discovery of their experts' drafts and attorney-expert communications. They also face greater risk of producing overlooked drafts that were inadvertently created and potentially embarrassing attorney-expert communications.

There are other transactional costs associated with requiring an expert to disclose everything he or she considered. Requests for electronic versions of expert's reports, including "meta-data" showing how the report evolved at each step, are now commonplace. The focus becomes not on the merit of the report but on the process by which the expert arrived at the final conclusions in the report. This, too, is not only time-consuming and expensive, but creates satellite litigation that serves no meaningful purpose in the overwhelming majority of cases.

F. Experienced Counsel Are Stipulating Around The Rule

As noted above, the ABA's Civil Discovery Standard 21 specifically provides that

> **. . . In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.**

And the Comment points out that

> If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) ("It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed."). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Even in jurisdictions where disclosure will likely be required, a growing number of experienced counsel are therefore stipulating at the start of the case to provisions that avoid these problems.

A typical stipulation provides that

> 3. The following categories of data, information, or documents need not be disclosed by any party, and are outside the scope of permissible discovery (including deposition questions):
>
> a. any notes or other writings taken or prepared by or for an expert witness in connection with this matter, including correspondence or memos to or from, and notes of conversations with, the expert's assistants and/or clerical or support staff, one or more other expert witnesses or non-testifying expert consultants, or one or more attorneys for the party offering the testimony of such expert witness, unless the expert witness is relying upon those notes or other writings in connection with the expert witness' opinions in this matter;
>
> b. draft reports, draft studies, or draft work papers; preliminary or intermediate calculations, computations or data runs; or other preliminary, intermediate or draft materials prepared by, for or at the direction of an expert witness;
>
> c. any oral or written communication between an expert witness and the expert's assistants and/or clerical support staff, one or more other expert witnesses or

non-testifying expert consultants, or one or more attorneys for the party offering the testimony of such expert witness, unless the expert witness is relying upon those notes or other writings in connection with the expert witness' opinions in this matter.

Instead of having to stipulate to these "opt out" provisions, this practice should be the rule.

G. *Consistent Practice in Both Federal and State Courts Calls for One Rule, Not Different Ones*

A basic policy underlying the ABA's Civil Discovery Standards is that best practices should be used throughout the American justice system.

It does no service to the system itself – or its users – to have separate rules for how experts prepare their reports, and what information they are required to keep and then disclose, to have inconsistent rules and practices.

States such as New Jersey, Massachusetts, Texas and others expressly exempt drafts and attorney-expert communications from disclosure or discovery. Although the weight of authority in the federal courts now seems to require this disclosure, there are still courts who hold that attorney-expert communications are protected work product.

Even in those federal districts where courts require disclosure, individual judges have different rules. Some require that experts and counsel retain – and then turn over – any and all drafts of whatever ilk and however preliminary they may be. Other judges may have a rule that protects drafts up until the expert turns one over to counsel. Still others protect the drafts until a report is turned over to the other side.

The result is uncertainty and does not materially advance the truth-finding process of litigation. As noted above, this uncertainty also fosters conduct that could be viewed as counterproductive and adding unnecessary cost to litigation.

Litigants, counsel and experts, as well as the public at large that relies on our justice system, deserve a consistent rule, for all cases – if not in both federal and state courts, then certainly in all federal courts.

Recommendations

A. *Federal and State Rules Should Be Amended or Adopted*

We therefore recommend that federal and state rules should be amended or adopted to make it clear that draft expert reports and attorney-expert communications other than the facts and data considered or relied upon by the expert should ordinarily be protected from discovery.

B. Counsel Should Enter Stipulations to Protect Draft Expert Reports and Their Collaborative Communications with their Experts

Until federal and state rules can be amended to make clear that draft expert reports and attorney-expert communications are protected from discovery, consistent with established ABA policy, counsel should stipulate that they will not seek this discovery from each other.

* * * * *

Jeffrey J. Greenbaum, Co-Chair
Loren Kieve, Co-Chair
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Honorable Joseph A. Greenaway, Jr., U.S.D.J.
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Members of the Federal Practice Task Force

The Honorable Nancy Friedman Atlas, U.S.D.J. and the Honorable Margaret M. Morrow, U.S.D.J., also members of the Task Force, abstain from this report.

21. **Written Reports From Each Testifying Expert.**

a. **When the Report Should Be Disclosed. At the same time a party discloses the identity of its expert, it should also furnish to the other side a written report signed by the expert.**

b. **What the Report Should Contain. The expert's report should contain:**

i. **A complete statement of each opinion the expert will give;**

ii. **The basis and reason(s) for that opinion;**

iii. **The data or information the expert is relying on in formulating the opinion and a description of where this data or information can be found if it is not part of the record or has not been produced in discovery;**

iv. **Any exhibit(s) to be used as a summary of or support for the opinion;**

v. **The expert's qualifications, including a list of any publication written by the expert in the last ten years;**

vi. **The compensation paid or to be paid to the expert;**

vii. **A list of any cases, including each case's name, court, docket number and the name, address and telephone number of each counsel of record, in which the expert has testified at trial or in deposition in the last four years; and**

viii. **If not provided in response to subsection (v) above, the expert's current resume and bibliography, if any.**

c. **When a Non-Testifying Consultant Becomes a Testifying Expert. A testifying expert who was initially retained as a non testifying consultant and who prepared a written report in a consultant capacity should disclose the written report to the opposing party in the same manner and subject to the same requirements as any other testifying expert.**

d. **Supplementation of an Expert's Opinion.**

i. **Ordinarily an expert's report, as well as his or her deposition testimony, should be final and complete when given, and not subject to later revision or amendment. The parties may stipulate that an expert's opinion can be supplemented within a reasonable specified time before trial.**

ii. In the absence of stipulation, a party wishing to supplement an expert's opinion less than 30 days before trial or a discovery cut-off or other date set by the court should first obtain leave of court. Factors that a court should consider in determining whether or not to allow supplementation include:

A. The good faith of the party seeking to supplement the opinion;

B. Whether the information was available to that party and/or the expert at an earlier date;

C. Unfair prejudice to any party; and

D. Whether it would result in an unfair delay of the trial.

iii. A party that is permitted to supplement its expert's opinion less than 30 days before trial or a discovery cut-off date should promptly make the expert available for deposition.

e. No Waiver of Attorney Work Product. The provision in section 21(b)(Iii) above that an expert's report describe "the data or information the expert is relying on in formulating [his or her] opinion" does not require the disclosure of communications that would reveal an attorney's mental impressions, opinions or trial strategy protected under the attorney work product doctrine. The report should disclose, however, any data or information, including that coming from counsel, that the expert is relying on in forming his or her opinion. In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.

f. Failure to Provide a Report or Opinion. The court should consider whether a party's failure to disclose the identity of its expert or to provide the expert's written report or a deposition within a reasonable period of time before trial or by a date set for doing so should preclude that party from (i) calling the expert at trial or (ii) introducing that part of the expert's opinion *that was not* timely disclosed.

g. Sanctions: Factors to Consider. Among the factors a court should consider in assessing what sanctions, if any, should be imposed for a party's failure to identify an expert or to provide the expert's report in timely fashion are:

i. The party's good or bad faith in the matter;

ii. Whether or not the failure was due to circumstances beyond the party's control;

iii. **Whether there has been unfair surprise or prejudice to the opposing side; and**

iv. **Whether the failure will unreasonably delay the trial or any other key events in the case.**

Comment

Subsection (a). See Comment above for Standard 20(a). Unlike the federal rule, this Standard requires that reports be provided by any person, other than a "hybrid" fact-opinion expert, who will give expert testimony at trial. In jurisdictions where there is no requirement that all experts furnish written reports containing the information listed in this Standard, it would be prudent to serve interrogatories that ask for this information.

Subsection (b). This Standard is modeled on the disclosure and discovery requirements in Fed. R. Civ. P. 26(a)(2)(B) and similar state rules, *e.g.,* Tex. R. Civ. P. 194.2(f). Compare Cal. Civ. Proc. Code § 2034(f) (which requires less detailed information); *Castaneda v. Bornstein,* 43 Cal. Rptr. 2d 10, 17 (Ct. App. 1995) (expert should not be excluded for failure to disclose the "general substance" of testimony).

Subsection (d). A party has a duty to supplement its expert's disclosure whenever it learns that the disclosure is incomplete or incorrect in some material respect. This duty applies to changes in the opinions in the expert's report, as well as those the expert gives in deposition. While supplementation should be made promptly after the deficiency has been discovered, the Standard sets a 30-day deadline before trial or a discovery cut-off after which a party must obtain the court's permission to make the change. *Accord* Fed. R. Civ. P. 26(e), (a)(3).

Subsection (e). Other than court-appointed experts, which *are sui generis, an* expert *is* retained to provide testimony to assist one side in the case. The expert is entitled to have the benefit of the theories, however tentative or preliminary they may be, of the counsel that has retained the expert. Experts logically come within the "zone of privacy for strategic litigation planning" that is the rationale for the attorney work product doctrine. See *United States v. Adlman,* 68 F.3d 1495, 1501 (2d Cir. 1995) (construing Fed. R. Civ. P. 26(b)(3) in an unrelated context). Counsel should be able to explore counsel's theories or ideas about the litigation with an expert without the worry that the discussion is tantamount to disclosure to the other side.

At least in federal practice, however, there is a split of authority as to whether communications to an expert of an attorney's "core" or "opinion" work product are immune from disclosure after the 1993 amendments to Rule 26.

For cases holding that all work product is now discoverable under Fed. R. Civ. P. 26(a)(2)(B), *see, e.g., Musselman v. Phillips,* 176 F.R.D. 194 (D. Md. 1997); *Bama v. United States,* No. 95 C 6552, 1997 U.S. Dist. LEXIS 10853 (N.D. Ill. July 23, 1997); *B.C.F. Oil Ref. v. Consolidated Edison Co.,* 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *Kam v. Ingersoll Rand*, 168 F.R.D. 633, 639-40 (N.D. Ind. 1996).

For cases holding otherwise, *see, e.g., Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634 (D. Kan. 1993); see also Gregory P. Joseph, *Emerging Expert issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 101-04 (1996) (collecting cases, and outlining reasons why the continuing recognition of protection for opinion work product is appropriate after recent amendments to Rule 26).

Particularly where an expert is acting as a consultant, the expert's report is likely to reflect counsel's mental processes and legal theories. The court may, however, assess whether there is "substantial need" for using the report to impeach the expert that would outweigh the policy of protecting work product. *National Steel Prods. Co. v. Superior Court*, 210 Cal. Rptr. 535, 543 (Ct. App. 1985).

An attorney's mental impressions, theories and strategies – archetypal "work product" – that have been conveyed to an expert should not have to be disclosed if the expert is not relying on them in his or her testimony. The ability to have untrammeled access to the process by which an expert has formulated his or her final opinion(s) in the case is outweighed by (1) the undesirability of placing substantial barriers to a full and free exchange of ideas and theories between counsel and the expert; (2) the fact that the expert has been retained to advise and assist one side in an adversary trial system; (3) the added, unnecessary expense of having to retain two experts – one to testify and the other to consult – if a lawyer wants to maintain the confidentiality of his or her work product, and (4) the ability of counsel to obtain and cross-examine the expert on anything the expert is actually relying on in his or her opinion.

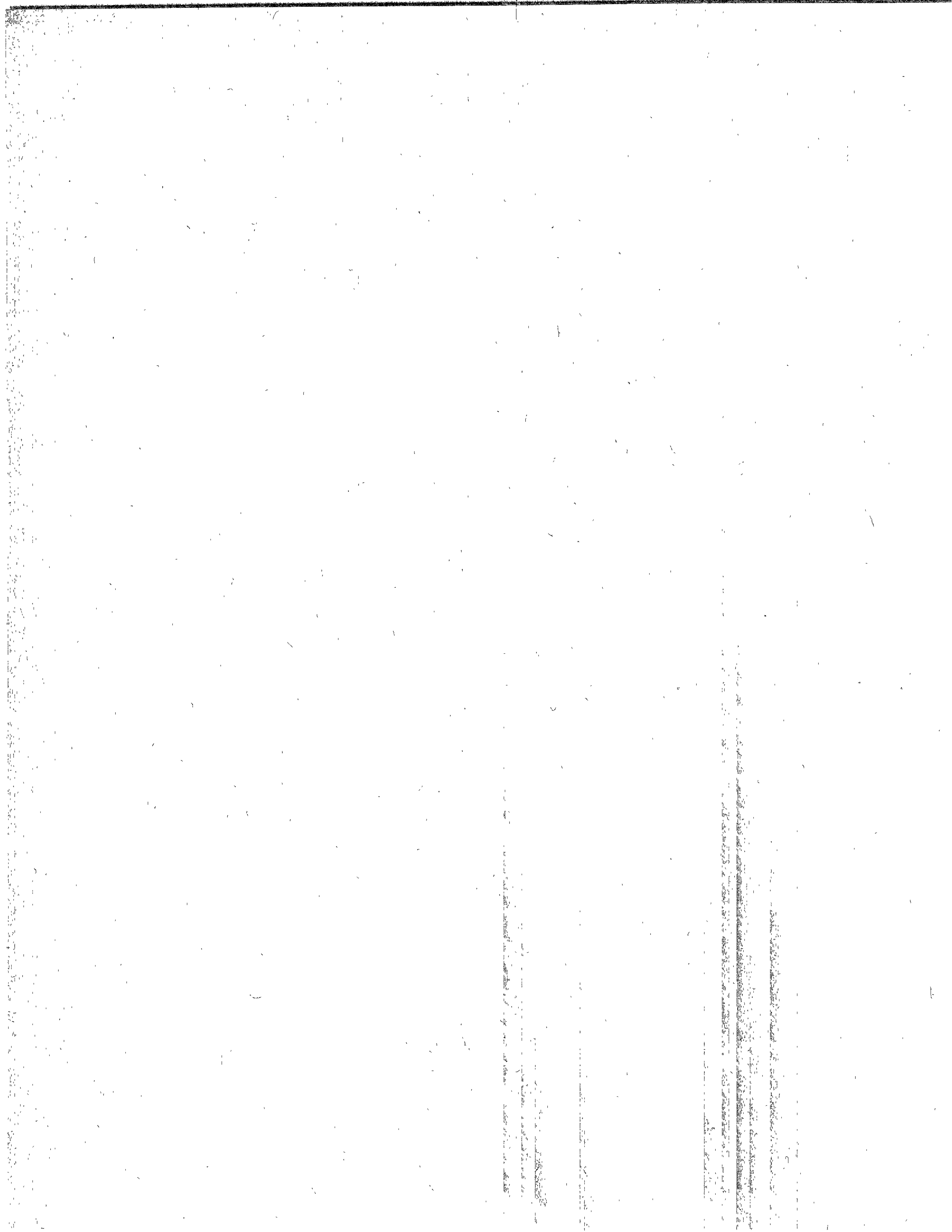
If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) ("It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed."). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Although a stipulation that there will be no waiver by sharing work product with an expert would probably protect the information in the particular case, there is no guarantee that it would protect it against nonparties in another setting. *E.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (the test is whether disclosure is done in a way that "substantially increases the likelihood that the work product will fail into the hands of the adversary").

Subsection (f). This Standard is modeled on Fed. R. Civ. P. 37(c)(1). The Standard creates a presumption that an expert will not be permitted to give trial testimony that has not first been disclosed in either a report or a deposition. *But see Martinez v. City of Poway*, 15 Cal. Rptr. 2d 644, 646 (Ct. App. 1993) (if an expert declaration has been submitted the expert cannot be excluded based on the inadequacy of the information in the declaration). The Standard

also recognizes the court's discretion to use other remedies than an absolute bar on the expert's testimony.

Subsection (g). This subsection identifies factors that are among those to be considered in determining whether or not a failure to identify an expert or to provide a report in a timely fashion should result in some form of sanction and, if so, what form. The list is not exclusive and a court should consider any other factors that would promote the interests of justice.



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August 3, 2000

00-CV-E

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

Re: Changes in the Federal Rules of Civil Procedure

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On June 22, 2000, the Section overwhelmingly approved the enclosed Report of Expert Witness Disclosure and "Core" Work Product. This report highlights an area involving the interplay between the work-product doctrine under Rule 26(b)(3) of the Federal Rules of Civil Procedure and the disclosures required of experts under Rules 26(a)(2) and 26(b)(4) of the Federal Rules of Civil Procedure which we believe requires clarification. On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

GKA:sm
Enclosure

cc: Sharon M. Porcellio, Esq. (w/o encl.)
Chair, Commercial and Federal Litigation Section

REPORT ON EXPERT WITNESS DISCLOSURE AND "CORE" WORK PRODUCT

New York State Bar Association
Commercial and Federal Litigation Section
Committee on Federal Procedure

June 22, 2000

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SUMMARY

The Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 511-12, 67 S. Ct. 385, 393-94 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383, 400-02, 101 S. Ct. 677, 688-89 (1981), has recognized that the work-product doctrine to some extent protects from disclosure to adversaries material prepared or gathered by attorneys in anticipation of litigation or in preparation for trial and protects to an even greater extent information revealing an attorneys' mental impressions, conclusions, opinions or legal theories, which has been called "core" work product. To a great degree, these views have been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

Experts are retained to present testimony concerning scientific, technical or other specialized knowlege supporting a party's position. It is rare that the expert's views are not affected in some manner by information transmitted by the party's counsel. That information will frequently reflect the attorney's mental impressions or conclusions. To the extent that an expert is required to disclose the information considered in reaching an opinion, disclosure of "core" work product may occur.

Prior to the 1993 amendments to the Federal Rules of Civil Procedure, there had been a split in authority as to the protection to be afforded to information disclosed to experts by counsel for a party. Following the revamping of expert disclosure in the 1993 amendments, there has continued to be a split in authority.

After reviewing the pre-amendment case law (part I) and the 1993 changes in procedure for disclosure of expert opinion (part II), the Section has concluded that it was the intent of the amendments not to provide protection to "core" work product disclosed to experts. After considering the competing purposes for protection of "core" work product and for disclosure of information considered by expert witnesses, the Section recommends that the Federal Rules of Civil Procedure be amended to make explicit that all information disclosed to testifying experts by attorneys is discoverable.

I. LAW AND POLICY PRIOR TO THE 1993 AMENDMENTS

There are several concepts that intersect at the issue of the disclosure of communications between attorneys and experts: the work-product doctrine, the exploration of the bases for an expert's opinion, and the evidentiary requirement that a document from which a witness testifies should be disclosed to the interrogator. However, it was not until after 1970, when the reluctance to permit pre-trial discovery of experts was reversed through the adoption of Rule 26(b)(4) of the Federal Rules of Civil Procedure and the protection of material prepared in anticipation of litigation or for trial was ensconced in Rule 26(b)(3) of the Federal Rules of Civil Procedure, that the issues at the intersection became apparent.

A. THE WORK-PRODUCT DOCTRINE

Hickman v. Taylor, 329 U.S. 495, 511-12, 67 S. Ct. 385, 393-94 (1947), first articulated the work-product doctrine. After decades of not always consistent case law development, the 1970 amendments to the Federal Rules of Civil Procedure added Rule 26(b)(3), which codified

an approach to materials prepared in anticipation of litigation or for trial, including information subject to the work-product doctrine.[1]

Rule 26(b)(3) defined two categories of material subject to protection: (1) "fact" or "ordinary" work product, and (2) "opinion" or "core" work product. Documents or tangible things comprising the former were discoverable upon a showing of substantial need and an inability to obtain the equivalent without undue hardship. *Upjohn Co. v. United States*, 449 U.S. 383, 400, 101 S. Ct. 677, 688 (1981). The latter were either absolutely protected, *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 736 (4th Cir. 1974), *cert. denied*, 420 U.S. 997, 95 S. Ct. 1438 (1975), or disclosable only after an extraordinary showing of necessity, *In re Murphy (United States v. Pfizer Inc.)*, 560 F.2d 326, 336 (8th Cir. 1977). The Supreme Court, while recognizing that "opinion" work product was subject to a higher standard for disclosure, in *Upjohn* refrained from deciding whether it was absolutely protected. 449 U.S. at 401-02, 101 S. Ct. at 688-89. *See generally*, Annot., *Protection from Discovery of Attorney's*

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[1] The 1970 version of Rule 26(b)(3) was:

> **Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Opinion Work Product Under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 A.L.R. Fed. 779 (1987).

A strong public policy to promote the proper functioning of our system of justice underlies the work-product doctrine. *Upjohn*, 449 U.S. at 398, 101 S. Ct. at 687; *Hickman*, 329 U.S. at 510, 67 S. Ct. at 393. The work-product doctrine allows an attorney to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman*, 329 U.S. at 510, 67 S. Ct. at 393.

> Proper preparation of a client's case demands that he [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

Id., 329 U.S. at 511, 67 S. Ct. at 393. "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes," *Upjohn*, 449 U.S. at 398, 101 S. Ct. at 687, and exposes the attorney to the possibility of being called to testify about what he or she remembers or what he or she wrote down regarding a witness' remarks, *Hickman*, 326 U.S. at 513 (Murphy, J.), 517-18 (Jackson, J. concurring), 67 S. Ct. at 394, 396-97.

However, work-product protection may be waived by attempting to make testimonial use of work-product materials. *United States v. Nobles*, 422 U.S. 225, 239 & n.14, 95 S. Ct. 2160, 2170-71 & n.14 (1975).

B. EXPERT DISCOVERY AFTER 1970

With the adoption in 1970 of Rule 26(b)(4) of the Federal Rules of Civil Procedure,[2] the procedure regarding experts changed dramatically. This was further accelerated in 1975 with

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[2] Rule 26(b)(4) provided:

> **(4) Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
>
> (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
>
> (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

the Congressional adoption of the Federal Rules of Evidence, and, in particular, Rules 702, 703 and 705.[3]

Rule 26(b)(4) was adopted, because "[e]ffective cross-examination of an expert witness requires advance preparation." Advisory Committee Notes to Rule 26(b)(4), 1970 Amendments. For testifying experts, Rule 26(b)(4) contemplated that interrogatories would normally be served to discover the substance of an expert's opinions and the grounds for those opinions, and depositions of experts would not be the rule. However, in practice, "[t]he information disclosed . . . in answering interrogatories . . . was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert." Advisory Committee Notes to Rule 26(a)(2), 1993 Amendments. Moreover, with the adoption of the Federal Rules of Evidence discouraging

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[3] Rule 702 stated:

> **Testimony by Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703 stated:

> **Bases of Opinion Testimony by Experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 705 stated:

> **Disclosure of Facts or Data Underlying Expert Opinion.** The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

hypothetical questions, encouraging cross-examination to discover the factual bases for an expert's opinion, and broadening the materials upon which an expert might rely to include materials not admissible in evidence, the need for pre-trial discovery of experts increased. *See Smith v. Ford Motor Co.*, 626 F.2d 784, 794 (10th Cir. 1980); Advisory Committee Notes to 1972 Proposed Rules 703 and 705.[4]

C. THE INTERSECTION OF EXPERT TESTIMONY AND THE WORK-PRODUCT DOCTRINE

Prior to 1993, there was a split of authority on whether documents containing work product revealed to an expert were discoverable. The leading case prohibiting discovery was *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984); the leading case permitting discovery was *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991). Each is discussed below.

1. Bogosian v. Gulf Oil Corp.

Bogosian was an antitrust class action by gasoline dealers against 15 major oil companies. 738 F.2d at 589. The district court directed that plaintiffs' eight experts on gasoline marketing, statistics, economics, chemistry and automotive engineering would be deposed under Rule 26(b)(4)(A)(ii) and that plaintiffs would produce, among others, all documents sent to the experts

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[4] The Advisory Committee Notes to 1972 Proposed Rule 705 stated, in part:

> Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area [the supporting facts or data for any expert's opinion], obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts.

by plaintiffs or their counsel and all documents utilized, relied upon, consulted or reviewed by each expert for the opinion the expert would express at trial. *Id.* Plaintiffs produced over 700 documents and identified hundreds of additional documents that were otherwise publicly available, but withheld 115 documents specified as work product. 738 F.2d at 590. The Third Circuit assumed that the 115 documents were "core" work product. 738 F.2d at 593.

The court first held that showing the material to the experts did not waive the protection for attorney work product. 738 F.2d at 593. *Cf. Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977).

Judge Sloviter then analyzed the language of Rule 26(b)(3), and, in particular the introductory proviso to the first sentence, "Subject to the provisions of subdivision (b)(4) of this rule." 738 F.2d at 594. Distinguishing between the first sentence of Rule 26(b)(3), which requires a showing of "substantial need" before work product must be produced, and the second sentence, which requires greater protection against disclosure of the mental impressions, conclusions, opinions or legal theories of attorneys, the court found that the proviso did not limit the second sentence. *Id.*

The Third Circuit then turned to Rule 26(b)(4). It acknowledged that the Advisory Committee Notes to the 1970 amendments stated that the rule rejected "as ill considered the decisions which have sought to bring expert information within the work-product doctrine," *id.*, but it found:

> The thrust of Rule 26(b)(4) is to permit discovery of facts known or opinions held by the expert. Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's

opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory. . . . [T]he marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product.

738 F.2d at 595. The court then held that the district court should review the documents *in camera* to separate the facts from the legal theories of counsel, and protect the latter from disclosure. 738 F.2d at 595-96.

Judge Becker dissented. He believed that the majority had failed to consider the most important interest of the party seeking the information: "the need to impeach plaintiffs' expert economist at his deposition." 738 F.2d at 597. Judge Becker wrote:

> I disagree with the majority's pronouncement . . . that evidence demonstrating an economist's theory did not originate or evolve as a result of his own research, but rather as a result of the hiring lawyer's suggestion, is of only "marginal value." Rather, such a revelation could, in some cases, critically alter the finder of fact's assessment of the expert's testimony.

738 F.2d at 598. However, Judge Becker, like his colleagues, suggested that the district judge review the documents *in camera* and decide whether their impeachment value would significantly outweigh the chill on the development of legitimate attorney work product if disclosed. *Id.*

Cases that followed *Bogosian* prior to December 1993 include *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283, 286 (M.D.N.C. 1985) (under *Duplan* "'opinion' work product is absolutely immune from discovery even if shared with an expert witness"); *Bethany Medical Center v. Harder*, Civ. A. No. 85-2415, 1987 WL 47845 at *8, *10 (D. Kan. Mar. 12, 1987) (providing to expert materials containing attorney's legal analysis and mental impressions, which were not relied upon by expert, held not to waive work-

product protection and no showing of substantial need or undue hardship was made to overcome the protection); and *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 284 (D. Kan. 1989) (discovery denied where no showing that the expert reviewed the documents to develop his opinion, to refresh his recollection or to prepare testimony and no strong showing of substantial need for the disclosure for impeachment after *in camera* review of the documents).

2. Intermedics, Inc. v. Ventritex, Inc.

In *Intermedics*, despite the mootness of the controversy that gave rise to a motion to compel an expert to respond to deposition questions and produce documents, Magistrate Judge Brazil announced the "law of the case" to govern discovery of communications between attorneys and testifying experts relating to subjects about which the experts would testify. 139 F.R.D. at 385.

The *Intermedics* court disagreed with the *Bogosian* court's reading of the proviso in Rule 26(b)(3). From the 1970 Advisory Committee's Notes, Magistrate Judge Brazil found "it clear that a purpose of creating a separate subsection of the Rule and devoting it specifically to discovery from experts was to 'reject as ill-considered the decisions which have sought to bring expert information within the work product doctrine.'" 139 F.R.D. at 388. The Magistrate Judge inferred that

> the drafters of these rules wanted to make sure that courts recognized that analysis of discovery of work product and analysis of discovery of information from expert witnesses were two conceptually quite distinct enterprises . . . .

Id. From this inference, Magistrate Judge Brazil concluded that the *Bogosian* court was incorrect to conclude that the proviso in the first sentence of Rule 26(b)(3) did not apply to the

second sentence. *Id.* He then examined the language of the two sentences and found that the reference in the second sentence to "'such materials' clearly relates back to and incorporates by reference the concepts at the center of the immediately preceding sentence" so that the proviso of the first sentence must therefore qualify and limit the second sentence. 139 F.R.D. at 388, 389.

The *Intermedics* court did not stop at this point, though. It acknowledged that the drafters of the 1970 amendments probably did not consider the interplay between work product and expert testimony, 139 F.R.D. at 389, and it found an unarticulated and unanticipated tension between paragraphs (3) and (4) of Rule 26(b), as well as between Rule 26(b)(3) and Federal Rules of Evidence 702, 703 and 705, 139 F.R.D. at 391.

> Given that we are dealing with rules of presumptively comparable standing, we believe that it is appropriate to resolve the tensions between them by . . . a truly open balancing analysis in which we (1) identify the interests that the work product doctrine is intended to promote, (2) make a judgment about how much those interests would be either (a) harmed by a ruling that the kinds of communications in issue here are discoverable or (b) advanced by a ruling that these kinds of communications are not discoverable, (3) identify the relevant interests that are promoted by Federal Rule of Civil Procedure 26(b)(4) and by Federal Rules of Evidence 702, 703 and 705, and then (4) make a judgment about how much those interests would be either (a) harmed by a ruling that the kinds of communications in issue here are not discoverable or (b) advanced by a ruling that these kinds of communications are discoverable.

139 F.R.D. at 391-92.

Magistrate Judge Brazil identified the interests promoted by the work-product doctrine as "preserving the incentive system that is perceived as essential to our adjudicatory process and creating an environment in which counsel are free to think dispassionately, reliably, and creatively both about the law and the evidence in the case and about . . . strategic approaches

to the litigation." 139 F.R.D. at 392. The Magistrate Judge then asked: "[H]ow much harm is likely to be caused to work product interests when lawyers know in advance that communications between them and testifying experts will be discoverable if those communications are related to the matters about which the experts will testify?" *Id.* Magistrate Judge Brazil found that such a rule would not interfere with an attorney's capacity to think dispassionately and creatively about the client's case in private, as long as the attorney did not share thoughts with an expert expected to testify, and as long as any uninhibited, roaming, or educational exchanges with experts were with non-testifying experts. 139 F.R.D. at 392, 393. The court conceded that retaining such a non-testifying expert carried a financial cost. 139 F.R.D. at 393.

The court also addressed the argument that making attorney communications with a testifying expert discoverable "would impair lawyers' ability to teach experts efficiently what they need to know to prepare to offer useful and well grounded opinions." *Id.* The court found that this accelerated learning would come at too high a price: "What obviously is threatened by such communications is the independence of the expert's thinking, both her analysis and her conclusions. The risk is that the lawyer will do the thinking for the expert, or, more subtly, that the expert will be influenced, perhaps appreciably, by the way the lawyer presents or discussed the information." 139 F.R.D. at 393-94. These risks would be reduced if it were known that all communications with counsel would be reviewable by other experts and made known to the trier of fact. 139 F.R.D. at 394.

> In sum, we are not persuaded that a rule that would permit discovery of communications from counsel to an expert about matters related to the expert's

> testimony would in fact cause significant harm to the principal interests that the work product doctrine is intended to advance.

Id.

Magistrate Judge Brazil identified the relevant interests promoted by Federal Rule of Civil Procedure 26(b)(4) and by Federal Rules of Evidence 702, 703 and 705, as "nothing less than the integrity and reliability of the truth finding process." *Id.* The court found that

> assertive, probing, coherent, and well-informed cross-examination was essential to equipping the trier of fact to judge the persuasive power and reliability of such testimony [from experts] and to determine which of competing expert views should be credited, and that often that kind of cross-examination would not be possible unless counsel had been permitted to explore thoroughly in pretrial discovery the mental route that the expert had travelled on the way to his or her conclusions.

Id.

Magistrate Judge Brazil then directly disagreed with the *Bogosian* majority's conclusion that it was of only marginal value to know that an expert's view may have originated with an attorney. 139 F.R.D. at 395.

> [I]t would be fundamentally misleading, and could do great damage to the integrity of the truth finding process, if testimony that was being presented as the independent thinking of an "expert" in fact was the product, in whole or significant part, of the suggestions of counsel. The trier of fact has a right to know who is testifying.

139 F.R.D. at 395-96.

> The fact that so much expert testimony concerns matters that are essentially out of empirical control makes it all the more important for the trier of fact to know, accurately, the source of the testimony. When matters are debatable, the background, attributes of mind, character and personality, and the perspective (or intellectual biases) of each of the debaters can play crucial roles in a jury's or judge's assessment of the different positions being taken. These considerations

> make it even more important that the trier of fact know what the real source of expert testimony is.

139 F.R.D. at 396-97.

The Magistrate Judge found that these policies would be promoted if counsel knew in advance that their communications with testifying experts would be discoverable, because it would improve the likelihood that an expert's opinions really were the expert's. 139 F.R.D. at 397.

Accordingly, the *Intermedics* court "h[e]ld that all communications from counsel to a testifying expert that relate to the subjects about which the expert will testify are discoverable." *Id.*

Cases that reached the same result as *Intermedics* prior to 1993 include *Boring v. Keller*, 97 F.R.D. 404, 407, 408 (D. Colo. 1983) (documents constituting "opinion" work product not protected where an expert witness uses them to formulate his or her opinion, so as to preserve the opportunity to impeach the expert on cross-examination); *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 613, 616, 617 (D.N.J. 1989) (draft of expert's report wholly authored by attorney ordered produced based on a demonstrated substantial need to obtain the discovery, which could not be obtained in a substantial equivalent by other means); and *Bio-Rad Lab., Inc. v. Pharmacia*, 130 F.R.D. 116, 119, 122-23 (N.D. Cal. 1990) (work-product protection inapplicable to expert witness who could not distinguish his opinions from those formulated in consultation with trial counsel).

D. USING DOCUMENTS TO REFRESH A WITNESS' MEMORY

It has also been argued that Federal Rule of Evidence 612 bears on the discovery of "core" work product shown to an expert. *See Bogosian, supra*, 738 F.2d at 595 n.3; *Intermedics, supra*, 139 F.R.D. at 386 n.1. Federal Rule of Evidence 612 governs the production to adversaries of writings used to refresh memory while a witness is testifying or before testifying.[5] Thus, by its terms, Rule 612 is inapplicable to documents shown to an expert to permit the expert to formulate an opinion. It should only apply to documents shown before or while testifying to refresh recollection. Nonetheless, one of the first cases to examine the concepts underlying the work-product doctrine and Rule 612 arose in the context of disclosure of documents shown to an expert. *Berkey Motor, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 614 (S.D.N.Y. 1977). Therefore, while Rule 612 is not directly applicable to all information attorneys share with experts, cases that have arisen under the Rule further illuminate

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[5] Rule 612 states, in part:

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either --
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto.

the issues that bear on whether "core" work product should be disclosed to an adversary after being presented to an expert.

As proposed by the Advisory Committee in 1972, Rule 612 provided that, except under 18 U.S.C. § 3500, if a witness used a writing to refresh his or her memory "either before or while testifying," an adverse party was entitled to have the writing produced at the hearing and to cross-examine on it. Notes of the Committee on the Judiciary, H.R. Rep. No. 650, 93rd Cong., 1st Sess. 8 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7086. Congress changed the proposed rule. Congress kept the rule intact for writings used to refresh memory while testifying, but left the production of writings used to refresh memory before testifying to the court's discretion "in the interests of justice," referencing existing law, citing *Goldman v. United States*, 316 U.S. 129, 62 S. Ct. 993 (1942). Notes of the Committee on the Judiciary, H.R. Rep. No. 650, 93rd Cong., 1st Sess. 8 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7086. The House Judiciary Committee also wrote that it intended "that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory." *Id.* Rule 30(c) of the Federal Rules of Civil Procedure made Rule 612 applicable to depositions and deposition testimony. *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir.), *cert. denied*, 474 U.S. 903, 106 S. Ct. 232 (1985).

Application of Rule 612(1) is straightforward. In *S&A Painting Co. v. G.W.B. Corp.*, 103 F.R.D. 407, 408 (W.D. Pa. 1984), a third-party defendant during his deposition referred to handwritten notes he had prepared at the request of counsel setting forth events relevant to the litigation. Although the notes were protected by both the attorney-client privilege and the

work-product doctrine, the court held that the protection had been waived under Federal Rule of Evidence 612(1) and directed production of that portion of the notes to which reference had been made during the deposition. 103 F.R.D. at 408-09.

Application of Rule 612(2) is less straightforward, because, by directing that courts exercise their discretion, Congress imposed a balancing test to determine whether the "interests of justice" require production of documents used to refresh recollection before testifying.

> On a case-by-case basis, it is appropriate to balance the competing interests in the need for full disclosure and the need to protect the integrity of the adversary system protected by the work-product rule.

In re Joint E. & S. Dist. Asbestos Litig., 119 F.R.D. 4, 5 (E.D.N.Y. 1988).

Generally, courts prior to December 1993 that denied discovery under Rule 612(2) did so because of the great weight placed on protection of work product. *See Sporck v. Peil*, *supra*, 759 F.2d at 318-19 ("Proper application of Rule 612 should never implicate an attorney's selection, in preparation for a witness' deposition, of a group of documents that he believes critical to a case. Instead, identification of such documents under Rule 612 should only result from opposing counsel's own selection of relevant areas of questioning, and from the witness' subsequent admission that his answers to those specific areas of questioning were informed by documents he had reviewed. In such a case, deposing counsel would discover the documents through his own wit, and not through the wit of his adversary."); *Bogosian*, *supra*, 738 F.2d at 595 n.3 (*dicta*: "the purposes of Rule 612 are generally fully served without disclosure of core work product"); *Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd.*, 85 F.R.D. 118, 120 (W.D. Mo. 1980) (attorney's notes subject to the attorney-client privilege given "special

discretionary safeguards" against disclosure, even though used to refresh his recollection before testifying at a deposition); *Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.*, 553 F. Supp. 45, 52 (S.D.N.Y. 1982) (documents protected by the work-product doctrine protected from disclosure under Rule 612(2)); *Bloch v. Smithkline Beckman Corp.*, Civ. A. No. 82-510, 1987 WL 9279 at *4 (E.D. Pa. Apr. 9, 1987) (desire to impeach or corroborate a witness' testimony cannot overcome the strong presumption against the protection afforded an interview memorandum); *Derderian v. Polaroid Corp.*, 121 F.R.D. 13, 16-17 (D. Mass. 1988) (plaintiff's contemporaneous notes created for the purpose of communicating with counsel and reviewed prior to deposition not discoverable because they were likely of meetings or communications with agents or employees of defendant to whom defendant had full access).

On the other hand, courts that granted discovery prior to December 1993 under Rule 612(2) did so on the ground of the importance of full disclosure and the ascertainment of truth. *See Wheeling-Pittsburgh Steel Corp. v. Underwriters Lab., Inc.*, 81 F.R.D. 8, 9, 10 (N.D. Ill. 1978) (defendant company's files, including one captioned "communications with counsel" borrowed and reviewed by former employee prior to deposition must be produced to serve the paramount purpose of federal discovery rules to ascertain the truth); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144, 146 (D. Del. 1982) (decision by counsel to educate company's principals, officers and employees in preparation for deposition by showing binders with documents selected by counsel held a waiver of work-product protection requiring disclosure under Rule 612(2)); *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 26 (N.D. Cal. 1985) (government did not demonstrate it would suffer substantial harm from disclosure of prior appraisal report used to refresh employee witnesses' recollection in preparation for

depositions so that the policy in favor of effective cross-examination resulted in disclosure); *In re Joint E. & S. Dist. Asbestos Litig.*, *supra*, 119 F.R.D. at 6 (after review of material *in camera*, court concluded that the documents sought did not reveal much concerning the attorney's thinking or legal strategy and therefore should be produced); *In re Atlantic Fin. Management Sec. Litig.*, 121 F.R.D. 141, 143 (D. Mass. 1988) (deposition transcripts and documents previously produced in the case provide minimal exposure of the attorney's mental process and must be produced after review by witness prior to deposition).

II. THE 1993 AMENDMENTS AND THEIR EFFECT ON DISCOVERY OF COMMUNICATIONS BY ATTORNEYS WITH EXPERTS

A. THE 1993 AMENDMENTS TO RULE 26

The 1993 amendments made significant changes with respect to expert discovery. Rule 26(a)(2) was added to require detailed disclosures, usually including a written report, with respect to proposed expert testimony.[6] Rule 26(b)(4)(A) was amended to permit specifically

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[6] Rule 26(a)(2) states:

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be

depositions of testifying experts and to eliminate expert interrogatories.[7] No change was made in Rule 26(b)(3) relating to work product.

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used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

[7] Rule 26(b)(4) now provides:

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

In amending Rule 26(b)(4) in 1993 to provide for the deposition of testifying experts, the Advisory Committee stated that this conformed "the norm stated in the rule to the actual practice, followed in most courts, in which depositions of experts have become standard." Rule 26(b)(4) also references new Rule 26(a)(2)(B) in stating that "[i]f a report from the expert is required . . ., the deposition shall not be conducted until after the report is provided."

Rule 26(a)(2)(B) provides detailed requirements for an expert report:

(1) a complete statement of all opinions to be expressed, and the basis and reasons therefor;

(2) "the data or other information considered by the witness in forming the opinions;"

(3) any exhibits to be used by the expert;

(4) the detailed qualifications of the witness, including publications;

(5) the witness' compensation; and

(6) a listing of any other cases in which the expert witness has testified within the last four years.

The Advisory Committee devoted five paragraphs of its 1993 Note to elucidating new Rule 26(a)(2). It stated that the expert disclosures are required "sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross-examination" and to obtain an expert witness of their own. In discussing the data and other information and the exhibits and charts to be supplied, the Advisory Committee wrote:

> Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions -- whether or not ultimately relied upon by the expert -- are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

The Advisory Committee did not, however, cross-reference this statement to Rule 26(b)(3) or further indicate how this provision was to interrelate with the admonition to protect "core" work product. As a result, Rule 26(a)(2), while it has clarified some issues, has not eliminated argument. Instead, it has stimulated further litigation over the question of how expert witness disclosure and protection of "core" work product are to be reconciled.

B. CASE LAW AFTER 1993

The 1993 amendments have ended certain disputes relating to work product and expert discovery. It appears to be generally accepted that purely factual material transmitted and considered by an expert, even if work product, is discoverable. *See B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997). Moreover, in order for the opposing party to discover "the data or other information" given to the expert, it is no longer necessary to show that the expert relied upon it in forming his or her opinion, just so long as he or she "considered" it. *See Musselman v. Phillips*, 176 F.R.D. 194, 196 (D. Md. 1997). However, there has been litigation over whether information was in fact "considered" by expert witnesses or was so far removed from the proposed testimony that it was probably not considered. *See B.C.F. Oil*, 171 F.R.D. at 67.

Yet, the issue of whether "core" or "opinion" work product provided to an expert witness is discoverable has not been completely solved by the 1993 amendments. Indeed, the cases and commentary dealing with the issue have been virtually evenly divided.

1. Cases in Which The Discovery Of "Core" Attorney Work Product *Is Not* Permitted.

The cases that do not permit discovery of "opinion" work product are typically based, as before the 1993 amendments, on the proposition that, unlike "fact" work product, "opinion" work product is given at least nearly absolute protection from mandatory discovery by Rule 26(b)(3). A relatively early case in which "core" work product was held not to be discoverable when transmitted to a testifying expert was *Haworth, Inc. v. Herman Miller Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995). The issue there arose at the deposition of plaintiff's expert when he was questioned about conversations with plaintiff's counsel. Plaintiff objected; the Magistrate Judge granted defendant's motion to compel; the district court reversed on appeal.

The district court first addressed whether the proviso in the first sentence of Rule 26(b)(3) also affected the second sentence concerning "core" work product. The court rejected the application of the proviso to the second sentence, holding that the expert discovery requirements dealt only with "fact" work product and did not reach "core" work product. 162 F.R.D. at 294 ("[t]his Court reads the words as meaning only that all factual information considered by the expert must be disclosed in the report").

The court then discussd the 1993 Advisory Committee Note quoted above, suggesting that materials provided to experts was not privileged or protected from disclosure, but concluded that

the Advisory Committee only intended to deal with the argument of whether factual material shown to an expert is to be turned over to the opposing party. The court concluded: "For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute," 162 F.R.D. at 295, citing *Hickman v. Taylor*, 329 U.S. 495, 514, 67 S.Ct. 385, 395 (1947).

Next, the court considered the argument that cross-examination of an expert is significantly helped by knowing the nature of counsel's influence on the expert. In the court's judgment, "a more effective cross-examination and impeachment of the opposing party's expert witness . . . is not the type of circumstance the Supreme Court contemplated would overcome the strong policy against disclosing an attorney's opinion work product." *Id.* The court viewed the use of opposing experts as adequate to handle the problem.

Several other courts have, since 1993, expressed similar sentiments and reached similar results. *See, e.g., Magee v. Paul Revere Life Insurance Co.*, 172 F.R.D. 627, 643 (E.D.N.Y. 1997) ("[a]lthough the level of protection afforded "core" work product materials has not been defined precisely by either the Supreme Court or the Second Circuit Court of Appeals, it is clear that it is substantially higher than that provided by the 'substantial need' and 'undue hardship' test," *citing In re Murphy* (*United States v. Pfizer Inc.*)). These cases generally rely on *Hickman*: "It would be 'a rare situation' which would justify disclosure of attorney opinion work product. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." 329 U.S. at 514, 67 S.Ct. at 395.

The primary rationale for providing "opinion" work product with additional protection is to maintain and encourage the free exchange of ideas in developing litigation strategy. *Kennedy v. Baptist Memorial Hospital-Booneville, Inc.*, 179 F.R.D. 520, 522 (N.D. Miss. 1998). It is argued that this necessary and important exchange would not be possible without statutory and judicial assurance that disclosure of attorney opinions and strategy to experts does not waive privilege upon such disclosure. *Musselman v. Phillips*, 176 F.R.D. 194, 196 (D. Md. 1997). The creation of a bright-line rule requiring discovery of all materials turned over to an expert would, it is argued, discourage attorneys from providing experts with necessary documents and materials, "thus arguably impairing the expert's ability to fully evaluate the relevant issues and the attorney's ability to receive a full and objective assessment of the issues." *Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999).

Likewise, some courts have found that, although attorneys have control over whether and which materials to disclose to witnesses, it is unfair to require a litigant to incur the additional expense of hiring a separate expert as a consultant in order to both have a free exchange of ideas with an expert and protect "core" work product documents from discovery. James Wm. Moore et al., *Moore's Federal Practice (3d)*, ¶26.80[1] (1998) (noting that the *Haworth* line of cases has the additional benefit that it "does not favor wealthy parties who can afford to hire both testifying and non-testifying experts").

Further, these cases argue, to mandate disclosure of all materials considered or relied on by an expert is not necessary to ensure adequate cross-examination and protect against undue attorney influence. In *Ladd Furniture, Inc. v. Ernst & Young*, No. 2:95CV00403, 1998 WL

1093901 at *13 (M.D.N.C. Aug. 27, 1998), the court found that "the adversarial system acts as a check against attorneys who would [improperly influence an expert's opinion] because experts are required in the first instance to explain the bases of any opinions expressed in their Rule 26(a)(2)(B) reports." *See also Magee*, 172 F.R.D. at 643. The *Haworth* court stated that "the reasonableness of an expert opinion can be judged against the knowledge of the expert's field," and that an expert's opinions and analyses are "always subject to the scrutiny of other experts." 162 F.R.D. at 295-96; *see also Nexxus*, 188 F.R.D. at 10. Even without the production of "core" work product, these courts believe that an opposing party has ample opportunity to test the expert's opinion in court and to call additional experts to refute untrustworthy testimony. Any deficiencies in the basis of the expert's opinion will become apparent during subsequent cross-examination of the expert and in the course of testimony from the opposing experts. *Nexxus*, 188 F.R.D. at 10.

For these reasons, several courts have agreed with *Haworth* in stating that the strong protection accorded to "core" work product, both statutorily and judicially, requires an unambiguous statement by Congress that disclosure to an expert witness constitutes waiver. *See Ladd Furniture, Inc.*, 1998 WL 1093901 at *13. The 1993 amendment of Rule 26(a)(2)(B) requiring the production of factual materials considered by the expert -- "data or other information" -- is not interpreted by these courts as being either clear or explicit enough to override the strong policy against mandatory disclosure. *Nexxus*, 188 F.R.D. at 10.

2. Cases in Which The Discovery Of "Core" Attorney Work Product *Is* Permitted.

There are also several thorough and instructive decisions that have come to the opposite conclusion -- *i.e.*, that "opinion" work product ought to be produced if it has been given or shown to the expert to be considered in forming the expert's opinion. The most frequently stated rationale for this result is that showing the document to the expert constitutes a waiver. Other courts have reasoned that the need for effective cross-examination of an opposing expert is such that this circumstance should be one of the few exceptions to the virtually absolute protection given "core" work product.

One of the more instructive decisions is that of District Judge Motley in *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57 (S.D.N.Y. 1997). There were a number of issues dealing with documents related to expert testimony presented in that case:

(1) Invoices sent by an expert to plaintiff were held not producible, because they were not documents "considered" by the expert in connection with rendering his opinion. 171 F.R.D. at 61.

(2) Material provided to an expert being used as a consultant was held not producible, but the burden was placed on the party using the expert to demonstrate that the expert was functioning solely in that role. 171 F.R.D. at 62.

(3) Documents written by the expert in connection with his report were held to be producible, because it was not clear that the documents were not related to the expert's testimony. *Id.*

(4) Documents containing facts provided by the attorney to the expert were held to be producible under the clear language of Rule 26(a)(2)(B) (the expert report must include the "data or other information considered by the witness"). 171 F.R.D. at 63.

(5) Attorney opinions reviewed by the expert were held producible for a variety of reasons. *Id.*

(a) Rule 26, by its amended language, was intended "to resolve the tension between work product and disclosure of expert testimony." 171 F.R.D. at 66. The Advisory Committee Note stated that arguments over the issue should be resolved by the amendment. *Id.* The court rejected the *Haworth* analysis finding that the only significant pre-amendment discovery dispute related to producing "core" work product, so the Advisory Committee must have been talking about "core" work product. 171 F.R.D. at 65, 66.

(b) The work-product codification in Rule 26(b)(3) is "subject to the provisions of subdivision (b)(4) of this rule," thus making clear that expert disclosure takes precedence over work product. 171 F.R.D. at 66-67.

(c) As a policy matter, both fact-finder and opposing counsel should be fully aware of the extent to which the expert's views have been influenced (or created) by counsel. 171 F.R.D. at 66.

(d) A ruling requiring disclosure should cause no serious hardship, since work-product protection can still be preserved if the "core" work product is not shared. *Id.*

(e) The "bright line" test allows both attorneys and the court to determine easily what is producible and what is not. *Id.*

(6) Documents created by attorneys of their conversations with experts, but not shown to the experts, were not producible under Rule 26(b)(4), because they were not "considered" by the expert. 171 F.R.D. at 67.

The cases that are in accord with *B.C.F. Oil* all recognize the "nearly absolute" privilege afforded "opinion" work product. Nevertheless, they read the revised rule as providing that the privilege traditionally afforded to "core" work product is waived when the documents are disclosed to a testifying expert witness.. *Musselman*, 176 F.R.D. at 196 ("opinion" work product receives "nearly absolute" immunity which "may, of course, be waived"); *see also Culbertson v. Shelter Mutual Insurance Co.*, No. 97-1609, 1999 WL 109566 (E.D. La. Mar. 2, 1999); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 304-5 (W.D. Va. 1998). These cases set forth a series of policy- and rule-based arguments in support of their finding that "core" work product is waived by disclosure to the expert.

First, these cases observe that the role of experts in both civil and criminal trials has increased greatly in the last few years. *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 639 (N.D. Ind. 1996). Often experts testify on subjects with which none of the judge, jury or counsel are familiar, and the experts are permitted to base their opinions on facts not admissible in evidence.

Id.; *see also Musselman*, 176 F.R.D. at 196. This increased use of experts, the importance of their testimony, and the difficulty in evaluating this type of testimony increases the possibility that experts who are unqualified, or unduly influenced, will not be detected, thus damaging the integrity of the truth-finding process. *Karn*, 168 F.R.D. at 639 ("the impact of expert witnesses on modern-day litigation cannot be overstated; yet to some, they are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired").

Effective cross-examination is extremely important to impeach an unqualified witness and to determine to what extent the attorney has influenced the expert's testimony. *Karn*, 168 F.R.D. at 639 ("Given this premise, it stands to reason that useful cross-examination and possible impeachment can only be accomplished by gaining access to all of the information that shaped or potentially influenced the expert witness's opinion. Without pre-trial access to attorney-expert communications, opposing counsel may not be able to effectively reveal the influence that counsel has achieved over the expert's testimony."); *see also Musselman*, 176 F.R.D. at 196 ("the trial judge depends upon the efficacy of cross-examination by the party opposing the expert's testimony to point out any weaknesses which might affect its admissibility as does the jury in determining how much weight to give to the expert's testimony"). These courts stress the potential for an attorney to unduly influence an expert witness's testimony and maintain that "[a]lthough it is not improper for an attorney to assist a retained expert in developing opinion testimony for trial . . . opposing counsel must be free during discovery to determine the nature and extent of this collaboration." *Musselman*, 176 F.R.D. at 201.

Many courts have found that mandatory disclosure of all documents considered or relied upon by an expert does not affect the integrity of the work-product doctrine as set forth in *Hickman*. *Karn*, 168 F.R.D. at 640. The work-product doctrine "is intended to allow counsel unfettered latitude to develop new legal theories or to conduct a factual investigation." *Id.* "[P]roviding work product to an expert witness does not further this policy in that it generally does not result in counsel developing new legal theories or in enhancing the conducting of a factual investigation. Rather, the work product either informs the expert as to what counsel believes are relevant facts or seeks to influence him to render a favorable opinion." *Id.* Additionally, an attorney's opinions or impressions would not be discoverable unless they were shared with the expert. Attorneys retain the ability to reflect in private on the strengths and weaknesses of the case and may still privately consult with an expert with respect to such matters "provided that the expert is not called to testify." *Oneida Ltd. v. United States*, 43 Fed. Cl. 611, 619 (Ct. Cl. 1999).

These courts also feel that their interpretation provides necessary clarity among the often confusing rules of discovery. Courts and practitioners can easily determine throughout the entire process of litigation "exactly which documents will be subject to disclosure and can react accordingly." *Karn*, 168 F.R.D. at 639; *Lamonds*, 180 F.R.D. at 306 ("[a]n attorney wishing to maintain the protection afforded by the work-product doctrine can choose to provide the expert with all relevant facts instead of directing the expert's attention to certain facts and instead of including opinions and conclusions drawn by the attorney").

Finally, like Judge Motley in *B.C.F. Oil,* these courts consider this interpretation of Rule 26(a)(2)(B) as mandated by the 1993 amendments. *See Karn,* 168 F.R.D. at 639. They have interpreted the wording of amended Rule 26(a)(2)(B) and of the Advisory Committee commentary as an attempt to remedy the conflict between the pre-1993 cases involving work-product protection and expert disclosure requirements by enabling Rules 26(a)(2) and 26(b)(4) to "trump" any assertion of the work-product doctrine.

C. THE COMMENTARY

The commentators also are split on this issue. Wright & Miller lists the cases (weighted heavily on the waiver side) and comments: "It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to disclosed." 8 Wright & Miller, *Fed. Prac. & Proc. 2d,* §§ 2016.2, 2031.1 at 442 (1999 Pocket Part). The Moore treatise states that it finds *Haworth* meritorious, because the Advisory Committee Notes do not state or suggest "that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product recognized by the Supreme Court in *Upjohn v. United States.*" James Wm. Moore et al., *Moore's Federal Practice (3d),* ¶26.80 at 26-234 (1998). However, the same treatise notes that a different result might well be desirable if it is obvious that the attorney had injected himself into the formation of an expert's opinion, citing *Kennedy v. Baptist Memorial Hosp.-Booneville, Inc.*, 179 F.R.D. 520, 522 (N.D. Miss. 1988).

Other commentators have focused on the uncertainty caused by the conflicting cases. *See* Note, Discoverability of Opinion Work Product Materials Provided to Testifying Experts, 32 Ind. L. Rev. 481 (1999), which concludes that Rule 26 should be amended to clarify that Rule

26(b)(3) work-product protection takes precedence over the expert discovery rules. In an article entitled "Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure," published at 164 F.R.D. 97 (1996), Gregory Joseph concluded that work-product protection should prevail because such a result:

(1) does not favor wealthy parties, who can afford both testifying experts and non-testifying experts (on whom counsel can try out his or her theories);

(2) does not encourage "coy or strained conversations cloaked as hypotheticals" to avoid disclosure; and

(3) avoids a challenge under the Rules Enabling Act.

164 F.R.D. at 106.

The last point requires some explanation as it is not discussed in detail in the cases. The Rules Enabling Act, 28 U.S.C. § 2074(b), prohibits the adoption of rules, without affirmative Congressional action, which create, abolish or modify an evidentiary privilege. Joseph argues that Rule 26(a)(2)(B) makes waiver of "core" work product an "unavoidable cost" of putting an expert forward to testify, and thus has the effect of "abolishing or modifying" work-product protection. 164 F.R.D. at 106. This argument seems to go too far; one is not compelled to share "core" work product with an expert witness. Moreover, as Joseph acknowledged, it is not clear that work-product protection is a "privilege" within the meaning of Section 2074(b).

The draft of Civil Discovery Standards proposed by the Section of Litigation of the ABA in May 1999 takes the position that the requirement for an expert's report in Rule 26(a)(2)(B)

"does not require the disclosure of communications that would reveal an attorney's mental impressions, opinions or trial strategy protected under the attorney work product doctrine." Standard 21(e). However, the Litigation Section includes the precaution that in jurisdictions where the issue has not been decided, "the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information." The Standard does not explicitly acknowledge (although it is stated in the Comment) that, of the jurisdictions that have addressed the issue, approximately half have reached the opposite result. Moreover, the Standard and the Comment might themselves be considered ambiguous: Is "core" work product absolutely protected, or only absolutely protected if not relied upon by the expert in formulating his opinion?

III. CONCLUSION AND RECOMMENDATION

The Section recommends that Rule 26 of the Federal Rules of Civil Procedure should be amended to make explicit in the rule itself that oral and written "core" work product furnished to a testifying expert witness in connection with the witness' proposed testimony is not protected from disclosure to the opposing party when the expert is being deposed or testifying at trial. There are several reasons:

(1) The language of the 1993 Advisory Committee Notes to Rule 26(a)(3) indicates that this was the result sought to be accomplished at that time, but was inadequately expressed in the 1993 amendments to the rule.

(2) There is great value in having a bright-line rule in this area, so that practitioners can determine how to proceed in their pre-trial preparation. Under the cases decided since 1993 on this subject, there is a division of authority; as a result, an attorney is unable to determine (absent an advisory ruling by the trial judge, which is not easy to obtain) what will be the consequences of sharing "core" work product with an expert.

(3) Most importantly, while there are strong arguments to be made on both sides of the issue, at bottom, evidence that an expert's testimony "did not originate or evolve as a result of his own research, but rather as a result of the hiring lawyer's suggestion" may often be a critical factor for the fact-finder in determining what weight should be given the expert testimony. Becker J., dissenting, in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 598 (1984). Full disclosure of the attorney's influence on the expert's preparation outweighs the considerations for protecting "core" work product.

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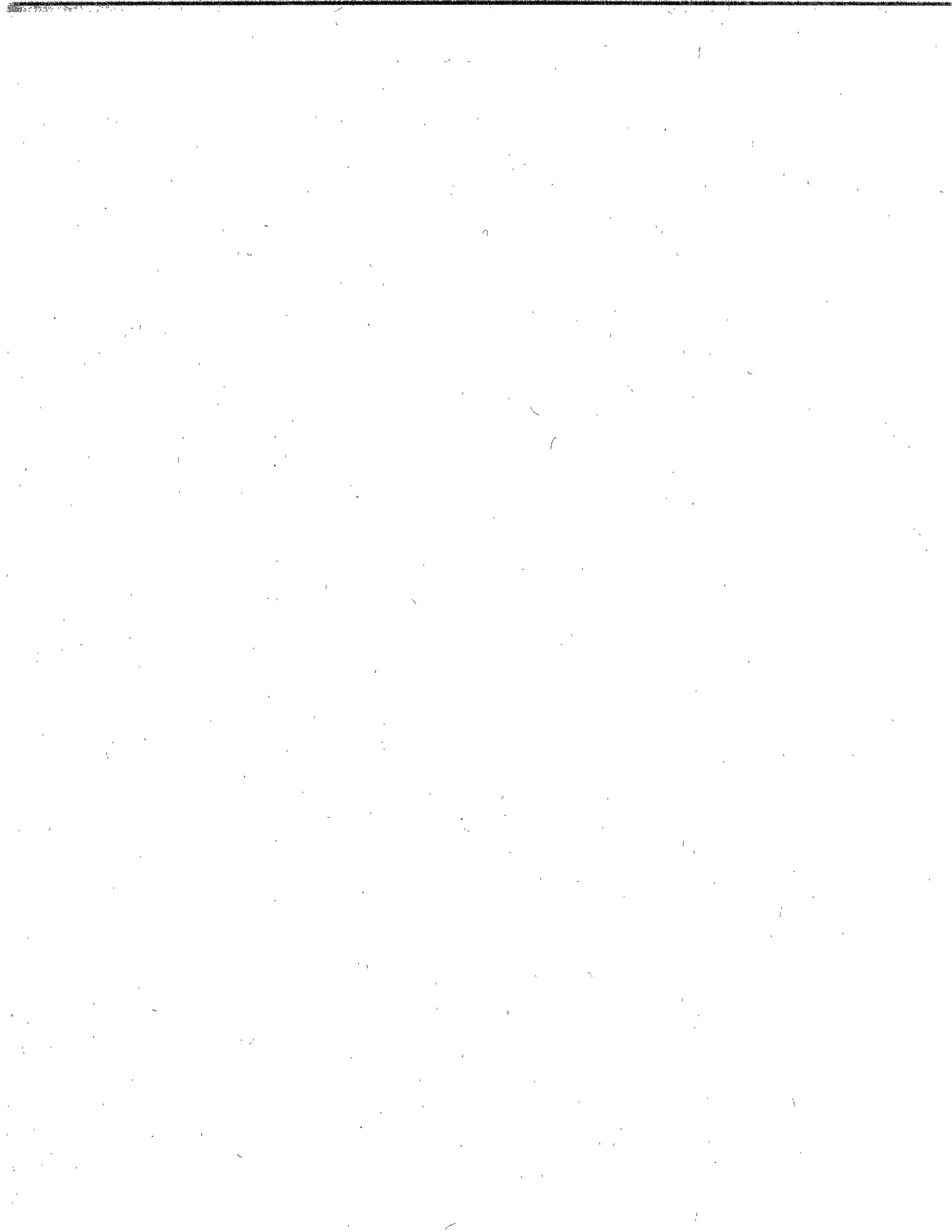

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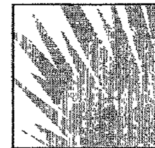

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Foreword

Welcome to the first publication of our third Working Group, this one devoted to the Role of Economics in Antitrust. The Sedona Conference® is a nonprofit law and policy think tank based in Sedona, Arizona, dedicated to the advanced study, and reasoned and just development, of the law in the areas of complex litigation, antitrust law and intellectual property rights. It established the Working Group Series (the "WGS℠") to bring together some of the nation's finest lawyers, consultants, academics and jurists to address current issue areas that are either ripe for solution or in need of a "boost" to advance law and policy. (See Appendix B for further information about The Sedona Conference® in general, and the WGS℠ in particular). WGS℠ output is first published in draft form and widely distributed for review, critique and comment, including, where possible, in-depth analysis at one of our dialogue-based Regular Season conferences. Following this public comment period, the draft is reviewed and revised, taking into consideration what has been learned during the peer review process. The Sedona Conference® hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law and policy, both as these are and ought to be.

The Sedona Conference® Working Group Addressing the Role of Economics in Antitrust was formed out of a desire to help bring some clarity and uniformity to the use, and reliance upon, expert economic evidence and testimony in the litigation of an antitrust case. It is hoped that the principles and commentary that follow will be of immediate benefit to the bench and bar as they approach these issues. It is our expectation that we will benefit greatly from the public comment process.

I want to thank the entire Working Group for all their hard work, and especially the chair and editor Daniel R. Shulman, Esq., who has guided this effort for the past year. We also want to note that the Working Groups of The Sedona Conference® could not accomplish their goals without the financial support of their sponsors. This Working Group has been supported by the following sponsors for the last year - Founding Sponsors: Gray Plant Mooty and Simpson Thacher & Bartlett, and Supporting Sponsor: Constantine & Cannon.

To make suggestions or if you have any questions, or for further information about The Sedona Conference®, its Conferences or Working Groups, please go to www.thesedonaconference.org or contact us at tsc@sedona.net.

Richard G. Braman
Executive Director
The Sedona Conference®
February 2006

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COMMENT

Because economic testimony should be closely tied to the antitrust claims, a detailed understanding of the antitrust claims furthers the economic analysis of those claims. Indeed, as explained more fully in Chapter I, courts can reject economic testimony that is not directly connected to an antitrust claim. Because the economic analysis is and should be intertwined with the legal analysis, the economic review should interact with the legal review.

Currently each draft of the testifying expert's report and the expert's notes are required to be disclosed. This obligation contrasts markedly with an attorney's review of a claim, where the work product doctrine applies to provide a zone of privacy to the process of reviewing the facts and law relating to the claim. An economist, on the other hand, arguably has no zone of privacy for the process of reviewing the facts and economics relating to the claim. *E.g., Trigon Ins. Co. v. United States,* 204 F.R.D. 277, 283 (E.D. Va. 2001); *B.C.F. Oil Ref. Inc. v. Consolidated Edison,* 171 F.R.D. 57, 62 (S.D.N.Y. 1997); *Hewlett-Packard, Inc. v. Bausch & Lomb, Inc.,* 116 F.R.D. 533, 536 (N.D. Cal. 1987); *W.R. Grace & Co. v. Zotos International,* 2000 U.S. Dist. LEXIS 18091, 2000 WL 1843258, *10 (W.D.N.Y. 2000).

The need to intertwine the economic review with the factual and legal analysis is in tension with the obligation to disclose the economist's drafts and notes. When drafts are discoverable, parties may engage in non-productive strategic behavior because drafts allow adversaries to argue that any differences illustrate that the final expert opinion is faulty, false, or the result of undue attorney influence. Disclosure of drafts fosters unproductive depositions focused on immaterial details. Economists can lessen this strategic behavior by lessening their interaction with others who review the factual or legal issues, with the effect of distancing the economic analysis from the other analyses of the claim. Lawyers can retain non-testifying economists to combine the economic and legal review, without giving rise to disclosure obligations. Testifying economists learn not to keep drafts and not to take notes, even if taking notes or keeping drafts would improve the economic analysis. Testifying economists sometimes rely on others to draft their report and to combine the economic analysis with the factual analysis.

Parties and the court can and should foster improved economic analysis by avoiding the adverse consequences of disclosure of drafts. Not allowing discovery of drafts will permit the expert to develop opinions, without worrying about defending each written word and each idea considered in the course of the work. The parties can by agreement avoid discovery of economists' drafts. The court can endorse such an agreement as part of a case management order.

Notes taken by the economist should stand on substantially the same footing as drafts. They should be immune from disclosure if they are precursors to and foundation for the economist's opinion. Documents that reflect factual inquiry by the economist, however, such as interviews, field research, and the like, should ordinarily be discoverable. Notes that reflect economic analysis, such as developing thoughts or approaches for economic opinions, should not be discoverable. Under present practice, the discoverability of notes leads experts not to take notes at all, or leads the parties to resort to absurd and unseemly measures to avoid and evade discovery, such as providing an attorney to sit with and take notes for an expert. Courts, litigants, and experts would all be better off if the notes were generally not discoverable.