

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 1-2, 2009

Volume I

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 1-2, 2009

1. Opening Remarks of the Chair
 - A. Report on the March 2009 Judicial Conference session
 - B. Transmission of Supreme Court-approved proposed rules amendments to Congress
 - C. Enactment of Statutory Time-Periods Technical Amendments Act of 2009
2. **ACTION** – Approving Minutes of January 2009 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 Civil Rules Committee
 - A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Civil Rules 8(c), 26, and 56
 - B. **ACTION** – Approving publishing for public comment proposed amendments to Supplemental Rule E(4)(f) (publication deferred)
 - C. Minutes and other informational items
6. Report of the Appellate Rules Committee
 - A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Appellate Rules 1, 29, 40, and Form 4
 - B. Minutes and other informational items
7. Report of the Bankruptcy Rules Committee
 - A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, 9001, and new Rule 5012, and proposed amendments to Official Form 23
 - B. **ACTION** – Approving publishing for public comment proposed

- amendments to Bankruptcy Rules 2003, 2019, 3001, and 4004, and new Rules 1004.2 and 3002.1, and proposed amendments to Official Forms 22A, 22B, and 22C
 - C. Minutes and other informational items (later mailing)
8. Report of the Evidence Rules Committee
- A. **ACTION** – Approving proposed “style” amendments to Evidence Rules 801-1103
 - B. **ACTION** – Approving publishing for public comment proposed “style” revision of Evidence Rules 101-1103
 - C. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Evidence Rule 804(b)(3)
 - D. Minutes and other informational items
9. Report of the Criminal Rules Committee
- A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1
 - B. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 1, 3, 4, 9, 12, 32.1, 40, 41, 43, 47, and 49, and new Rule 4.1
 - C. Minutes and other informational items
10. **ACTION** — Approving and transmitting to the Judicial Conference proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court’s Website*
11. Report on Observance of Rules Enabling Act 75th Anniversary (oral report)
12. Report on Sealed Cases (oral report)
13. Long-Range Planning Report
14. Next Meeting: January 2010

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

CHAIRS and REPORTERS

May 12, 2009

Chairs:	Reporters:
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
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Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall Univ. of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Standing Committee

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Honorable Harris L Hartz United States Circuit Judge United States Court of Appeals 201 Third Street, N.W., Suite 1870 Albuquerque, NM 87102	Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse 940 Front Street - Suite 5135 San Diego, CA 92101
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Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818	Honorable James A. Teilborg United States District Judge United States District Court 523 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Standing Committee (CONT'D.)

Honorable Diane P. Wood United States Court of Appeals 2688 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	
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Secretary:	
Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

ADVISORY COMMITTEE ON APPELLATE RULES

Chair: Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074	Reporter: Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Members: James F. Bennett, Esquire Dowd Bennett LLP 7733 Forsyth, Suite 1410 St. Louis, MO 63105	 Honorable Kermit Edward Bye United States Circuit Judge United States Court of Appeals Quentin N. Burdick United States Courthouse - Suite 330 655 First Avenue North Fargo, ND 58102
 Honorable T.S. Ellis III United States District Judge United States District Court Albert V. Bryan United States Courthouse 401 Courthouse Square Alexandria, VA 22314-5799	 Solicitor General Honorable Elena Kagan (ex officio) U.S. Department of Justice 950 Pennsylvania Ave., N.W. Room 5143 Washington, DC 20530
 Honorable Randy J. Holland Associate Justice Supreme Court of Delaware 34 The Circle Georgetown, DE 19947	 Douglas Letter Appellate Litigation Counsel Civil Div., U.S. Department of Justice 950 Pennsylvania Ave., N.W., Rm 7513 Washington, DC 20530
 Maureen E. Mahoney, Esquire Latham & Watkins LLP 555 11 th Street, N.W., Suite 1000 Washington, DC 20004-1304	 Dean Stephen R. McAllister University of Kansas School of Law 1535 West 15 th Street Lawrence, KS 66045
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ADVISORY COMMITTEE ON APPELLATE RULES (CONT'D.)

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Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

ADVISORY COMMITTEE ON BANKRUPTCY RULES

<p>Chair:</p> <p>Honorable Laura Taylor Swain United States District Judge United States District Court Daniel P. Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007</p>	<p>Reporter:</p> <p>Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall Univ. of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380</p>
<p>Members:</p> <p>Michael St. Patrick Baxter Covington & Burling LLP 1201 Pennsylvania Avenue, NW Washington, DC 20004-2401</p>	<p>Honorable David H. Coar United States District Court 1478 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604</p>
<p>Honorable R. Guy Cole, Jr. United States Circuit Judge United States Court of Appeals 127 Joseph P. Kinneary United States Courthouse 85 Marconi Boulevard Columbus, OH 43215</p>	<p>Honorable Jeffery P. Hopkins United States Bankruptcy Court Atrium Two, Suite 800 221 East Fourth Street Cincinnati, OH 45202</p>
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<p>Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604</p>	<p>Honorable Judith H. Wizmur Chief Judge United States Bankruptcy Court Mitchell H. Cohen U. S. Courthouse 2nd Floor – 400 Cooper Street Camden, NJ 08102-1570</p>
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<p>Liaison Member:</p> <p>Honorable James A. Teilborg United States District Judge United States District Court 523 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146</p>	<p>Liaison from Committee on the Administration of the Bankruptcy System:</p> <p>Honorable Joy Flowers Conti United States District Court 5250 United States Post Office and Courthouse 700 Grant Street Pittsburgh, PA 15219-1906</p>
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ADVISORY COMMITTEE ON CIVIL RULES

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<p>Members:</p> <p>Honorable Michael M. Baylson United States District Judge United States District Court 4001 James A. Byrne U.S. Courthouse 601 Market Street Philadelphia, PA 19106</p>	<p>Honorable David G. Campbell United States District Judge United States District Court 623 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146</p>
<p>Honorable Steven M. Colloton United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044</p>	<p>Professor Steven S. Gensler University of Oklahoma Law Center 300 Timberdell Road Norman, OK 73019-5081</p>
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<p>Chilton Davis Varner, Esquire King & Spalding LLP 1180 Peachtree Street, N.E. Atlanta, GA 30309-3521</p>	<p>Honorable Vaughn R. Walker Chief Judge United States District Court Phillip Burton United States Courthouse 450 Golden Gate Avenue, 17th Floor San Francisco, CA 94102-3434</p>
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ADVISORY COMMITTEE ON CRIMINAL RULES

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<p>Leo P. Cunningham, Esquire Wilson Sonsini Goodrich & Rosati, P.C. 650 Page Mill Road Palo Alto, CA 04304-1050</p>	<p>Honorable Robert H. Edmunds, Jr. Associate Justice of the Supreme Court of North Carolina Justice Building 2 East Morgan Street Raleigh, NC 27601</p>
<p>Honorable Morrison C. England, Jr. United States District Court 501 I Street – Suite 14-230 Sacramento, CA 95814-7300</p>	<p>Honorable James P. Jones Chief Judge United States District Court 180 West Main Street - Room 146 Abingdon, VA 24210</p>

ADVISORY COMMITTEE ON CRIMINAL RULES (CONT'D.)

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<p>Mr. Bruce Rifkin Clerk United States District Court United States Courthouse, Lobby Level 700 Stewart Street Seattle, WA 98101-1271</p> <hr/> <p>Honorable James B. Zagel United States District Court 2588 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604</p>	<p>Assistant Attorney General Criminal Division (ex officio) Honorable Lanny A. Breuer U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Rm 2107 Washington, DC 20530-0001</p> <p>Jonathan Wroblewski Director, Office of Policy & Legislation Criminal Division U. S. Department of Justice 950 Pennsylvania Ave., N.W. Rm 7728 Washington, DC 20530-0001</p> <p>Kathleen Felton Deputy Chief, Appellate Section Criminal Division U. S. Department of Justice 950 Pennsylvania Ave., N.W. Rm 1264 Washington, DC 20530-0001</p>
<p>Liaison Member:</p> <p>Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818</p>	

ADVISORY COMMITTEE ON CRIMINAL RULES (CONT'D.)

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
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Washington, DC 20544

ADVISORY COMMITTEE ON EVIDENCE RULES

<p>Chair:</p> <p>Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717</p>	<p>Reporter:</p> <p>Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023</p>
<p>Members:</p> <p>Honorable Joseph F. Anderson, Jr. Chief Judge, United States District Court Matthew J. Perry, Jr. United States Courthouse 901 Richland Street Columbia, SC 29201</p>	<p>Honorable Anita B. Brody United States District Court 7613 James A. Byrne United States Courthouse 601 Market Street Philadelphia, PA 19106-1797</p>
<p>Honorable Joan N. Ericksen United States District Judge United States District Court 12W United States Courthouse 300 South Fourth Street Minneapolis, MN 55415</p>	<p>William T. Hangle, Esquire Hangle, Aronchick, Segal & Pudis, P.C. One Logan Square, 27th Floor Philadelphia, PA 19103-6933</p>
<p>Honorable Andrew D. Hurwitz Justice Supreme Court of Arizona Suite 431 1501 West Washington Phoenix, AZ 85007</p>	<p>Marjorie A. Meyers Federal Public Defender 310 The Lyric Center 440 Louisiana Street Houston, TX 77002-1634</p>
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ADVISORY COMMITTEE ON EVIDENCE RULES (CONT'D.)

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LIAISON MEMBERS

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Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

<p>John K. Rabiej Chief Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544</p>	<p>James N. Ishida Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544</p>
<p>Jeffrey N. Barr Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544</p>	<p>Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544</p>
<p>Ms. Amaya Hain Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544</p>	<p>Ms. Maggie Moore Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544</p>
<p>James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544</p>	<p>Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544</p>

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Laura L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/ Circuit	Start Date	End Date
Lee H. Rosenthal, Chair	D	Texas (Southern)	Chair: 2007	2010
David J. Beck	ESQ	Texas	2003	2009
Douglas R. Cox	ESQ	Washington, DC	2005	2011
David Ogden	DOJ	Washington, DC	2009	----
Ronald M. George	CJUST	California	2006	2009
Harris L. Hartz	C	Tenth Circuit	2003	2009
Marilyn L Huff	D	California (Southern)	2007	2010
John G. Kester	ESQ	Washington, DC	2004	2010
William J. Maledon	ESQ	Arizona	2005	2011
Reena Raggi	C	Second Circuit	2007	2010
James A. Teilborg	D	Arizona	2006	2009
Dianne Wood	C	Seventh Circuit	2007	2010
Daniel Coquilette, Reporter	ACAD	Massachusetts	1985	Open
Principal Staff:				
Peter G. McCabe		(202) 502-1800		
John K. Rabiej		(202) 502-1820		

ADVISORY COMMITTEE ON APPELLATE RULES

Members	Position	District/Circuit	Start Date	End Date
Carl E. Stewart	C	Fifth Circuit	Member: 2001	----
Chair			Chair: 2005	2009
James Forrest Bennett	ESQ	Missouri	2005	2011
Kermit Edward Bye	C	Eighth Circuit	2005	2011
Thomas S. Ellis III	D	Virginia (Eastern)	2003	2009
Elena Kagan	DOJ	Washington, DC	2009	-----
Randy J. Holland	JUST	Delaware	2004	2010
Maureen E. Mahoney	ESQ	Washington, DC	2005	2011
Stephen R. McAllister	ACAD	Kansas	2004	2010
Jeffrey S. Sutton	C	Sixth Circuit	2005	2011
Catherine T. Struve	ACAD	Pennsylvania	2006	Open
Reporter				
Principal Staff:				
John K. Rabiej		(202) 502-1820		

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Members	Position	District/Circuit	Start Date	End Date
Laura Taylor Swain Chair	D	New York (Southern)	Member: 2002 Chair: 2007	---- 2010
David H. Coar	D	Illinois (Northern)	2007	2010
Ransey Guy Cole, Jr.	C	Sixth Circuit	2003	2009
Jeffery Hopkins	B	Ohio (Southern)	2007	2010
J. Christopher Kohn*	DOJ	Washington, DC	----	Open
J. Michael Lamberth	ESQ	Georgia	2005	2011
David A. Lander	ESQ	Missouri	2008	2011
William H. Pauley III	D	New York (Southern)	2005	2011
Elizabeth L. Perris	B	Oregon	2007	2010
Lawrence Ponoroff	ACAD	Louisiana	2004	2010
John Rao	ESQ	Massachusetts	2006	2009
Richard A. Schell	D	Texas (Eastern)	2003	2009
Eugene R. Wedoff	B	Illinois (Northern)	2004	2010
S. Elizabeth Gibson Reporter	ACAD	Ohio	2008	Open
Principal Staff:				
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Jim H. Wannamaker		(202) 502-1910		
*Ex-Officio				

ADVISORY COMMITTEE ON CIVIL RULES

Members	Position	District/Circuit	Start Date	End Date
Mark R. Kravitz Chair	D	Connecticut	Chair: 2007	2010
Michael M. Baylson	D	Pennsylvania (Eastern)	2005	2010
Tony West	DOJ	Washington, DC	2009	-----
David G. Campbell	D	Arizona	2005	2011
Steven M. Colloton	C	Eighth Circuit	2008	2010
Steven S. Gensler	ACAD	Oklahoma	2005	2011
Daniel C. Girard	ESQ	California	2004	2010
C. Christopher Hagy	M	Georgia (Northern)	2003	2009
Peter D. Keisler	ESQ	District of Columbia	2008	2011
John G. Koeltl	D	New York (Southern)	2007	2010
Randall T. Shepard	CJUST	Indiana	2006	2009
Anton R. Valukas	ESQ	Illinois	2006	2009
Chilton Davis Varner	ESQ	Georgia	2004	2010
Vaughn R. Walker	D	California (Northern)	2006	2009
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
Principal Staff:				
John K. Rabiej		(202) 502-1820		

ADVISORY COMMITTEE ON CRIMINAL RULES

Members	Position	District/Circuit	Start Date	End Date
Richard C. Tallman	C	Ninth Circuit	Member: 2004	----
Chair			Chair: 2007	2010
Anthony J. Battaglia	M	California (Southern)	2003	2009
Rachel Brill	ESQ	Puerto Rico	2006	2009
Leo P. Cunningham	ESQ	California	2006	2009
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2010
Morrison C. England, Jr.	D	California (Eastern)	2008	2011
Lanny A. Breuer	DOJ	Washington, DC	----	Open
James P. Jones	D	Virginia (Western)	2003	2009
John F. Keenan	D	New York (Southern)	2007	2010
Andrew Leipold	ACAD	Illinois	2007	2010
Thomas P. McNamara	FPD	North Carolina	2005	2011
Donald W. Molloy	D	Montana	2007	2010
James B. Zagel	D	Illinois (Northern)	2007	2010
Sara Sun Beale	ACAD	North Carolina	2005	Open
Reporter				
Principal Staff:				
John K. Rabiej			(202) 502-1820	

ADVISORY COMMITTEE ON EVIDENCE RULES

Members	Position	District/Circuit	Start Date	End Date
Robert L. Hinkle Chair	D	Florida (Northern)	Member: 2002 Chair: 2007	---- 2010
Joseph F. Anderson, Jr.	D	South Carolina	2005	2011
Michael M. Baylson**	D	Pennsylvania (Eastern)	2006	2010
Anita Brody	D	Pennsylvania (Eastern)	2007	2010
Joan N. Ericksen	D	Minnesota	2005	2011
William T. Hangley	ESQ	Pennsylvania	2006	2009
Andrew D. Hurwitz	JUST	Arizona	2004	2010
John F. Keenan**	D	New York (Southern)	2007	2010
Marjorie A. Meyers	FPD	Texas (Southern)	2006	2009
William W. Taylor III	ESQ	Washington, DC	2004	2010
John Cruden	DOJ	Washington, DC	----	Open
Daniel J. Capra Reporter	ACAD	New York	1996	Open
Principal Staff:				
John K. Rabiej		(202) 502-1820		

** Ex-Officio, non-voting members' terms coincide with terms on Civil and Criminal Rules

TAB 1A-C



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT JUDICIAL CONFERENCE ACTIONS March 17, 2009

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

At its March 17, 2009 session, the Judicial Conference of the United States —

Elected to the Board of the Federal Judicial Center for a term of four years:
Magistrate Judge John Michael Facciola, United States District Court for the District of Columbia, to succeed Magistrate Judge Karen K. Klein, United States District Court for the District of North Dakota, and Bankruptcy Judge James B. Haines, Jr., United States District Court for the District of Maine, to succeed Bankruptcy Judge Stephen Raslavich, United States District Court for the Eastern District of Pennsylvania.

EXECUTIVE COMMITTEE

Rescinded its March 1995 decision to pursue legislation to create a Judicial Conference Foundation that can receive and expend private contributions in support of official programs.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Agreed to seek legislation that would authorize, as appropriate, the additional duties and powers for bankruptcy administrators conferred on the United States trustees in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Redesignated Bankruptcy Judge Henry J. Boroff's duty station in Worcester, Massachusetts, to Springfield, as requested by the Judicial Council of the First Circuit, and deleted Springfield as an additional place of holding court.

COMMITTEE ON CODES OF CONDUCT

Approved and adopted the proposed Code of Conduct for United States Judges with an effective date of July 1, 2009.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Approved the following related to internet citations in opinions:

- a. That all internet materials cited in final opinions be considered for preservation. Each judge, however, should retain the discretion to decide whether the specific cited resource should be captured and preserved.
- b. That the Administrative Office work with the Committee on Court Administration and Case Management to develop guidelines to assist judges in making the determination of which citations to preserve. The guidelines will discuss considerations for citation to internet resources, criteria for evaluating whether to capture cited internet resources, the process of capturing and maintaining cited internet resources, and the use of hyperlinks to commercial databases in final opinions.
- c. That chambers staff be involved in the process of preserving internet resources. This will ensure that cited internet resources are captured and preserved at the time they are viewed and relied upon by the judge. While each chambers should determine the best method of adjusting its workflow to allow it to efficiently preserve the information it deems important, the suggested guidelines regarding the process of capturing and maintaining internet materials should be used to assist them in this process.
- d. That cited and preserved internet resources be made available on a non-fee basis, as is done with final opinions in PACER and on court websites.
- e. That the judiciary avoid including in final opinions hyperlinks that lead directly to materials contained within commercial vendor databases to prevent a stated or implied endorsement or preferential treatment. To the extent that a court determines that such hyperlinks are to be used in opinions, it is recommended that an appropriate disclaimer be provided.

With regard to sealed cases:

- a. Approved the inclusion, on a CM/ECF-generated report of cases, of the case number and a generic name (e.g., “Sealed versus Sealed”) for each sealed case; and
- b. Agreed that individual courts would determine the additional information about sealed cases to be made available to the public.

Approved the issuance of guidance related to the filing of electronic transcripts of voir dire proceedings. The guidance will —

- a. Ask courts to examine the manner in which they conduct voir dire proceedings in civil and criminal cases, and suggest that judges (1) inform jurors that they have the right to approach the bench to share personal information in an on-the-record in camera conference with the attorneys; and (2) make efforts to limit references on the record to potential jurors' names by assigning and using numbers for each juror;
- b. Remind courts of the existing judiciary policy that voir dire transcripts not be created unless specifically requested (*Guide to Judiciary Policies and Procedures*, Volume 6, Chapter 17, Section 17.5.3.a);
- c. Ask judges to balance, once a transcript is created, the right to public access to transcripts with the jurors' right to privacy – consistent with applicable circuit case law – and, only if appropriate, to seal the transcript; and
- d. Suggest that, when sealing, judges consider sealing (1) the transcripts of the entire voir dire proceeding, which would be docketed separately from the rest of the trial transcript; or (2) the transcripts of the bench conferences with potential jurors, docketed separately from the rest of the transcripts of voir dire. The guidance should inform the courts, however, that this last option would require additional work for court reporters in creating and docketing a separate transcript of the bench conferences held during voir dire.

With regard to the management of court records:

- a. Approved revisions to the records disposition schedule (to be endorsed by the National Archives and Records Administration (NARA)) to provide that —
 - (1) courts of appeals permanent records be stored at the courthouse for up to one year after the case mandate has issued, or longer, as space permits, and then be transferred to the National Archives, bypassing storage time at the Federal Records Centers (FRCs);
 - (2) temporary bankruptcy court records that currently have a 20-year FRC retention period be destroyed 15 years after case closing;
 - (3) bankruptcy court permanent records be stored at the courthouse for up to one year, or longer, as space permits, and then transferred to the National Archives, bypassing storage time at the FRCs;
 - (4) district court temporary records be destroyed 15 years after case closing; and

- (5) district court permanent records be stored at the courthouse for up to one year, or longer, as space permits, and then transferred to the FRC, with transfer to the National Archives 15 years after case closing; and
- b. Agreed to initiate action through the Administrative Office to apply the new disposition schedule to both permanent records currently at the FRCs, moving them to the National Archives, and temporary records currently stored at the FRCs.

Approved a policy requiring all courts to adopt the following two safeguards for verifying bar admission of attorneys seeking to be admitted to the court:

- a. An admission form that gathers sufficient information to allow the court to verify the state bar admission status of an applicant; and
- b. A procedure for verifying that the information on the forms is correct.

Amended the United States Court of Federal Claims Miscellaneous Fee Schedule to add the following item:

- (9) For reproduction of an audio recording of a court proceeding, \$26. This fee applies to services rendered on behalf of the United States, if the recording is available electronically.

Approved a policy statement regarding courtroom sharing by senior judges in new construction and agreed to include it in the *U.S. Courts Design Guide*.

COMMITTEE ON CRIMINAL LAW

Agreed to seek an amendment to 18 U.S.C. § 924(c) that precludes the stacking of counts and makes clear that additional penalties apply only when a sentence has been served between counts.

COMMITTEE ON DEFENDER SERVICES

Agreed to revise its 1995 policy of seeking legislation authorizing immediate and periodic adjustments to the statutory case compensation maximums in proportion to Criminal Justice Act attorney compensation rate increases to state that immediate and automatic adjustments to the service provider maximums can be made by reference to measures such as increases to the attorney compensation rates, cumulative ECI adjustments, or similar objective standard.

COMMITTEE ON FEDERAL-STATE JURISDICTION

Rescinded a position adopted in September 2003 to seek an amendment to 28 U.S.C. § 1446(a) to replace the specific reference to Rule 11 of the Federal Rules of Civil Procedure with a generic reference to the rules governing pleadings and motions in civil actions in federal court.

COMMITTEE ON THE JUDICIAL BRANCH

Approved amendments to sections H.2.b. and H.2.c. of the Travel Regulations for United States Justices and Judges to clarify judges' eligibility for evacuation, safe haven, and other special allowances.

COMMITTEE ON JUDICIAL RESOURCES

Authorized the Administrative Office to —

- a. Transmit to Congress a request for the addition of nine permanent and three temporary judgeships in the courts of appeals, and for the district courts, the addition of 38 permanent and 13 temporary judgeships, plus conversion to permanent status of five existing temporary judgeships and extension of one existing temporary judgeship for an additional five years; and
- b. Transmit to the President and the Senate a recommendation not to fill the existing judgeship vacancy in the District of Wyoming and the next judgeship vacancy occurring in the District of Massachusetts, based on the consistently low weighted caseloads in these districts.

Approved applying the Court Personnel System rules for initial pay setting, including the 90-day break-in-service rule for federal judiciary applicants, to non-chambers Judiciary Salary Plan positions (excluding pro se, death penalty, and bankruptcy appellate panel law clerks) and graded federal public defender organization positions, in lieu of the current salary matching rules. Pro se, death penalty, and bankruptcy appellate panel law clerks will continue to be subject to the current salary matching rules.

Approved, effective August 31, 2009, discontinuation of the practice of crediting the time spent in a bar examination preparatory course toward the one year of legal work experience required for the Judiciary Salary Plan grade 12 level for law clerk.

Approved the establishment of unit executive and Type II deputy designee positions to support the orderly transition of responsibilities from outgoing to incoming unit executives and deputies, subject to the following conditions:

- a. A designee position may be utilized for the selectee for either a unit executive or a Type II deputy position;

- b. A designee position is not applicable to, or available for, candidates who are being promoted within their current court unit;
- c. A designee position should be established using decentralized funds; however, a unit may request supplemental funding for a period of up to 30 days for a designee position, if local funds are unavailable to fund the full period desired; and
- d. A designee position may be established for a maximum period of three months regardless of the source of funding.

Amended the current policy regarding employment of relatives in courts and federal public defender organizations to include that employment in Court Personnel System positions is subject to the following:

- a. Unit executives, managers, and supervisors may not approve a discretionary step increase or render a performance evaluation for any employee who is a relative of that unit executive, manager, or supervisor (applying the definition of “relative” in 5 U.S.C. § 3110(a)(3)); and
- b. For any prospective employment or organizational changes or actions, courts may not place or retain an employee in a position within the supervisory chain of a supervisor, manager, or unit executive who is a relative of the employee.

Amended its March 1979 policy regarding re-employment of retired law enforcement officers to include that a retired law enforcement officer may be re-employed for only a single period for a maximum of 18 months, and that all such re-employments must meet one of the following two criteria: (1) well-qualified candidates other than the retired law enforcement officer are not available (as evidenced by the results of a vacancy announcement); or (2) the experience, knowledge, or competencies of the retired law enforcement officer are critical to the court’s ability to respond to an emergency.

Recommitted to the Committee on Judicial Resources the following recommendations regarding the policy on determining the official duty station for teleworking employees in courts and federal public defender organizations:

- a. The court, chambers, court unit, or federal public defender organization location is the official duty station for an employee who is required to report at least once per week on a regular and recurring basis to that office location, and temporary exceptions to the reporting requirement may be granted in the event of injury, illness, or emergency situation;
- b. The telework site is the official duty station for an employee who is not required to report at least once per week on a regular and recurring basis to his or her employing office;

- c. The employing court or federal public defender organization has discretion with regard to reimbursing the employee whose telework site is the official duty station for travel or subsistence expenses when the employee reports to the employing court or federal public defender organization location; and
- d. If the official duty station changes as a result of modification or termination of the telework agreement, relocation benefits will not be authorized.

Amended the employee recognition program policy so that a court may use appropriated funds as follows:

- a. For food and beverages (excluding alcohol) for an award ceremony as long as such expenditures are for the purpose of enhancing an award program and limited to reasonable amounts, not to exceed the dinner component of the meal and incidental expense allowance (under the Federal Travel Regulations) for the ceremony location, per employee attending the event;
- b. To provide a meal to an employee as an informal recognition award, either alone or in conjunction with other informal or formal recognition; and
- c. To pay the meal expenses of award nominees and their supervisors who are invited to attend award ceremonies sponsored by entities outside the judiciary.

Authorized courts and federal defender organizations to use decentralized funds for the purchase of fitness/wellness-related items (limited to the Internal Revenue Service definition of *de minimis* fringe benefits) for employees who agree to participate or have participated in fitness/wellness activities, as allowed under 5 U.S.C. § 7901.

Agreed, effective six months after the Human Resources Management Information System Electronic Official Personnel Folder (eOPF) application is fully deployed, that paper copies of all documents filed in the eOPF, as well as leave and earnings statements, Payroll Certifying Officer reports, Notices of Health Premiums Due, Step Increase Certifications, Notifications of Leave Without Pay, and Personal Services for the National Courts reports, and any similar documents that are available online will no longer be provided to courts, including active and senior judges, and federal public defender organizations.

Amended its policy on transcript fees to make explicit that official court reporters may charge only copy fees for copies of transcripts provided to parties when the original transcript was produced at the request of a judge.

Approved an exemption for the Southern District of Iowa at its Des Moines location from the Conference's September 1987 policy that requires a court to place all of its official court reporters in the same location on a tour of duty if some reporters in that location are on a tour of duty.

Rescinded its March 2001 position to seek legislation deferring repayment of both principal and interest on federally insured educational loans for full-time chambers law clerks during clerkships, for a period not to exceed three years of service.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Agreed to waive the two-year limit on credit for law clerk service that may be used toward the five-year active practice of law requirement for magistrate judge applicants under Section 1.01(b)(4) of the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges to allow the incumbent clerk of court in the Western District of Wisconsin to serve as the clerk of court/magistrate judge .

Approved recommendations regarding specific magistrate judge positions.

COMMITTEE ON SPACE AND FACILITIES

Approved General Services Administration (GSA) feasibility studies for the following projects: Philadelphia, Pennsylvania; St. Thomas, U.S. Virgin Islands; Des Moines, Iowa; and Chattanooga, Tennessee.

Approved the *Five-Year Courthouse Project Plan for FYs 2010-2014*.

Approved the tenant alterations formula that uses rentable square footage (50 percent) and authorized staff (50 percent) to determine tenant alterations requirements.

Approved a lease construct courthouse for Clarksburg, West Virginia, subject to the conditions set forth below, at a rental cost not to exceed the rent cap to be established by the Space and Facilities Committee:

- a. The district must commit in writing that the replacement judge for the current active district judge in Clarksburg who is expected to take senior status in 2009, will be assigned to the Clarksburg division;
- b. The space program will provide for two courtrooms and three chambers;
- c. The court recognizes that the U.S. Marshals Service will in all likelihood face difficulty in obtaining the funds to build out detention cells in the project;
- d. No circuit rent budget Component B funding will be provided for an interim space solution in the existing building in the time before the lease construct project is delivered; and
- e. The lease construct procurement will adhere to the new process to be piloted in Lancaster.

TAB 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 12-13, 2009
San Antonio, Texas
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at St. Mary’s Law School in San Antonio, Texas, on Monday and Tuesday, January 12 and 13, 2009. The following members were present:

- Judge Lee H. Rosenthal, Chair
- David J. Beck, Esquire
- Douglas R. Cox, Esquire
- Chief Justice Ronald N. George
- Judge Harris L Hartz
- Judge Marilyn L. Huff
- John G. Kester, Esquire
- William J. Maledon, Esquire
- Judge Reena Raggi
- Judge James A. Teilborg
- Judge Diane P. Wood

Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division, represented the Department of Justice. Professor Daniel J. Meltzer was unable to attend the meeting.

Also participating in the meeting were: Judge Anthony J. Scirica, former chair of the committee; Professor Geoffrey C. Hazard, Jr., consultant to the committee; Judge Patrick E. Higginbotham, former chair of the Advisory Committee on Civil Rules; Judge Vaughn R. Walker, Professor Steven S. Gensler, and Daniel C. Girard, Esquire, current members of the Advisory Committee on Civil Rules; and Professor David A. Schlueter, former reporter to the Advisory Committee on Criminal Rules.

In addition, the committee conducted a panel discussion in which the following distinguished members of the bench and bar participated: Judge Rebecca Love Kourlis; Gregory P. Joseph, Esquire; Joseph D. Garrison, Esquire; Douglas Richards, Esquire; and Paul C. Saunders, Esquire. Dean Charles E. Cantu of St. Mary's Law School greeted the participants and welcomed them to the school.

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, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Emery Lee	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

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 Laura Taylor Swain, Chair
 - Professor S. Elizabeth Gibson, Reporter
- Advisory Committee on Civil Rules —
 - Judge Mark R. Kravitz, Chair
 - Professor Edward H. Cooper, Reporter
- Advisory Committee on Criminal Rules —
 - Judge Richard C. Tallman, Chair
 - Professor Sara Sun Beale, Reporter
- Advisory Committee on Evidence Rules —
 - Judge Robert L. Hinkle, Chair

INTRODUCTORY REMARKS

Judge Rosenthal thanked Dean Cantu and St. Mary's Law School for hosting the committee meeting and Becky Adams, Coordinator to the Dean, for her help in planning the meeting, managing transportation, and providing meals and refreshments. She suggested that the committee consider holding more meetings at law schools in the future. She also recognized the outstanding contributions to the rules committees made by Judge Higginbotham and Professor Schlueter, both of whom currently teach at St. Mary's.

Judge Rosenthal thanked Mr. Tenpas for his active and productive involvement in the rules process over the last several years in representing the Department of Justice. She asked him to convey the committee's appreciation back to the many Department executives and career attorneys who have contributed professionally to the work of the rules committees. In particular, she asked the committee to recognize the important contributions in the last couple of years of James B. Comey, Paul J. McNulty, Robert D. McCallum, Jr., Paul D. Clement, John S. Davis, Alice S. Fisher, Greg Katsas, Benton J. Campbell, Deborah J. Rhodes, Douglas Letter, Ted Hirt, J. Christopher Kohn, Jonathan J. Wroblewski, Elizabeth Shapiro, Stefan Cassella, and Michael J. Elston.

Mr. Tenpas announced that the Department had arranged to have career attorneys support the work of the committees during the transition from the Bush Administration to the Obama Administration.

Judge Rosenthal welcomed Judge Scirica and thanked him for his distinguished leadership as the committee's chair. She also recognized Professor Gibson, professor of law at the University of North Carolina, as the new reporter of the Advisory Committee on Bankruptcy Rules. She noted that the advisory committee will have to move quickly to draft additional changes in the bankruptcy rules if pending legislation is enacted to provide bankruptcy judges with authority to modify home mortgages.

Judge Rosenthal reported that all the rules amendments sent by the committee to the Judicial Conference at its September 2008 session had been approved on the Conference's consent calendar and were pending before the Supreme Court. The majority of the changes, she said, were part of the comprehensive package of time-computation amendments. She pointed to the draft cover letter that will be sent to Congress conveying proposed legislation to amend 29 statutory provisions affecting court proceedings and deadlines. She noted that the Department of Justice and a number of bar associations had also written Congress to support the changes.

She added that the new Congress was largely preoccupied in getting organized, but she and others planned to visit members and their staff in February 2009 to discuss

the proposed legislation. She noted that a good deal of background work for the proposal had already been initiated in the preceding Congress.

Judge Rosenthal explained that the purpose of the proposed legislation was to coordinate the time-computation rules changes with appropriate statutory changes and make them all effective on December 1, 2009. She reported, too, that the committee would initiate efforts to have the courts amend their local rules to take account of the changes in the national rules and statutes. To that end, it will send materials to the chief judges. She suggested that it should not be difficult for the courts to comply, but it will take coordinated efforts to make sure that the task is completed on a timely basis in each court. She added that the chief judges should also be advised of the matter at various judge workshops and meetings and in articles in the judiciary's publications.

Judge Scirica reported that Chief Justice Roberts had complimented Judge Rosenthal at the September 2008 Judicial Conference meeting for her extraordinary efforts in securing legislative approval of the new FED. R. EVID. 502. Unfortunately, he said, Judge Rosenthal had not been able to attend the Conference in person because of the hurricane in Houston. But, he noted, the honor from the Chief Justice was greatly deserved and remarked upon by many members of the Conference. Judge Scirica then presented Judge Rosenthal with a framed copy of the legislation enacting Rule 502 signed by the President and a personal note from the President.

Judge Rosenthal noted that the 75th anniversary of the Rules Enabling Act of 1934 will occur on June 19, 2009. She said that she planned to speak with the Chief Justice about holding an appropriate program later in the year to mark the event. One possibility, she said, would be to combine a celebration at the Supreme Court with education programs on the federal rules process featuring prominent law professors.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 9-10, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that the 111th Congress was just getting organized. The first legislative task for the rules office staff, he said, had been to prepare the cover letters to be sent to Congressional leadership in support of legislation to amend the time deadlines

in 29 statutes. The judiciary, he said, hopes that the legislation will take effect on December 1, 2009.

Mr. Rabiej reported that proposed legislation on gang crime would amend FED. R. EVID. 804(b)(6) (the hearsay exception for unavailable witnesses) to codify a decision of the Tenth Circuit and make it explicit that a statement made by a witness who is unavailable because of a party's wrongdoing may be introduced against that party if the party should have reasonably foreseen that its wrongdoing would make the witness unavailable. One version of the legislation would amend the rule directly by statute. But another would only direct the Standing and Evidence Committees to consider the necessity and desirability of amending the rule.

Mr. Rabiej noted that legislation was anticipated in the new Congress that would authorize bankruptcy judges to alter certain provisions of a debtor's personal-residence mortgage. If enacted, he said, the legislation would likely require amendments to the bankruptcy rules and forms.

On the criminal side, Mr. Rabiej reported that legislation likely would be introduced once again on behalf of the bail bond industry to prohibit judges from forfeiting bonds for any condition other than the defendant's failure to appear in court as ordered. In addition, legislation may be introduced in the new Congress to add more provisions to the rules to protect victims' rights.

On the civil side, Mr. Rabiej reported that the main legislative focus will be on Senator Kohl's bill that would amend FED. R. CIV. P. 26 to impose certain limitations on protective orders. He said that the legislation had been introduced in the last several Congresses and had been opposed consistently by the Judicial Conference on the grounds that it is unnecessary, impractical, and overly burdensome for both courts and litigants. He noted that Judge Kravitz had testified against the legislation in the 110th Congress, and his written statement had been included in the committee's agenda materials. He added that Senator Kohl was expected to introduce the bill again in the 111th Congress.

Judge Kravitz explained that the legislation had two primary provisions. First, it would prevent judges from entering sealed settlement orders. He pointed out, though, that empirical research conducted for the committee by the Federal Judicial Center had demonstrated that these orders are relatively rare in the federal courts. Thus, the provision would have little practical impact.

The second provision of the legislation, though, would be very troublesome. It would prevent a judge from entering a discovery protective order unless personally assured that the information to be protected by the order does not implicate public health or safety. He pointed out that a judge would have to make particularized findings attesting to that effect at an early stage in a case – when the judge knows very little about

the case, the documents have not been identified, and little help can be expected from the parties.

He pointed out that he had been the only witness invited by the House Judiciary Committee to speak against the legislation. He explained in his testimony that the judiciary opposed the bill because empirical data demonstrates that protective orders typically allow parties to come back to the court to challenge the information produced or ask the judge to lift the order. In addition, protective orders have the beneficial effect of allowing lawyers to exchange information more readily and at much less expense to the parties. Many of the problems targeted by the legislation, he said, appear to have arisen in the state courts, rather than the federal courts. He also reported that he had emphasized at the hearing that Congress had established the Rules Enabling Act process explicitly to allow for an orderly and objective review of the rules. Accordingly, Congress should normally give substantial deference to that thoughtful and thorough process.

Judge Kravitz observed that the supporters of the proposed legislation clearly do not fully understand the rules process. Several members of Congress, he said, seemed surprised to discover that the Advisory Committee on Civil Rules had actually held hearings on the proposal, commissioned sound research from the Federal Judicial Center, and reached out to all interest groups. He suggested that the rules committees increase their outreach efforts to Congress. A participant added that the regular turnover of members and staff on Congressional committees results in little institutional memory. He suggested that several prominent law professors would be willing to help educate Congressional staff about the rules process by conducting special seminars for them. Judge Rosenthal added that the 75th anniversary celebration of the Rules Enabling Act might be a good time to have some prestigious academics conduct seminars staff on the rules process. The programs, she said, should emphasize that the work of the rules committees is transparent, thorough, and careful.

Administrative Report

Mr. Ishida reported that the rules staff has continued to improve and expand the federal rules page on www.uscourts.gov. The digital recordings of the public hearings have now been posted on the site and are available as a podcast. He noted that the website had been attracting favorable attention among bloggers. Mr. McCabe added that the staff was continuing to search for historical records of the rules committees. They traveled recently to Hofstra and Michigan law schools to obtain copies of missing records of the Advisory Committee on Bankruptcy Rules from the 1970s and 1980s.

Judge Rosenthal thanked both the advisory committees and the members of the Standing Committee for their helpful comments on the appropriate use of subcommittees. She said that they will be incorporated in the committee's response to the Executive

Committee of the Judicial Conference. Judge Scirica explained that the Executive Committee's request for comments had been motivated by about the supervision by some committees over their subcommittees. He emphasized that the rules committees' use of subcommittees has always been appropriate and productive.

Judge Rosenthal reported that the newly re-established E-Government Subcommittee, which includes representatives from the Court Administration and Case Management Committee, will address a number of issues that have arisen since the new privacy rules took effect.

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 attachments of December 11, 2008 (Agenda Item 6).

Informational Items

FED. R. APP. P. 40(a)(1)

Judge Stewart reported that the advisory committee had voted to give final approval to proposed amendments to Rule 40(a)(1) (time to file a petition for panel rehearing). The amendments would clarify applicability of the extended deadline for seeking panel rehearing to cases in which federal officers or employees are parties. At this time Judge Stewart presented the proposed amendments to the Standing Committee for discussion, rather than for final approval.

He explained that the proposal was one of two recommended by the Department of Justice and published for comment in 2007. The other would have amended FED. R. APP. P. 4(a)(1) to clarify applicability of the 30-day and 60-day appeal time limits in cases in which federal officers or employees are parties. The Department, however, later withdrew the second proposal because the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), indicated that statutory appeal time limits are jurisdictional. Amending Rule 4's time periods for filing a notice of appeal, he said, might raise questions under *Bowles* because those time limits also appear in 28 U.S.C. § 2107.

Judge Stewart reported that the advisory committee at its November 2008 meeting had voted to proceed with the proposed amendment to Rule 40 because it involved a purely rules-based deadline. But he noted that there was no need to proceed at the January 2009 Standing Committee meeting because the matter could be taken up more effectively at the June 2009 meeting. This would give the Department of Justice

additional time to decide whether to pursue a legislative change of Rule 4's deadlines, rather than a rules amendment. He pointed out that there is no disadvantage in waiting because the matter will not be presented to the Judicial Conference until its September 2009 session. The advisory committee, he said, hoped to receive additional input from the Department at its April 2009 meeting.

BOWLES V. RUSSELL

Judge Stewart noted that a number of issues are unresolved regarding the impact of *Bowles v. Russell* on appeal deadlines set by statute versus those set by rules. The Supreme Court, he said, has had other pertinent cases on its docket since *Bowles*, but has not provided additional guidance. Accordingly, the advisory committee decided to explore – in coordination with the civil, criminal, and bankruptcy advisory committees – whether a statutory change, rather than a rules amendment, might be appropriate to resolve these issues.

Professor Struve explained that although *Bowles* holds that appeal deadlines set by statute are jurisdictional, the implications of the decision for other types of deadlines are unclear. A consensus has developed, she said, that purely non-statutory deadlines are not jurisdictional. But there are also “hybrid deadlines,” such as those involving motions that toll the deadline for taking an appeal. A split in the case law already exists among the circuits on this matter, and there may even be instances in which one party in a case has a statutory deadline and the other does not.

Professor Struve reported that the advisory committee was considering developing a proposed statutory fix to rationalize the whole situation, and it had asked her to try drafting it. Obviously, she said, the advisory committee will consult with the other advisory committees and reporters, and it will appreciate any insights or guidance that members of the Standing Committee may have. She added that the Advisory Committee on Civil Rules had been particularly helpful in working with her on the matter.

COMPLIANCE WITH THE SEPARATE-DOCUMENT REQUIREMENT OF FED. R. CIV. P. 58

Judge Stewart reported that the advisory committee had voted to ask the Standing Committee to take appropriate steps to improve district-court awareness of, and compliance with, the separate-document requirement of FED. R. CIV. P. 58 (entering judgments), rather than to seek rules changes. In particular, jurisdictional problems arise between the district court and the court of appeals in cases where: (1) a separate judgment document is required but not provided by the court; (2) an appeal is filed; and (3) a party later files a tolling motion – which is timely because the court did not enter a separate judgment document – and the motion suspends the effect of the notice of appeal.

Judge Stewart emphasized that it is important for the bar to have the district courts comply with the rule. He reported that the advisory committee had asked the Federal Judicial Center to make informal inquiries regarding compliance. In addition, the advisory committee had asked its appellate clerk liaison, Charles Fulbruge, to canvass his clerk colleagues regarding the level of compliance that they have experienced in their respective circuits with the separate-document rule. Some clerks, he reported, had noted a fair degree of noncompliance, but others had not.

A member reported that a serious problem had existed in his circuit with district courts not entering separate documents, especially in prisoner cases. After judgment, prisoners who have already filed a notice of appeal file a document that can be construed as a Rule 59 motion for a new trial that tolls the deadline for filing a notice of appeal. The court of appeals then loses jurisdiction because a timely post-judgment motion has been filed in the district court, but the district court fails to act because it believes that the court of appeals has the case. He said that representatives of his circuit had spoken directly with the district court clerks in the circuit about the Rule 58 requirements, and compliance has now been much improved. He suggested that it would be productive for the rules committees also to work informally with the district courts on the matter. In addition, it would be advisable to place an automated prompt or other device in the CM/ECF electronic docket system to help ensure compliance with the separate-document requirement. Judge Rosenthal added that the committee should coordinate on the matter with the Committee on Court Administration and Case Management.

MANUFACTURED FINALITY

Judge Stewart reported that the advisory committee was collaborating with the other advisory committees on the issue of “manufactured finality” – a mechanism used in various circuits for parties to get a case to the court of appeals when a district court dismisses a plaintiff’s most important claims but other claims survive. To obtain the necessary finality for an appeal, he said, the plaintiff may seek to dismiss the peripheral claims in order to let the case proceed to the court of appeals on the central claims.

Whether or not these tactics work to create an appealable final judgment generally depends on the conditions of the voluntary dismissal. The circuits are split on whether there is a final judgment when the plaintiff has reserved the right to resume and revive its dismissed peripheral claims if it wins its appeal on its central claims. A member added that her circuit does not allow dismissals without prejudice to create an appealable final judgment. The circuit will permit the appellant to wait until oral argument to stipulate to a dismissal with prejudice, but the appellant must do so by that time. Another member pointed out that manufactured finality may arise in several ways. In his circuit, some parties simply take no action after an interlocutory decision, and the district court ultimately dismisses the peripheral claims for failure to prosecute. A participant suggested that the case law on finality and the application of 28 U.S.C. § 1292(b) varies

considerably among the circuits, and many district judges use a variety of devices to get cases to the courts of appeal.

Judge Stewart pointed out that there are cases in which everybody – the parties and the trial judge – wants to send a case up to the court of appeals quickly. He suggested that manufactured finality is a real problem, and the circuits have taken very different approaches to dealing with it. Therefore, he said, it may well be appropriate to have national uniformity. To that end, he said, the advisory committee will consider whether the federal rules should provide appropriate avenues for an appeal other than through the certification procedure of FED. R. CIV. P. 54(b) and the interlocutory appeal provisions of 28 U.S.C. § 1292(b).

OTHER MATTERS

Judge Stewart reported that the advisory committee had decided to remove from its active agenda a proposal to amend FED. R. APP. P. 7 (bond for costs on appeal in a civil case) to clarify the scope of the “costs” for which an appeal bond may be required. Professor Struve added that the advisory committee would collaborate with the Advisory Committee on Civil Rules on whether to amend FED. R. APP. P. 4(a)(4) (effect of a motion on a notice of appeal in a civil case) to refine the time and scope of notices of appeal with respect to challenges to the disposition of post-trial motions.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain’s memorandum and attachments of December 12, 2008 (Agenda Item 9).

Amendments for Publication

FED. R. BANKR. P. 6003

Professor Gibson reported that FED. R. BANKR. P. 6003 (relief immediately after commencement of a case) was adopted in 2007 to address problems typically arising in large chapter 11 cases when a bankruptcy judge is presented with a large stack of motions on the day of filing. The rule imposes a 21-day breathing period before the judge may actually rule on these first-day motions – largely applications to approve the employment of attorneys or other professionals and to sell property of the estate. The delay provides time for a creditors committee to be formed and for the U.S. trustee and the judge to get up to speed on the case.

Some judges and lawyers, she said, have read the rule to prohibit a debtor-in-possession from hiring an attorney during the first 21 days of the case. The current rule permits an exception on a showing of irreparable harm, but some parties resort to claiming irreparable harm in every case. The proposed amendment, she said, would make it clear that although the judge may not issue the order before the 21-day period is over, the judge may issue it later and make it effective retroactively, thereby ratifying the appointment of counsel sought in the motion.

Another, minor change to the rule, she said, would make it clear that even though a judge may not grant the specific kinds of relief enumerated in the rule – such as approving the sale of property – the judge may enter orders relating to that relief, such as establishing the bidding procedures to be used for selling the property.

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

Informational Items

Professor Gibson reported that several of the bankruptcy rules amendments published in August 2008 would implement chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, dealing with cross-border cases. She noted that only two comments had been received, and the advisory committee had canceled the scheduled public hearings.

OFFICIAL FORMS 22A and 22C

Professor Gibson explained that Forms 22A and 22C implement the “means test” provisions of the 2005 Act. The statute, she said, defines “current monthly income” and establishes the means test to determine whether relief for the debtor under chapter 7 should be presumed abusive. Chapter 13 debtors must complete the means test to determine the applicable commitment period during which their projected disposable income must be paid to unsecured creditors.

Under the Act, debtors may subtract from their monthly income certain expenses for themselves and their dependents. In determining these allowances, the forms currently use the terms “household” and “household size.” The advisory committee believes, though, that “household” is not correct in light of the statute because it is both over-inclusive and under-inclusive. The Act allows deductions for food, clothing, and certain other items in amounts specified in IRS National Standards and deductions for housing and utilities in the amounts specified in IRS Local Standards. Both the national and local IRS standards are based on “numbers of persons” and “family,” rather than “household.” Moreover, the IRS bases these numbers on the number of dependents that

the debtor claims for federal income tax purposes. A person in the “household” may not necessarily be a “dependent.”

Judge Swain explained that the policy of the advisory committee, whenever there are possible conflicting interpretations of the Act, is to allow filers to present their claims as they interpret the statute – and not have them precluded from doing so by restrictive language in the forms. She added that the revised forms focus on dependency without specifically adopting the IRS standard. Thus, Form 22C refers to “exemptions . . . plus the number of any additional dependents.” This provides room for a litigant to argue that a member of the debtor’s household could be a “dependent” for bankruptcy purposes even without entitling the debtor to an exemption under IRS standards.

Judge Swain stated that the advisory committee had planned to present the revisions to the Standing Committee at the current meeting as an action item. But another technical problem had just been discovered with the forms, and the advisory committee would like to consider making another change and return with the forms for final approval in June 2009. Accordingly, she said, the matter should be considered as an informational item, rather than an action item.

NATIONAL GUARD AND RESERVISTS RELIEF ACT

Professor Gibson explained that after the advisory committee meeting, Congress had passed the National Guard and Reservists Relief Act, creating a temporary exemption from the means test for reservists and members of the Guard. The statute took effect on December 19, 2008, but it will expire in 2011. Thus, a permanent change to the rules is not advisable. But an amendment to Form 22A (the chapter 7 means test form) and a new Interim Rule 1007-I were approved on an emergency basis by email votes of the advisory committee, the Standing Committee, and the Executive Committee of the Judicial Conference. Thus, they were in place when the Act took effect in December 2008. She added that the interim rule had now been adopted as a local rule by all the courts.

She pointed out that the amendment to Form 22A had been particularly challenging to craft because the statute gives a reservist or member of the Guard a temporary exclusion from the means test only while on active duty or during the first 540 days after release from active duty. Thus, a temporarily excluded debtor may still have to file the means test form later in the case.

PART VIII OF THE BANKRUPTCY RULES

Professor Gibson said that the advisory committee was considering revising Part VIII of the bankruptcy rules governing appeals. Part VIII, she said, had been modeled on the Federal Rules of Appellate Procedure as they existed many years ago. The appellate

rules, though, have been revised several times since, and they have also been restyled as a body. Accordingly, the advisory committee concluded that it was time to take a fresh look at Part VIII and consider: (1) making it more consistent with the current appellate rules; (2) adopting restyling changes; and (3) reorganizing the chapter. She reported that the advisory committee at its October 2008 meeting had considered a comprehensive revision of Part VIII prepared by Eric Brunstad, a very knowledgeable appellate attorney whose term on the advisory committee had just expired.

She added that the committee had decided that it would be very helpful to conduct open subcommittee meetings on Part VIII with members of the bench and bar at its next two advisory committee meetings, in March and October 2009. The committee, she said, will invite practitioners, court personnel, and others to address any problems they have encountered with the existing rules and to discuss their practical experience with the two different sets of rules – one governing appeals from a bankruptcy judge to the district court or bankruptcy appellate panel and the other governing appeals to the court of appeals. She said that the dialog at the open subcommittee meetings will help inform the advisory committee as to the worth of proceeding with the project.

ZEDAN V. HABASH

Judge Swain reported that Judge Rosenthal had referred to the advisory committee the concurring opinion of Chief Judge Frank Easterbrook in *Zedan v. Habash*, 529 F.3rd 398 (7th Cir. 2008), a case that raised two bankruptcy rules issues. In particular, he questioned whether FED. R. BANKR. P. 7001 (list of adversary proceedings covered by Part VII of the rules) should continue to classify proceedings to object to or revoke a discharge as adversary proceedings, termination of which constitutes a final decision that permits appellate review.

Zedan, she said, was a very unusual case involving a potential objection to discharge brought after the objection to discharge deadline had lapsed, but before a discharge had been entered by the court. *Zedan*, a creditor, claimed fraud with respect to an asset sale, and he tried to object to or revoke the debtor's discharge. Under the literal language of the Bankruptcy Code and Rules, however, he was barred from either type of relief. An objection to discharge was untimely because the deadline had passed, and an attempt to revoke the discharge was premature because no discharge had been entered. Moreover, even if *Zedan* had waited until the discharge were entered, an attempt to seek revocation would not have been possible because § 727(d)(1) of the Code requires that the party seeking revocation “not know of such fraud until *after* the granting of such discharge.”

Judge Swain said that the advisory committee was considering the matter thoroughly and would consider a potential rules fix. It was also weighing whether the need for relief in this unusual situation outweighs the importance of finality in

bankruptcy cases. One possible amendment, she said, would be to permit an extension of the time for the creditor to file an objection based on newly discovered evidence.

Judge Swain explained that Judge Easterbrook in his concurring opinion had also asked whether objections to discharge should be treated as adversary proceedings or reclassified as contested matters because they are “core proceedings” under the Bankruptcy Code. She noted that the advisory committee had always considered objections to discharge as adversary proceedings, requiring application of the full panoply of the Federal Rules of Civil Procedure. She reported that the committee had conducted a lengthy discussion on the matter at its October 2008 meeting and concluded that it is appropriate to consider certain core proceedings as adversary proceedings, rather than contested matters. Moreover, a judge may deal with unusual problems, such as those arising in *Zedan*, by a variety of devices.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported on the advisory committee’s project to analyze and modernize all the bankruptcy forms. She said that the committee was undertaking a holistic review of the forms both for substance and for practical usage in today’s electronic environment. Among other things, she said, courts and other participants in the bankruptcy system have requested an expanded capacity to manipulate electronically the individual data elements contained on the forms.

She pointed out that the advisory committee had established two subgroups to tackle the project. An analytical group is analyzing for substance all the information contained on all the forms, *i.e.*, what pieces of information are truly needed by each participant, whether any of it is duplicative, and whether the information could be solicited in a more effective manner. At the same time, a technical group is looking at various ways to gather and distribute the information contained on the forms. It is working closely with the special group of judges, clerks of court, and AO staff just convened to design the next generation electronic system to replace CM/ECF.

HOME-MORTGAGE LEGISLATION

Professor Gibson reported that legislation had been introduced in Congress to authorize a bankruptcy judge to modify the terms of a debtor’s home mortgage. (Since 1979, the Bankruptcy Code has prohibited modification.) As currently drafted, the legislation would allow a home mortgage to be treated in the same manner as other secured claims, and a bankruptcy judge would be able to “cram down” the mortgage to the current value of the house and allow repayment for up to 40 years. It would also let the judge reset the interest rate at the current market rate for conventional mortgages plus a premium for risk. Other provisions include dispensing with the credit counseling requirements, changing the calculation for chapter 13 eligibility, and requiring that home

owners be given notice of additional bank fees and charges. The legislation would be effective on enactment and would apply to mortgages originated before its effective date. The legislation would also require a number of changes to the bankruptcy rules and forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of December 9, 2008 (Agenda Item 5).

Discussion Items

Judge Kravitz reported that a great deal of interest had been expressed by the bench and bar in the published amendments to FED. R. CIV. P. 26 (expert witness disclosures and discovery) and FED. R. CIV. P. 56 (summary judgment). He noted that the public comments had been heavy, and many witnesses had signed up to testify at the three scheduled public hearings. He pointed out that the publication distributed to the bench and bar had asked for comments directed to the specific concerns voiced by Standing Committee members at the June 2008 meeting.

FED. R. CIV. P. 26

Judge Kravitz said that the proposed amendments to Rule 26 had been very well received on the whole, principally because they offer a practical solution to serious problems regarding discovery of expert witness draft reports and attorney-expert communications. The great majority of comments from practicing lawyers, he said, had stated that the amendments will help reduce the costs of discovery without sacrificing any information that litigants truly need. On that point, he emphasized, extending work-product protection to drafts prepared by experts and to certain communications between experts and attorneys will not deprive adversaries of critical information bearing on the merits of their case.

Judge Kravitz noted, though, that opposition to the proposed amendments had been voiced by a group of more than 30 law professors. He suggested that their principal concern was that the amendments would further ratify the role of experts as paid, partisan advocates, rather than independent, learned observers. By way of contrast, experts in other countries are often appointed by the court or selected jointly by the parties.

He noted that the professors argue that by limiting inquiry into discussions between lawyers and their experts, the rule will lead to concealment of huge amounts of relevant information contained in draft reports and communications with experts. But, he said, the practicing bar had told the committee repeatedly that it will not in fact do so

because the information they seek presently does not exist. Practitioners report that lawyers today avoid communications with their testifying experts and discourage draft reports. Therefore, the proposed amendments will not make unavailable information that is currently available. Experience in the New Jersey state courts, moreover, shows that few problems arise in the state systems that prohibit discovery of expert drafts and communications. The practicing lawyers say consistently that juries clearly understand that experts are paid by the parties, and they are not misled at trial.

Judge Kravitz said that the professors are concerned that the amendments would take the rules in a direction inconsistent with *Daubert* and the gate-keeping role that it imposes on the courts to protect the integrity of expert evidence. But, he said, the advisory committee had consulted regularly with judges and lawyers and had been informed that decisions applying *Daubert* really turn on the actual testimony of expert witnesses, not on their communications with attorneys.

Finally, Judge Kravitz noted that the professors claim that the amendments would create an evidentiary privilege that under the Rules Enabling Act must be enacted affirmatively by Congress. He pointed to an excellent memorandum in the agenda book on work-product protection prepared by Andrea Kuperman. The advisory committee, he reported, was convinced that the amendments deal only with work-product protection and do not create a privilege. Essentially, he said, they really only modify a change made by the 1993 amendments to Rule 26. He recommended, though, that it may be advisable to dispel any notion that a privilege is being created by eliminating any reference in the proposed committee note regarding the expectation that the work-product protections provided during pretrial discovery will ordinarily be honored at trial. He suggested that the current language of the note may allow opponents to argue, incorrectly, that a privilege is being created at trial.

Judge Kravitz said that the advisory committee very much appreciated the comments from the law professors, and it had taken all their concerns very seriously. But the committee concluded that it is vital to the legal process for lawyers to be able to interact freely with their experts without fear of having to disclose all their conversations and drafts to their adversaries. He noted, by way of example, that a law professor had informed the committee that the amendments will be very beneficial to him as an expert witness because he will now be able to take notes and have candid conversations with attorneys regarding the strengths and weakness of their cases.

A participant suggested that there is a wide gulf between practitioners and the professors on these issues. He attributed the difference to a lack of practical experience on the part of the latter and their focus on theory. He suggested that the professors tend to view experts under the current system as “hired guns.” The nub of their opposition is their policy preference for a “truth-seeking” model versus the current “adversary” model. He conceded, though, that there are some cases in the state courts where there is

insufficient monitoring of experts, but there are few problems in practice in the federal courts and in most state courts. Several other participants endorsed these observations.

One member, however, expressed sympathy with the views of the law professors and argued that the proposed amendments are unwise. She suggested that the committee think carefully about whether the amendments in fact would create a privilege, or at least a hybrid between a privilege and a protection. In particular, she objected to the language in the committee note stating that the limitations on discovery of experts' drafts and communications will ordinarily be honored at trial. She suggested that the note should state explicitly that judges have discretion in individual cases to require more disclosure, especially when they suspect sharp practices. She noted, too, that in addition to the law professors, opposition had been expressed to the proposed amendments by the bar of the Eastern District of New York, which had argued for more discovery of communications between experts and attorneys.

Judge Kravitz responded that proposed Rule 26(b)(4)(C) explicitly would allow discovery of communications between experts and attorneys if they: (1) relate to the expert's compensation; (2) identify facts or data that the attorney provided and the expert considered; and (3) identify assumptions that the attorney provided and the expert relied upon. He said that the advisory committee had concluded that these three exceptions to the work-product protection of the rule were sufficient.

A lawyer-member added that it is difficult for him to ask his expert to assess the weaknesses of his case because the expert's responses will be discoverable by the other side. For that reason, lawyers often hire two experts – one to testify and one to assess candidly. Other practitioners said that the rule will reduce costs and delays in many ways. Several participants added that juries know well that experts are advocates for the parties, but they believe an expert only if the expert is convincing on the stand.

Another lawyer pointed out that good lawyers regularly enter into stipulations to protect communications with their experts. He explained that experts are often unfamiliar with a case when they are hired. Therefore, they need a lawyer to give them information and directions. In fact, it is not unusual for experts to prepare reports that are not at all helpful – simply because they do not understand the case. This often leads to a sideshow during the discovery process, and potentially at trial. He said that it is important for the rules to specify that these preliminary communications between attorneys and experts are protected in order for experts to be educated at the outset of a case without having to risk sideshows from adversaries.

A judge-member stated that it is important for the rules to provide advice and direction to trial judges in this difficult area of discovery law. But, she suggested, the committee note should be amended to eliminate the controversial language on protecting information at trial. Another judge added that removing the note language would also be

advisable because issues at trial are much broader and also involve the rules of relevance. In short, she recommended, the committee should make it clear that discovery is discovery and trial is trial.

A member strongly supported the rule but suggested that the committee be very careful about the scope of its authority. It has clear authority, he said, to decide what information may be discovered, but no authority to create an evidentiary privilege governing what may be introduced at trial. He asked whether the states that have a similar rule, such as New Jersey and Massachusetts, have actually created an evidentiary privilege. Judge Kravitz responded that the advisory committee was convinced that the proposal was a discovery rule only, and it would not create a privilege.

A participant recommended that the committee note be revised to eliminate all language regarding information at trial. He also rejected the charge that experts are merely hired guns, noting that an expert's reputation and credibility are very important. Good experts, he said, value their reputation and are more than just advocates. Of course, they would not be called unless their testimony is helpful to the party calling them.

Another participant concurred and suggested that the concerns of the law professors appear to be less with the Rules Enabling Act than with their vision of experts as independent, learned truth-seekers, rather than paid advocates. He suggested that their opposition was based on theory and not real experience. He said that the best way for lawyers to challenge experts is by good cross-examination.

A member pointed out that there is a genuine risk for lawyers that the work-product protection that governs discovery will not continue to protect them at trial. As a result, he suggested, the amendments may not actually work in practice. Judge Kravitz responded, though, that his understanding was that practitioners believe that if the work-product information is protected during discovery, the remaining risk of disclosure at trial will not be significant enough for them to incur the costs of hiring two sets of experts or to resort to all the other artificial practices that the proposed amendments are designed to avoid. Several members agreed.

Another member suggested a parallel situation between the proposed amendments to Rule 26 and the recent development of FED. R. EVID. 502 (waiver of attorney-client privilege and work-product protection). The evidence rule, too, had been devised specifically to allay the fear of lawyers that protection given to documents during discovery in a given case would not carry over to future cases. With Rule 502, the bar argued forcefully that if the protection against waiver does not carry over to future proceedings in the state courts, the rule would be useless as a practical matter in achieving its goal of reducing discovery costs. With the Rule 26 amendments, however,

the bar has not suggested that confining the work-product protection to the discovery phase of litigation would undermine the practical value of the rule.

Judge Kravitz suggested that these problems should not occur very often at trial, and it may simply be necessary to let the rule play out in practice. He added that the amendments cannot provide 100% protection, but the bar has been telling the committee that they offer a practical solution to difficult and costly problems. Professor Cooper pointed out that the New Jersey state rule deals only with discovery, and the bar in that state has informed the advisory committee that it has caused no problems at trial. The rule's most important effect, they said unequivocally, has been to change the behavior and the very culture of the lawyers in dealing with experts' drafts and communications.

FED. R. CIV. P. 56

Judge Kravitz reported that public reaction to the proposed revision of Rule 56 (summary judgment) had been mixed. The great majority of comments, even those from judges and lawyers criticizing particular aspects of the rule, acknowledge that the revised rule is clearly organized and effectively addresses a number of problems arising in current practice. The objections to the rule, he said, fall into three categories.

First, many – but not all – plaintiff's lawyers and law professors criticizing the proposed rule appear to oppose summary judgment in general and are concerned that the revised rule may lead to additional grants of summary judgment. But, he said, research conducted by the Federal Judicial Center demonstrates that the amendments will not produce that result. Opponents also object to the rule's point-counterpoint procedure, claiming that it focuses exclusively on individual facts and obscures inferences, thereby preventing plaintiffs from telling their full story. Judge Kravitz suggested, though, that he – as a judge – looks first to the parties' briefs for a gestalt view of a case and to discover the lawyers' theory of the case. Later, he said, he consults the point-counterpoint to hone in on and confirm specific facts in the record.

Second, many – but not all – members of the defense bar support the point-counterpoint approach. They strongly urge, though, that proposed Rule 56(a) be revised to specify that a judge “must” – rather than “should” – grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The great majority of comments from the defense bar support using “must.” In addition, the defense bar would like to have the rule provide sanctions for frivolous opposition to summary judgment.

A member said that the proposed rule will send an important reminder to the courts that they need to grant summary judgment when it is appropriate. Many cases have no material facts in dispute and should not go to a jury. Nevertheless, some judges announce that they will not decide summary-judgment motions until the moment of trial. So the lawyers have to prepare for trial, and their clients bear unnecessary and

unreasonable additional costs. A revised Rule 56 is needed, he said, if only to prod judges into acting on summary-judgment motions.

Third, many judges and some federal practitioners say that the point-counterpoint approach is not an effective procedural device. They recommend that the rule permit local discretion, rather than impose a national procedure. More importantly, many judges informed the committee that they have actually used the point-counterpoint procedure and have found it unsatisfactory for a variety of reasons. First, they say, it is not user-friendly and increases the cost of litigation. Second, they believe that it distracts from the merits of a case and encourages disputes over the statement of facts and motions to strike. Third, they say that the point-counterpoint process results in evasion of the page limitations on the briefs. Fourth, it lets moving parties dictate the facts, and it ignores inferences. Fifth, districts that have adopted the point-counterpoint procedure tend to have generated more paperwork, and the motions take longer to resolve.

Judge Kravitz noted that one lawyer had told the committee that the summary judgment papers in point-counterpoint districts are simply too long and require a good deal of unnecessary work by lawyers in dealing with immaterial facts and responses. Judge Kravitz explained that the advisory committee had struggled to confine the point-counterpoint procedure to essential, material facts and had heard from members of the bar that a numerical limitation should be imposed on the number of facts that a party may include in its statement.

Judge Kravitz said that these are substantial criticisms, especially because they come from people who have used point-counterpoint and have abandoned it. In defense of the proposal, though, he said that the rule allows a judge to opt out of it on a case-by-case basis. Nevertheless, he said, some judges do not want to use the point-counterpoint process in any cases.

Judge Kravitz reported that the advisory committee had initiated the project to revise Rule 56 for two reasons. First, summary-judgment practice around the country varies enormously, even within the same district. The committee concluded that there was substantial value in encouraging more national uniformity in the federal court system for a procedure as vital as summary judgment. Second, he said, summary judgment practice in the federal courts has deviated greatly from the text of the rule, and it is appropriate to update the rule to reflect the actual practice.

Judge Kravitz stated that the advisory committee would like to have the Standing Committee's input on the importance of national uniformity in summary judgment practice. He reported that several members of the bench and bar have told the committee that summary judgment today lies at the very heart of federal civil practice and should be relatively uniform across the federal system. Others, though, have said that local courts should be able to shape the procedure the way they want, in coordination with their local bars. Moreover, they say, it is relatively easy for lawyers to ascertain what the practice is

in each court and adapt to it. Therefore, procedural uniformity may not be very important.

Judge Kravitz said that some commentators have urged that Rule 56 not specify a particular procedural method for pinpointing material, undisputed facts. Judges or courts should be free to adopt the point-counterpoint procedure, but only if they wish. On the other hand, if national uniformity is an important, overriding value, the advisory committee must decide what the national default procedure should be. On that point, the advisory committee believes that the point-counterpoint procedure specified in the published rule is the best approach to take. The local rules of some 20 districts require both parties to prepare summary-judgment motions in a point-counterpoint format, while roughly another third only require the movant to list all undisputed facts in individual paragraphs. Thus, if the advisory committee were to choose another approach, there would still be opposition to the rule from courts that have a point-counterpoint system. Therefore, the threshold question is whether national uniformity is truly needed in Rule 56.

One member argued that uniformity is important, and the advisory committee should continue trying to draft a national rule. But, she said, allowing an opt-out from the national procedure by local rule of court would be a good idea and would make the rule much more acceptable to the courts. Even allowing a broad opt-out would still be a marked improvement over the current rule.

A lawyer-member said that national uniformity is indeed important, but the fact that there is such strong dissent from the proposal by many judges argues for including a broad opt-out provision. He suggested that it would be helpful to have a national procedure specified in the rule, but courts should be allowed to deviate from it broadly.

A judge-member agreed that uniformity is the key question to focus on. She said that the point-counterpoint system works well in her experience, but the committee needs to respect the view of judges and lawyers who claim that it increases costs and disputes. It is hard in the end to be optimistic about achieving national uniformity because each court has developed its own system over time and is comfortable with it.

Another member agreed that uniformity is the critical question, but argued that it simply may not be achievable. The comments and testimony have indicated that the proposed rule will not be as successful as expected. In reality, imposed uniformity is likely to be ephemeral because judges will add their own requirements to whatever any national rule specifies.

Professor Coquillette pointed out that Congress over the years has urged more national uniformity and has expressed concern over the proliferation of local court rules. The committee's local rules project, he said, had been successful in getting the courts to

eliminate local rules that are inconsistent with the national rules. Nevertheless, the project avoided treading in two areas where enormous differences persist among the courts – attorney conduct and summary judgment. Many local rules, he said, are clearly better than the current FED. R. CIV. P. 56, but the differences of opinion among the courts are so deep that it would be extremely difficult to achieve national uniformity.

He noted that the 1993 amendments to FED. R. CIV. P. 26 allowed individual district courts to opt out of the national disclosure requirements by local rule. Many districts opted out, in whole or in part. There was no uniformity even within many districts. The only way to restore uniformity was to dilute the national rule, a change that itself required considerable effort. He suggested that it would be better to have the national rule not specify any particular procedures than to have one that sets forth national procedures but authorizes wholesale opt-outs. Allowing a broad opt-out by local rule, he said, will not promote uniformity.

Judge Kravitz explained that the problem with summary-judgment variations among the courts is not only that courts have a fondness for their own local rules and resist change, but it is also that many judges genuinely believe that the proposed national rule will add costs without making meaningful improvements.

Two members recommended that the committee proceed with the point-counterpoint proposal, but another suggested that the rule require that only the moving party state the material, undisputed facts in numbered paragraphs without burdening the opponent with having to respond to each fact in numbered paragraphs. Another member expressed support for the point-counterpoint process, but suggested that the committee impose a limit on the number of facts that may be stated and consider a different system for certain categories of cases.

A participant pointed out that his district had used the point-counterpoint system for more than a decade, but had abandoned it because it was not helpful to judges in resolving summary-judgment motions. They discovered that in reality there are not many disputed facts after discovery. Rather, cases turn largely on inferences drawn from the facts, rather than the facts themselves.

A member related that the point-counterpoint procedure is used currently in his district, and all the judges follow it. But a visiting judge from a district not using the procedure has criticized it strongly, and the district court is taking a fresh look at the matter.

Several participants said that they liked the point-counterpoint process because it adds structure to the rule and forces attorneys to focus on the facts, but they recognized that it may add costs. They emphasized that the briefs or memoranda of law, which argue the inferences drawn from the facts, are more important than the statements of facts

themselves. One lawyer-member said that he had practiced both in courts that have the process and those that do not have it, and he has no problem in adapting to the requirements of each court or allowing courts considerable latitude to structure their own process.

Judge Scirica pointed out that the proposed changes in Rule 56 will have to be approved by the Judicial Conference. It is a virtual certainty, he said, that they will be placed on the Conference's discussion calendar for a full debate.

Two other members suggested that the key problems are not so much with the mechanics of the procedure, but the fact that some district judges are simply not deciding summary-judgment motions. Judge Kravitz noted that the advisory committee had learned from the Federal Judicial Center's research that summary judgment motions remain undecided until trial in many districts. But that problem will not likely be cured by any rule.

Professor Cooper pointed out that the Federal Judicial Center's research had shown that there is more likelihood that summary-judgment motions will be decided in the point-counterpoint districts. The figures show that more motions are granted in these districts, but largely because a higher percentage of motions are actually ruled on. On the other hand, the courts' time to disposition is longer in these districts, in part because it may take more judicial time to resolve summary judgment motions presented in this detailed format. He noted, though, that the numbers may not be not reliable because there may be other reasons for delays in some districts, such as heavy caseloads.

Judge Kravitz mentioned that some sentiment had been expressed that the point-counterpoint system may favor defendants and the well-heeled. The advisory committee, he said, had tried to address that perception by allowing an opponent of a summary-judgment motion to concede a particular fact for purposes of the motion only. This provision would save the opponent the expense of having to respond in detail to each and every fact asserted to be undisputed.

Judge Kravitz emphasized that a fundamental principle for the advisory committee had been to produce a rule that does not favor either side. The committee, he said, had succeeded in that objective, despite certain criticisms from both sides. He suggested that the opposition from some plaintiffs' lawyers is largely a proxy for their opposition to summary judgment per se. He pointed out that other plaintiffs' lawyers support the proposal, though they favor a cap on the number of facts that may be stated.

A member added that the perception that the point-counterpoint process is favored by defendants and opposed by plaintiffs makes no sense. He suggested that defense counsel normally want to have as few disputed facts as possible when seeking summary judgment. Plaintiffs, on the other hand, want to raise as many facts as they can.

One participant pointed out that summary judgment is the key event in many federal civil cases, either because it disposes of a case or, if denied, leads to settlement. He emphasized that summary judgment must be seen as interconnected with several other procedural devices specified in the Federal Rules of Civil Procedure – such as Rule 8 (pleading), Rule 12 (defenses), Rule 16 (pretrial management), and Rules 26-37 (disclosures and discovery). The numbering and organization of the rules imply that these are separate stages of litigation, rather than essential components of an interconnected process. He suggested that the committee consider bringing those rules physically closer together, instead of having them spread out as they are now. He also suggested that the committee consider looking at all the rules as a whole and examining how all the parts work together.

He added that faux uniformity may not be a bad idea. There are clear differences among regions, judges, and types of cases. There are also great differences among the bar, both as to the culture of the bar and the quality of individual lawyers. There are differences, too, in the abilities and preferences of individual judges. And it must be recognized that judges have to work hard to grant a motion for summary judgment.

Judge Kravitz reported that the advisory committee had decided to conduct a two-day conference in 2010 at a law school to conduct a holistic review of all these interrelated provisions and how well they work in practice.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering potential revisions to FED. R. CIV. P. 45 (subpoenas). The rule, he said, is long, complicated, and troubling to practitioners. Practical issues have been raised, for example, regarding: whether Rule 45 issues should be decided by the court where the action is pending or the court where a deposition is to be taken or production made; the use of the rule to conduct discovery outside the normal discovery process; the adequacy of the modes of service; use of the rule to force corporate officers to come to trial; and the continuing relevance of the territorial limits of subpoenas, such as the 100-mile radius that dates from 1789. He noted that Judge David G. Campbell's subcommittee will take the lead on this issue, and Professor Richard L. Marcus will serve as the principal Reporter.

Professor Cooper added that the Federal Rules of Appellate Procedure intersect with the Federal Rules of Civil Procedure in several ways, and the advisory committee is working on joint projects with the appellate advisory committee. He noted, for example, the suggestion that FED. R. APP. P. 7 (bond for costs on a civil appeal) include statutory attorney fees as costs on appeal. The civil advisory committee, he said, had been considering changes to FED. R. CIV. P. 23 (class actions) for several years, and the problem of objectors to class settlements is a long-standing and difficult one. The civil advisory committee would be interested, for example, in whether it is appropriate to

require a cost bond for objectors who appeal from approval of a class-action settlement, especially in fee-shifting cases. He added that some appeals by objectors rest on solid grounds, but some clearly are not.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman presented the report of the advisory committee, as set forth in his memorandum and attachments of December 15, 2008 (Agenda Item 8).

Informational Items

FED. R. CRIM. P. 32

Judge Tallman reported that the advisory committee was considering a possible revision to FED. R. CRIM. P. 32(h) (notice of possible departure from sentencing guidelines). Under the current rule, a sentencing court must notify the parties if it intends to depart from the sentencing guidelines range on a ground not identified in the pre-sentence report or the parties' submissions. There has been litigation, he said, over whether the rule also applies to variances from the guidelines under *United States v. Booker*, 543 U.S. 220 (2005). Recently, the Supreme Court held in *Irizarry v. United States*, 553 U.S. ____ (2008), that the rule does not apply to variances. So the committee may wish to amend the rule to cover both. Alternatively, though, it may also consider eliminating Rule 32(h) altogether.

Judge Tallman reported that the American Bar Association had approved a resolution to mandate disclosure to the parties of all information used by probation officers in preparing their pre-sentence reports. The proposal was designed to increase transparency, and both the defense and the government argue for greater openness in the sentencing process.

The advisory committee, he said, had discussed the proposal and was concerned that it could compromise sources who give confidential information to probation officers, including victims and cooperating witnesses. It would also impose additional burdens on probation offices and make the process of preparing reports more adversarial than it is now. He explained that the committee was relying heavily on the Federal Judicial Center and the Administrative Office to canvass those district courts currently following a regime similar to the ABA model to ascertain what their practical experience has been. In particular, the staff will explore with the courts whether there is merit to the concerns that sources will be compromised if all communications to probation officers must be disclosed.

Professor Beale added that there is a relationship between FED. R. CRIM. P. 32(h) and the ABA proposal to require disclosure of all materials presented to the probation officer. If more information were disclosed to the parties earlier, more would be on the record at the time of sentencing, and notice of planned departures or variances would not be needed. A member suggested that many judges are concerned that the ABA proposal would add another layer of litigation. Another pointed out that defendants in her district have asked for access to information given to probation officers regarding earlier cases in a defendant's criminal history. That information, though, may reveal information about victims, cooperating witnesses, and other sensitive matters.

FED. R. CRIM. P. 12(b)

Judge Tallman reported that the Supreme Court had held in *United States v. Cotton*, 535 U.S. 625 (2002), that omission of an essential element in the indictment does not deprive the court of jurisdiction. Under the current rule, a motion alleging a failure to state an offense can be made at any time. In light of *Cotton*, the advisory committee was exploring an amendment to FED. R. CRIM. P. 12(b) (motions that must be made before trial) to require that a challenge for failure to state an offense, like other defects in an indictment or information, be made before trial. Under FED. R. CRIM. P. 12(e), a party waives the defense or objection if not made on time, but the court may grant relief from the waiver for "good cause shown."

He explained that the proposal raises a number of difficult issues, particularly relating to the breadth of the "good cause" that the defendant must show to obtain relief. Some courts, for example, interpret the rule to require both "good cause" and "prejudice." The requirement to show "good cause" may result in a defendant forfeiting substantial rights merely because of an error of counsel in failing to raise the defect earlier. In addition, the committee is concerned about the relationship between the proposed amendment and cases holding that the Fifth Amendment precludes a court from constructively amending an indictment. He said that the advisory committee had voted 7 to 5 to continue working on the proposed amendment and will consider the issue again at its April 2009 meeting.

TECHNOLOGY

Judge Tallman reported that the advisory committee had formed a technology subcommittee, chaired by Judge Anthony J. Battaglia, to conduct a comprehensive review of all the criminal rules to assess whether amendments are desirable to sanction the use of new technologies. He pointed out that several rules already permit the use of technology, such as the use of video teleconferencing to conduct certain proceedings. But more amendments may be needed to let judges, lawyers, and law enforcement agents take full advantage of technology in performing their jobs. The subcommittee, he said, was expected to complete its report in time for the advisory committee's April 2009 meeting.

AUTHORITY OF PROBATION OFFICERS TO SEEK AND EXECUTE SEARCH WARRANTS

Judge Tallman reported that the advisory committee was considering a preliminary proposal referred by the Criminal Law Committee that would authorize probation officers (and pretrial services officers) to seek and execute search warrants. The proposal, he said, was controversial and would represent a major change of policy for the federal courts. Among other things, it raises questions of separation of powers because probation officers are part of the judiciary. In effect, judiciary employees could be asking a court for a search warrant to obtain evidence that might lead to criminal charges, a decision entrusted to the executive branch. Professor Beale added that the Department of Justice had expressed concern about the proposal because of the possibility of probation officers, who are not law enforcement officers, interfering with investigations and other prosecution efforts.

Judge Tallman pointed out that committee members had expressed concern that seeking and executing search warrants could interfere with the relationship between probation officers and their clients and impede the effectiveness of the officers. They were also concerned about the training and safety of probation officers if they will be placed in dangerous situations that may arise when conducting a search.

Judge Tallman reported that he had sent a letter to Judge Julie E. Carnes, chair of the Criminal Law Committee, advising her of the advisory committee's initial concerns and inviting her to participate in the April 2009 meeting. In response, he said, she advised that members of the Criminal Law Committee share some of the same concerns.

VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor a number of issues arising under the Crime Victims' Rights Act. He noted that the General Accountability Office had just published a comprehensive report on implementation of the Act, which gave the judiciary a clean bill of health for its efforts. The report also noted that the Act's 72-hour limit on the time for a court of appeals to act on mandamus review appeared to be too short. Professor Beale added that the advisory committee did not pursue amending that particular statutory deadline as part of the judiciary's time-computation legislation because it raised significant policy issues and were not appropriate in a package of proposed technical, non-controversial changes.

Judge Tallman reported that the advisory committee had been receiving written reports of the regular meetings that the Department of Justice holds with victims' rights organizations. In addition, he said, the advisory committee anticipates that additional legislative proposals on victims' rights might be introduced in the new Congress.

FED. R. CRIM. P. 12.4

Finally, Judge Tallman reported that the advisory committee had received a request from the Codes of Conduct Committee to consider an amendment to FED. R. CRIM. P. 12.4 (disclosure statement) to require additional disclosures to help courts screen for potential conflicts of interest. The proposal would assist courts in ascertaining whether an organization, including its subsidiary units or affiliates, that was a victim of a crime is one in which a judge holds an interest.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 2008 (Agenda Item 7).

Amendments for Publication

RESTYLED FED. R. EVID. 501-706

Judge Hinkle reported that the advisory committee had now completed restyling two-thirds of the Federal Rules of Evidence. The final third of the rules, he said, will be more difficult to restyle because it includes the hearsay rules. He pointed out that, for the first time, the committee's reporter, Professor Daniel J. Capra, could not attend a Standing Committee meeting due to a conflict with essential teaching duties. He also regretted that Professor R. Joseph Kimble, the committee's style consultant, could not attend the meeting because of winter snows and transportation difficulties. He said that both will participate in the June 2009 meeting.

Judge Hinkle pointed out that Judge Hartz had discovered a glitch in the restyled draft of FED. R. EVID. 501 (privilege). It could be read to suggest that if testimony relates to both a federal and state claim, only state law will apply. Case law, however, suggests that federal law applies.

The advisory committee, he said, had intended no change in the law. Accordingly, it would recommend substituting the following language for the last sentence of FED. R. EVID. 501: "But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege." A corresponding change will also be made in FED. R. EVID. 601 (competency to testify).

A member praised the work of the advisory committee, but expressed concern over some of the style conventions, including the use of bullets rather than numbers in some lists, the use of dashes rather than commas, and beginning sentences with "but," "and," or "or." A member pointed out, however, that these conventions are fully consistent with

widely accepted contemporary style. Judge Hinkle promised to bring these concerns back to the advisory committee for consideration at its next meeting.

The committee by a vote of 10 to 2 approved the restyled FED. R. EVID. 501-706 for publication, including the substitute language for FED. R. EVID. 501 and 601. The dissenting members explained that their negative votes were motivated solely by what they regard as some inelegant and inappropriate English usage in the restyled rules. Judge Rosenthal added that the committee's action will be subject to an additional, final review of the entire body of restyled evidence rules at the June 2009 committee meeting.

Informational Items

Judge Hinkle reported that only one public comment had been received in response to the proposed amendment to FED. R. EVID. 804(b)(3) (hearsay exception for a statement against interest), and the scheduled public hearing had been cancelled because there had been no requests to testify.

He added that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004), that admission of "testimonial" hearsay violates an accused's right to confrontation unless given an opportunity to cross-examine the declarant. He said that case law developments to date suggest that amendments to the hearsay exceptions in the rules may not be necessary.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that Professor Capra had prepared an excellent report on the use of standing orders and general orders in the district courts and bankruptcy courts. In addition, a survey of the courts had been conducted asking judges for their advice in identifying matters that belong in local rules versus those that may be addressed appropriately in standing orders. The survey results, she said, had shown that the courts do not want federal rules to regulate standing order practices, but they do favor the committee distributing guidelines to help them decide what matters should be included in their local rules and standing orders.

To that end, she said, Professor Capra had prepared draft "Guidelines For Distinguishing Between Matters Appropriate For Standing Orders and Matters Appropriate for Local Rules and For Posting Standing Orders on a Court's Website." Judge Rosenthal emphasized that the proposed guidelines were not an attempt by the Standing Committee or the Judicial Conference to dictate particular binding rules that the courts must follow.

Several members endorsed the guidelines and said that they were very well-written and helpful. But one expressed reservations about the specific language of Guideline 4 on the grounds that it appeared to give too much encouragement to individual judges to deviate from court-wide standing orders. He suggested that it may also be internally inconsistent with Guideline 8, specifying that individual-judge orders may not contravene a court's local rules.

Another member suggested, though, that Guideline 4 had an inappropriately negative tone because it appeared to fault district judges for having orders different from their own district court rules and standing orders. She said that it is perfectly appropriate to accommodate some individual-judge preferences, such as those dealing with courtesy copies of papers and courtroom etiquette. In fact, the committee may not have authority to address the orders of individual judges. She recommended that the guidelines focus on court-wide orders and say nothing about the orders of individual judges.

Judge Rosenthal agreed that the guidelines will be more successful if they are not openly negative as to the preferences of individual judges. But some members cautioned that individual-judge orders can pose a serious problem. Some are very beneficial, they said, but others are not. Some, in fact, are contrary to the national rules and may contain matters that should be addressed in local rules, rather than orders. Moreover, the orders of individual judges are not readily accessible, may not be posted on a court's website, and can create a trap for litigants. The point of the proposed guidelines, she said, was not to make judges change their procedures, but to make them aware of the effects of their actions.

Professor Coquillette pointed out that the current standing-orders project should be viewed in the context of the local-rules project and the 1995 amendments to FED. R. CIV. P. 83. As revised, the rule specifies that no sanction or other disadvantage may be imposed on a party for noncompliance with a procedural requirement unless the requirement has been set forth in a national or local rule or the party has received actual notice of it in the particular case.

Judge Rosenthal explained that there are two kinds of standing orders – court-wide standing orders and the standing orders of individual judges. The committee, she said, can address court-wide standing orders, but an individual judge's ability to include the judge's own preferences, particularly on such matters as courtroom practices, is a much more delicate matter. She said that she agreed with Professor Capra's view that it would be a more successful approach if the committee were to focus on court-wide standing orders.

Judge Rosenthal added that if an order affects lawyers and litigants on a district-wide basis, it should be set forth in a local rule of court. But it is appropriate to let individual judges continue to include variations and innovations in their own standing orders. In addition, she said, judges normally send specific orders and detailed written

instructions to the parties at the outset of each case. The parties, thus, receive actual notice of what the judge expects from them. The committee, she said, should not attempt to police the orders of individual judges. Its goal should be simply to provide helpful advice to the courts and urge them to make all orders readily accessible and easily searchable.

Members suggested some specific edits for the guidelines. Judge Rosenthal said that the document would be amended to take account of these concerns and re-circulated to the members after the meeting.

Judge Swain asked whether the committee would like comments from the Advisory Committee on Bankruptcy Rules. Judge Rosenthal responded that comments would be very welcome, and the advisory committee should explore whether any changes in the guidelines would be appropriate for the bankruptcy courts. At this point, though, the focus should be on sending the guidelines to the district courts.

SEALED CASES

Judge Hartz, chair of the Ad Hoc Subcommittee on Sealed Cases, reported that the Federal Judicial Center was examining all cases filed in the federal courts since 2006 to ascertain for the subcommittee what types of cases are sealed. The Center's initial review has now been largely completed. The results show that many of the sealed cases on the civil docket are filed under the False Claims Act. By statute, they must be sealed until the government decides whether or not to proceed. It often takes a long time for the government to make its decision. Moreover, some of these cases are later dismissed, but not unsealed.

The largest number of sealed cases are on the districts' magistrate-judge dockets, and many of them involve the issuance of warrants. It appears that many were never formally unsealed after the warrants were executed, an indictment filed, and a district-court criminal case opened. Only one bankruptcy case has been identified among the sealed cases. The subcommittee learned later that the courts' CM/ECF case management system now provides an electronic reminder to unseal a filing after a certain period of time has elapsed.

Judge Hartz said that the initial research by the Center for the subcommittee seemed to reveal that there are few, if any, systemic problems with sealed cases in the courts. He noted that the procedure in his circuit has been for the court of appeals to carry over the status of a case from the district court. Thus, if a case has been sealed by a district court, it will remain sealed in the court of appeals, and sometimes the circuit judges are unaware of the sealing. Another judge reported that the court of appeals in her

circuit effectively orders that all cases be unsealed at filing but asks the parties to petition the court if they wish to have the cases remain sealed.

PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION

Mr. Joseph chaired the panel discussion and announced that it would focus on the ideas set forth in the draft report on the civil justice system prepared by the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. He pointed out that the report is not yet final, but would likely be endorsed by the College. It sets forth a series of broad principles and recommendations to improve civil litigation in the federal and state courts, addressing such areas as pleading, discovery, experts, dispositive motions, and judicial management.

Professor Cooper opened the discussion by referring to recent reform efforts by the Advisory Committee on Civil Rules. He noted that the committee had been looking at pleading for years. It has explored fact pleading or substance-specific pleading rules, but it has not been prepared to pursue that path. Recently, the committee considered reinvigorating motions for a more definite statement under FED. R. CIV. P. 12(e) to support the disposition of motions to dismiss, for judgment on the pleadings, and to strike under FED. R. CIV. P. 12(b), (c), and (f). More ambitiously, a more definite statement might promote more effective pretrial management. The concept was endorsed by the lawyer members of the advisory committee, but all the judges cautioned that it would result in the lawyers filing motions for a more definite statement in every case.

The advisory committee had also made some progress in drafting a set of simplified procedures that include fact pleading and much reduced discovery, but that project had been placed on indefinite hold. The committee's next effort will be to solicit ideas for improving the civil process at a major conference next year with members of the bench and bar.

Professor Cooper said that hope springs eternal for rulemakers in their efforts to make procedural rules "just, speedy, and inexpensive," in the words of FED. R. CIV. P. 1. He noted, for example, a new rule in New South Wales specifies that resolution of cases should be "just, quick, and cheap," parallel to FED. R. CIV. P. 1. The 1848 Field Code had a standard that a complaint should be a statement of the facts constituting a cause of action in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended. In 1916, Senator Root proclaimed that procedure ought to be based on common intelligence of the farmer, the merchant, and the laborer. There is no reason why a plain, honest man should not be permitted to go into court to tell his story and have the judge be permitted to do justice in that particular case. In 1922, Chief Justice Taft addressed the American Bar Association and argued that the plan should be to make procedure so simple that it requires no special

knowledge to master it. Indeed, a plaintiff should be able to write a letter to the court to make his case.

Professor Cooper pointed out that good rules often do not work in practice, even though they may be sound in principle and expertly crafted. The 1970 amendments to the Federal Rules of Civil Procedure, for example, were good rules, but they do not function as anticipated. There may be a variety of reasons to explain the phenomenon. It may be because the rules are trans-substantive or govern the litigation of some topics that are just not well suited to resolution through our adversary dispute system. They may be focused too much on ordinary, traditional litigation. Or perhaps the system is no longer effective for the general run of claims.

The problem, in part, may lie with the lawyers. We may have developed a world of litigators and associates who understand discovery well, but few actual trial lawyers. The fault may be attributable in part to adversary zeal run amok, the structure of law firms, and the realities of hourly billings and law practice as a business. Judicial overload and the lack of judicial resources, too, may be part of the problem. Sound pretrial management is needed, and some pretrial and discovery problems need to be addressed quickly. But the judges may not be available or willing to oversee cases or resolve problems in a timely manner.

Professor Cooper suggested that inertia is a major obstacle to reform, as lawyers generally do not like change. He noted, by way of example, that a bar committee had objected recently to the proposed revision of FED. R. CIV. P. 56 (summary judgment) because the current Rule 56 has a long history of interpretation, and it would be impossible to predict the unintended consequences if the rule were changed. The fear of doing something different, he said, is prevalent.

In addition, the rules committees have been told to make no changes in the rules without first having sound empirical support behind them. As a result, the committees turn regularly to the Federal Judicial Center to provide them with excellent research support. The Center's resources, though, are limited. Its research can identify associations in the data between specific procedures and specific outcomes, but it cannot often prove actual causation. Therefore, it is difficult to predict with certainty the impact that proposed amendments will have.

Finally, Professor Cooper noted that a critical issue for reform of the civil justice system is which body should initiate it. The rules committee process, he said, unlike the legislative process, provides balance and careful discussion and deliberation. But sometimes there is political resistance to certain rules changes based on partisan or financial interests. Note, for example, the opposition to proposed changes in FED. R. CIV. P. 11 (sanctions) and FED. R. CIV. P. 68 (offer of judgment) in the past, and to certain aspects of proposed FED. R. CIV. P. 56 (summary judgment) now. Getting even modest

changes through the system can be difficult if certain segments of the bar and their clients oppose them strongly. As a result, the advisory committee treads carefully and strives for consensus, when feasible.

Discovery, for example, has been on its agenda for over 30 years, and there appears to be no end in sight. Notice pleading, for example, has been brought back to the table by the Supreme Court's decision in *Bell Atlantic v. Twombly*, 550 U.S. 554 (2007). The package of notice pleading, discovery, and summary judgment, though, lies at the very heart of the revolutionary 1938 Federal Rules of Civil Procedure. It represents the very soul of the current civil justice system. Therefore, making significant changes in these basic components of the rules – as the proposals of the College and Institute appear to recommend – may have consequences that are profoundly political. As a result, it is natural to ask whether a change of this sort should be made through the Rules Enabling Act process.

Judge Kourlis suggested that the ideas and recommendations embodied in the report are not new. They respond to a pervasive belief that the civil justice system is just too costly and laden with procedures. In many ways, she said, the recommendations mirror the proposed Transnational Principles and Rules of Civil Procedure drafted, in part, by the American Law Institute, the new civil rules of the Arizona state courts, and the simplified rules developed a few years ago by the advisory committee.

For some time, she said, there has been a variety of opinions about whether the rules should be substantially revised, merely tweaked, or left untouched. But a great many observers, including legislators, have come to the conclusion that substantial changes in the civil justice system are needed.

She pointed out that the Federal Rules of Civil Procedure cast a long shadow over the civil justice system and set the standard for litigation throughout the nation. The federal rules committees occupy a unique leadership position. Among the states, 23 follow the federal rules closely, and 10 more apply them relatively closely. Eleven states rely on factual pleading, and 4 have hybrid systems.

Judge Kourlis said that lawyers and judges tend to cleave to consensus. But the search to achieve consensus can impede the sort of innovation that is needed. Therefore, the report declares that it is time to answer the growing voice for change. To that end, it is time for the federal system to lead the way. The federal rules committees can take advantage of the expertise of the Federal Judicial Center and the Administrative Office, and they enjoy a great electronic case management and data collection system that can provide the sorts of empirical data that the reform effort requires. State courts, unfortunately, just do not have those resources.

Judge Kourlis emphasized that the report does not advocate wholesale revision of the rules. Rather, it recommends carefully designed pilot projects that can provide critical

empirical information on how to reduce costs, increase customer satisfaction, and perhaps increase the number of trials. She said that innovative pilot programs are easier to establish in the state courts than in the federal courts, but the states are not good at collecting data from them.

She recognized that federal law does not readily accommodate pilot programs. Nevertheless, the committee might wish to reexamine FED. R. CIV. P. 83 (local rules) or seek legislation to establish appropriate pilot projects. Clearly, she said, the language and intent of the Rules Enabling Act would support the suggested reform efforts.

She recommended, though, that the courts proceed carefully. The civil justice system is tarnished in the eyes of the public, lawyers, and litigants alike. Some of the criticisms may be unjustified, but some are clearly justified. The plea to rulemakers is that they remember whom they are serving and that their charge is to provide a civil justice system that is as good as they can make it.

Mr. Saunders reported that the drafters of the American College-Institute report had not been constrained by the Rules Enabling Act or by precedent. The group, he said, was composed of trial lawyers and two judges, but no scholars. They were liberated to write on a blank slate. They started by considering the existing civil discovery system and examining a number of proposals for reform made since the federal rules were first adopted. But the group was not looking just at the federal system. Its proposals are meant to apply across the board to all systems, federal and state.

Mr. Saunders reported that the participants had read many articles and examined a great deal of data. After doing so, they reached the conclusion that much of the available data are simply counter-intuitive. The 1990 Rand study, for example, showed that there are few problems with civil discovery. But that conclusion clearly did not seem correct to the members of the group. So they asked for more data and administered a survey to all 3,000 fellows of the College and received a good response. One of the first conclusions they drew from the responses was that discovery cannot be considered in a vacuum. Several other parts of the civil rules, such as pleading, intersect with it.

The survey encompassed 13 different areas of civil litigation. In 12, there was widespread agreement among all segments of the bar. Only one area – summary judgment – produced any differences between the responses from lawyers representing plaintiffs and those representing defendants. For that reason, the group refrained from making recommendations regarding summary judgment.

The goal of the group, he said, was only to identify principles, not to write actual rules. It attempted to reach agreement on a set of basic principles that could be applied across the board to civil litigation. The principles set forth in the report were then adopted unanimously by all 20 members of the task force.

The first principle, he said, is that there should be different sets of rules for different kinds of cases. In essence, “one size does not fit all” in civil litigation. Judge Kourlis added that both the task force and the Institute agree that one set of rules cannot handle all kinds of civil cases effectively. Instead, there should be either be separate rules for different kinds of cases or separate protocols within the same set of rules for different kinds of cases.

Mr. Joseph pointed out that the federal rules already sanction deviations from the trans-substantive provisions of the rules. For example, FED. R. CIV. P. 26 exempts certain categories of civil cases from its mandatory disclosure requirements. FED. R. CIV. P. 9 (pleading special matters) imposes separate requirements of particularity for pleading fraud or mistake, and there is a separate set of supplemental rules for admiralty cases. In addition, certain kinds of civil cases, such as social security appeals, are handled very differently by the courts from other cases, even though they are governed by the same civil rules. The report recognizes these differences and recommends that rulemakers create different sets of rules for certain types of cases.

Mr. Richards agreed that it would be constructive to consider adopting specific procedures for different types of cases. He noted that he had argued *Twombly*, and he emphasized that antitrust cases are truly different from other kinds of cases. Nevertheless, the lawyers in that case cited securities cases and other types of cases to the Supreme Court as precedent, assuming – incorrectly – that the concerns and principles discussed in those cases must be applicable in antitrust cases.

Judge Kravitz pointed out that patent lawyers come to him in every case and suggest how they want to handle the case. He works together with them to craft specific procedures for each case. But they are the only category of lawyers to do so. He pointed out that mechanisms currently exist in the Federal Rules of Civil Procedure to have a court fashion special rules, at least on an individual-case basis.

Mr. Saunders reported that the study group agreed that if discovery is to be tailored in different kinds of cases, the specialty bars – such as the patent, admiralty, and employment discrimination bars – should be called upon to fashion the special discovery rules for those types of cases. In a patent case, for example, discovery should focus on the history of the patent and the patent holder’s notebooks. Other specialty bars could do the same for their cases. Mr. Garrison added that this concept would include standard document requests and standard interrogatories for the special categories of cases. He said, though, that it is very difficult to get judges to do this under the current rules.

Mr. Joseph pointed out that a defense lawyer’s focus is normally on two matters – dismissal and summary judgment. There is a fear of juries that causes many cases to settle if summary judgment is denied. Consideration might be given, he said, to conducting a

small mini-trial in appropriate cases to see whether it is worth going forward with the case.

A member suggested that the central concern being expressed by the panel appeared to be that judges are not taking sufficient charge of their cases, and lawyers are not working together with the court to fashion the direction of each case. Mr. Joseph responded that law firms are conservative by nature. No lawyer wants to try an alternative procedure and be second-guessed after the fact. Lawyers need to be assured that certain procedural alternatives are fully authorized and encouraged. Accordingly, it would be much easier for lawyers to get together and agree if there were specific alternatives set forth in the rules, or in recognized protocols, that they can rely on. Mr. Saunders added that the task force was unanimous in its conclusion that judges need to be more involved at the outset of each case – much earlier and much more directly than most judges are today.

A member suggested that model procedures could be devised by each specialty bar. Lawyers could then inform the court that they wish to follow the appropriate model in their case. Mr. Joseph agreed that the model procedures could well be developed by the bar itself, rather than through the rules. Mr. Richards added that the key point is that the specialized procedures need to be enshrined somewhere, either in the rules or in authorized models that can be considered by the lawyers and the judges. In either case, it would provide legitimacy for procedural options that should be considered in specific areas of the law.

Mr. Joseph concurred with a member that the task force was in effect asking the rules committees to formalize rules that would sanction different tracks for different kinds of cases. Judge Kourlis pointed out that recent reforms in the United Kingdom have led to protocols that govern disclosure requirements. Each segment of the bar was asked to develop a set of protocols, and if there are no protocols in a given area, the lawyers must follow the standard protocols.

Mr. Richards addressed the second principle in the draft report, which calls for fact-based pleading. He pointed out that there is now some sort of fact pleading in the federal courts as a result of *Bell Atlantic v. Twombly*, holding that a complaint must provide “enough facts to state a claim to relief that is plausible on its face.” He said that discovery clearly imposes excessive costs in certain cases, and some cases settle because of the high costs of discovery. The Federal Rules of Civil Procedure, he said, do not deal adequately with the problems of discovery.

But, he said, there is no showing that a systemic problem of that sort exists in antitrust cases. Nevertheless, the Supreme Court in *Twombly* threw out the traditional foundations of the civil rules system in an antitrust case on the theory that the cost of discovery forces settlement. He said that the underlying debate in *Twombly* was indeed

over the costs of discovery, but the Court had no data to support its view. He suggested that a whole myth has been developed by industry and the defense bar that defendants are forced to settle cases that have no merits just because it costs too much to defend them. Antitrust cases, he said, are inherently expensive, but there is no indication at all that frivolous antitrust cases are settled because of attorney fees.

Mr. Saunders reported that some Canadian provinces have developed a procedure in which the bar may ask a court for an “application” and obtain relief very quickly based on affidavits and without full discovery. Accordingly, he said, rather than apply the full panoply of the federal or state procedural rules to each case, exceptions to the federal rules could be carved out for certain types of cases to provide relief quickly.

Mr. Saunders reported that 80% of the respondents in the American College survey agreed that the civil justice system is too expensive, 68% said that civil cases take too long to decide, and 67% said that costs inhibit parties from filing cases. He added that the report states that pleadings should “set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party’s claims or affirmative defenses.” Discovery would be limited to what is pleaded.

Mr. Garrison replied, however, that employment lawyers would take issue with the College’s recommendations. Mr. Richards added that in both antitrust and employment discrimination cases, the plaintiff simply does not know all the facts at the time of filing.

Mr. Saunders explained that the task force had spent a great deal of time discussing discovery, including electronic discovery, and it has two fundamental suggestions to offer to the rules committee. First, the federal rules should retain and slightly modify the existing initial disclosures by eliminating the option for a party merely to identify categories of documents. Rather, a party should be required to turn over all the actual documents reasonably available that support its case.

Second, he said, after the initial disclosures, only limited discovery should be allowed. The existing system of wide-open, unlimited discovery should be ended. Instead, the rules should provide an initial set of discovery limited to producing documents or information that enables a party to prove or disprove a claim or defense. After that, a party should not be entitled to additional discovery unless the parties agree to it or the court approves it on a showing of good cause and proportionality.

This fundamental recommendation of the report, he said, represents a major change from current civil practice. In essence, the task force wants to fundamentally change the current mind set of litigants, under which they seek as much discovery as possible and keep asking for documents and depositions until somebody stops them. The task force, he said, had concluded that the current default in favor of unlimited discovery increases discovery costs and delays without producing corresponding benefits. Instead,

parties should be entitled as a matter of right only to specified, limited disclosures. Additional discovery should be permitted only if there is an agreement among the parties or a court order authorizing it.

One way to achieve this result, he said, would be for the specialty bars, such as the patent and employment discrimination bars, to specify the kinds of discovery and documents that they need and typically receive in a typical case. In addition, the task force identified – without comment and for further consideration – several other ways in which discovery might be limited, such as by changing the definition of “relevance,” limiting the persons from whom discovery may be sought, and imposing discovery budgets approved by clients and the court.

Mr. Saunders added that he knew of no case in which a district judge has been reversed for allowing too much discovery. But judges may be reversed for allowing too little. Therefore, the safest course for a judge under the current regime is to allow discovery. That reality has created the mind set of entitlement that has led to the excessive costs and delays caused by discovery.

He reported that the College survey shows that electronic discovery is an extremely costly morass, and some fellows responded that it is killing the civil justice system. He said that it is essential for lawyers and litigants to work together with the court early in a case to decide how much discovery is truly needed and what the appropriate costs of it should be. To that end, perhaps the most important recommendation in the report, he said, is to change the default on discovery.

A member reported that the rules that now limit discovery in the Arizona state courts have worked very well. The required disclosures in Arizona are much more elaborate than those in the federal system. But additional discovery is much more limited. Third-party depositions, for example, are not allowed without court approval. Moreover, the state court system has an evaluation committee, and there are empirical data demonstrating the effectiveness of the Arizona regime. In general, cases move through the Arizona state court system quickly and at less cost. The state has also established a complex-case division that has its own discovery rules under which all discovery is stayed until the judge holds an initial conference and determines how much discovery to allow.

Mr. Saunders said that the data from the survey of College fellows show that the costs of litigation must be addressed. Those costs are causing cases to settle that should not be settled on the merits. He said that 83% of the respondents to the survey agreed with this observation, and 55% said that the primary cause of delay in civil cases is the time to complete discovery.

Mr. Garrison said that certain discovery costs can be reduced, but he argued that the College’s recommendations are too broad. He offered a range of other, alternative

suggestions to improve efficiency and reduce costs. Most importantly, he said, there is a need to improve early judicial case management under FED. R. CIV. P. 16(a) because lawyers simply will not take the initiative to do so on their own. In employment cases, for example, the court should enter a standard protective order at the Rule 16 conference. There could also be model protective orders that would apply in most civil cases. The courts could require the plaintiff and defendant bars, or a special task force appointed by the court, to craft standard interrogatories that, once adopted, would not be subject to objections. The process of developing the standards could follow that used by the bar to draft pattern jury instructions.

The court and the bar could also adopt standard discovery requests to produce documents early in a case. They, too, would not be subject to objection. He added that the initial disclosures currently required by FED. R. CIV. P. 26(a) do not work because plaintiffs simply do not obtain the disclosures they need from defendants. Therefore, they have to proceed straight to discovery. He suggested that the proposed standard documents should be an alternative to initial disclosure.

He also suggested that a court should conduct a second conference at the end of the initial round of discovery. At that point, no more discovery will be needed in many cases. But if more is required, the judge could refer the case to a magistrate judge to handle the second stage of discovery. Judges could also get rid of the voluminous and duplicative paper produced in discovery by just requiring final documents. Courts could also consider alternate ways to deal with discovery disputes, such as by asking for letters, rather than motions, and holding telephone conferences to resolve disputes.

Mr. Garrison said that electronic discovery is really not that much of an issue for him, as he obtains the electronic information that he needs without difficulty. He cautioned against drafting procedural rules based on the experience acquired in heavy commercial litigation. Discovery problems in those cases, he said, are completely different from what occurs in most other cases.

Mr. Richards said that there are indeed major problems with electronic discovery in antitrust cases and other big cases. The participants, he said, typically run search terms against electronic databases and come up with many hits. It then takes enormous attorney and paralegal time just to review all the hits. Nevertheless, he said, the College's proposal is not the right way to go. Rather, he said, courts should focus on the costs in each individual case and manage the discovery in reference to the anticipated costs of the discovery and the benefits it will produce in the case. That goal, he said, could be accomplished in three ways.

First, courts could require that discovery requests be more focused, directed, and limited to key areas. The broad requests seen today are very harmful. Discovery demands should be limited and based on specific details and events.

Second, courts should apply a triage system. Nothing, he said, focuses the mind of a plaintiff's lawyer more than costs. For example, the 7-hour limit on depositions has worked very well. Other kinds of limits, such as on interrogatories and discovery demands, would also work very well. Judges could ask lawyers at the outset of a case how many hits they expect to get on electronic discovery searches and then tailor the request to the anticipated results.

Third, courts could require phased discovery in many cases. At the outset of a case, the lawyers normally know that there really are only a handful of key issues. Resolution of those issues will determine the outcome of the case as a whole. In antitrust cases, for example, it may be whether there was or was not a conspiracy.

The plaintiffs should be made to focus on the issues they really care about. Unfortunately, though, simultaneous, unlimited discovery now occurs on all issues. Plaintiffs want to receive all the key information as quickly and as cheaply as possible, but they should be made to cut to the chase. To that end, phased discovery is the preferred way to go to narrow the scope of discovery. On the other hand, he said, throwing a case out because of defects in the pleadings makes no sense at all.

A participant stated that one problem with phased discovery is that parties are not willing to move quickly to engage in it. Instead of allowing nine months or so for all discovery in a case, they ask for nine months just to conduct the first phase of discovery. In addition, with phased discovery, key witnesses may get deposed three separate times, instead of only once. In reality, he said, one side often wants discovery, and the other does not. Mr. Richards agreed as to depositions, but said that documents are the main causes of unnecessary costs and delays.

Mr. Saunders pointed out that the obligation to preserve electronic information begins on the first day of a case. The parties, however, do not see a judge for some time after filing. During the hiatus between filing and issuance of a pretrial order, parties incur large costs just to preserve electronic information before the court relieves them of that responsibility. Therefore, judges should take immediate action at the outset of a case to address preservation obligations, and no sanctions should be imposed on the parties other than for bad faith. The current rules, he said, do not adequately address this point.

A member recommended that the advisory committee obtain more information from the state courts in Arizona and Massachusetts to see how well they are controlling discovery. Judge Kravitz agreed to pursue the matter.

NEXT MEETING

The committee agreed to hold the next meeting in Washington, D.C., in June 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, June 1 and 2, 2009.

Respectfully submitted,

Peter G. McCabe
Secretary

TAB 3A



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 7, 2009

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twelve bills were introduced in the 111th 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.

Time Computation

On March 18, 2009, Senator Patrick Leahy (D-VT) introduced the "Statutory Time-Periods Technical Amendments Act of 2009." (S. 630, 111th Cong., 1st Sess.) The next day, Representative Henry C. "Hank" Johnson (D-GA 4th) introduced H.R. 1626, which is identical to S. 630. (See attached.) Both bills amend 28 statutory deadlines making them consistent with time-computation amendments to the Federal Rules of Appellate Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, and Federal Rules of Criminal Procedure approved by the Supreme Court on March 26, 2009. In May 2009, the President signed H.R. 1626 after it was passed by the House and Senate on April 22, 2009, and April 27, 2009, respectively. Both the rules amendments and changes to the statutory deadlines are expected to take effect on December 1, 2009.

On May 1, 2009, Judge Rosenthal sent a memorandum to all chief judges informing them that the national rules amendments will affect the time deadlines contained in local rules and suggesting that the courts review every time deadline in their local rules and consider making appropriate adjustments. (See attached.) Judge Rosenthal also suggested that amendments to local rules take effect on December 1, 2009, consistent with the effective date of the federal rules amendments and statutory changes.

Judge Rosenthal met with Congressional Members and their staff and worked tirelessly to get the legislation introduced and passed. Judge Thomas Thrash, Jr., a former member of the Standing Rules Committee, played a key role.

Protective Orders.

On March 5, 2009, Senator Herb Kohl (D-WI), along with Senator Lindsay Graham (R-SC), introduced the “Sunshine in Litigation Act of 2009” (S. 537, 111th Cong., 1st Sess.), which is similar to legislation that had been introduced regularly since 1991. On March 12, 2009, Representative Robert Wexler (D-FL), along with Representative Jerry Nadler (D-NY), introduced the same proposal as H.R. 1508. (111th Cong., 1st Sess.)

The legislation provides, among other things, that before a judge enters a protective order under Civil Rule 26(c), the judge must make findings of fact that the discovery sought is not relevant for the protection of public health or safety or, if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information and the protective order is narrowly drawn to protect only the privacy interest asserted. The bill would apply to protective orders sought by motion as well as agreed to by stipulation.

The bills have been referred to the Senate and House Judiciary Committees. No further action has been taken on the legislation.

The ABA adopted a resolution at its February 2009 meeting in which it “reaffirms its support for the Congressionally-enacted, judicial rulemaking process set forth in the Rules Enabling Act and opposes those portions of the Sunshine in Litigation Act of 2007 of the 110th Congress (S. 2449) or other legislation that would circumvent that process” and “opposes the Sunshine in Litigation Act of 2007 of the 110th Congress . . . or other legislation that would impose similar requirements or burdens on the federal courts above and beyond the current (2008) provisions of Fed. R. Civ. P. 26(c) for entering or modifying protective orders or sealing settlements.” On April 13, 2009, the ABA wrote to the Senate and House Judiciary Committees expressing its strong opposition to the Sunshine in Litigation Act of 2009. (See attached.)

In the last Congress, Judge Rosenthal, on behalf of the Standing Committee and with the concurrence of the Executive Committee, sent a letter to the Senate Judiciary Committee on March 4, 2008, and to the House Judiciary Committee on May 22, 2008, expressing strong concerns with S. 2449, stating that “the legislation is not necessary to protect the public health and safety and that the discovery protective order provision would make it more difficult to protect important privacy interests and would make civil litigation more expensive, more burdensome, and less accessible.” The Department of Justice also wrote a letter to the Judiciary Committee to share its concerns with the bill.

Journalists’ Shield

On February 11, 2009, Representative Rick Boucher (D-VA) introduced the “Free Flow of Information Act of 2009.” (H.R. 985, 111th Cong., 1st Sess.) Senator Arlen Specter (D-PA) introduced a similar bill on February 13, 2009. (S. 448, 111th Cong., 1st Sess.) Both bills are

similar to legislation introduced in the last two Congresses. In particular, H.R. 985 gives journalists a limited privilege to withhold the identity of a confidential informant or other confidential information unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the information sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the information sought is essential to the successful completion of that matter; (4) in any matter in which the information sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information is contrary to public interest.

On March 31, 2009, the House passed H.R. 985 by voice vote. There has been no further action on the legislation.

Cameras in the Courtroom

On March 19, 2009, Senator Charles Grassley (R-IA), joined by Senators Charles Schumer (D-NY), Patrick Leahy (D-VT), Arlen Specter (D-PA), Lindsey Graham (R-SC), Russ Feingold (D-WI), John Cornyn (R-TX), and Richard Durbin (D-IL), introduced the "Sunshine in the Courtroom Act of 2009." (S. 657, 111th Cong., 1st Sess.) The legislation is the same as the cameras bill reported by the Senate Judiciary Committee last Congress and generally provides that the presiding judge of proceedings in the district court, court of appeals, and Supreme Court, may, at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising of any court proceeding over which the judge presides. S. 657 also provides that the presiding judge must not allow electronic media coverage if that judge determines that such coverage would violate the due process rights of any party. In appellate proceedings involving more than one judge, if a majority of judges participating determine that the electronic media coverage would violate the due process rights of any party, then the presiding judge must not permit media coverage in that case.

S. 657 also directs the Judicial Conference to promulgate mandatory guidelines no later than six months after enactment that shield certain witnesses from electronic media coverage, including minors, crime victims, and undercover law enforcement officers. Media coverage is not permitted until the Conference promulgates the mandatory guidelines.

On January 9, 2009, Representative Ted Poe (R-TX) introduced H.R. 429, a bill permitting the televising of Supreme Court proceedings. (111th Cong. 1st Sess.) Senator Specter introduced S. 446, a bill identical to H.R. 429, on February 13, 2009. The legislation would require the Supreme Court to permit television coverage of all open sessions unless the Court

decides, by majority vote of the justices, that allowing such coverage would constitute a violation of the due process rights of one or more parties before the Court.

The bills were referred to the Senate and House Judiciary Committees. No further action has been taken on the legislation.

The Judicial Conference strongly opposes legislation that would allow the use of cameras in trial court proceedings (see, e.g., JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) (The Second and Ninth Circuits allow broadcast coverage of their proceedings, upon approval of the presiding panel.) There is no provision governing televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings. In 2007 Secretary Duff sent letters to the House and Senate Judiciary Committees on behalf of the Judicial Conference strongly opposing the legislation. The Department of Justice also sent a letter on October 30, 2007, strongly opposing it.

Other Developments of Interest

Privacy. On February 27, 2009, Senator Joseph Lieberman (I-CT) wrote to Judge Rosenthal expressing, among other things, concerns about the presence of personal information contained in publicly available court records. (See attached.) Judge Rosenthal responded on March 12, 2009, agreeing that incidents of personal identifier information in court filings is disturbing and must be addressed. Judge Rosenthal reported on the immediate steps taken by the Judiciary to address the problem as well as ongoing efforts by the Standing Committee's Privacy Subcommittee, which has been tasked with examining how the 2007 privacy rules amendments have worked in practice, why personal identifier information continues to appear in some court filings, whether the privacy rules should be amended, and how to make implementation of the rules more effective. (See attached.)

Bankruptcy Home Mortgages. On January 6, 2009, Senator Richard Durbin (D-IL) introduced the "Helping Families Save Their Homes in Bankruptcy Act of 2009." (S. 61, 111th Cong., 1st Sess.) On the same day, Representative John Conyers, Jr. (D-MI) introduced H.R. 200, a bill identical to S. 61. (H.R. 200, 111th Cong., 1st Sess.) The legislation would, among other things, authorize bankruptcy courts to modify ("cramdown") both the interest and principal amount due on a mortgage on a debtor's principal residence.

On March 5, 2009, the House of Representatives passed H.R. 1106 by a vote of 234-191, a bill that included provisions of H.R. 200. However on April 30, 2009, the Senate rejected an amendment offered by Senator Durbin that would have added to S. 896, a bill aimed at reducing foreclosures, provisions that would have authorized a bankruptcy court to modify a home mortgage.

James N. Ishida

Attachments



**LEGISLATION AFFECTING THE FEDERAL
RULES OF PRACTICE AND PROCEDURE¹
111th Congress**

SENATE BILLS

- S. 61 - *Helping Families Save Their Homes in Bankruptcy Act of 2009*
 - Introduced by: Durbin
 - Date Introduced: 1/6/09
 - Status: Referred to the Senate Committee on the Judiciary (1/6/09).
 - Related Bills: H.R. 200, H.R. 225
 - Key Provisions:
 - The legislation would authorize bankruptcy courts to modify both the interest and principal amount due on a mortgage on a debtor’s principal residence. It would also require the mortgage lender to give notice to the debtor and the court of certain fees and charges incurred during the pendency of a Chapter 13 bankruptcy proceeding, and eliminate the pre-petition credit counseling requirement for chapter 13 filers facing foreclosure. (Under current law, a mortgage on a debtor’s principal residence cannot be modified by a bankruptcy court.) The proposal to prohibit the addition of fees without notice to the court addresses situations in which lenders have added to the balances of mortgages fees that were imposed during the Chapter 13 proceedings, but without notice to the debtor or bankruptcy trustee.

- S.445- *Attorney-Client Privilege Protection Act of 2009*
 - Introduced by: Specter
 - Date Introduced: 2/13/09
 - Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/09).
 - Related Bills: None
 - Key Provisions:
 - Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding from an organization attorney-client privilege or work product protection materials. Section 3 also prohibits the government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney’s fees

¹The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share “internal investigation materials of such organization.”

- S. 446 - *To Permit the Televising of Supreme Court Proceedings*

- Introduced by: Specter

- Date Introduced: 2/13/09

- Status: Referred to the Senate Committee on the Judiciary (2/13/09).

- Related Bills: H.R. 429

- Key Provisions:

- Section 1 amends **28 U.S.C. Chapter 45** by inserting a new section 678 requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- S. 448 - *Free Flow of Information Act of 2009*

- Introduced by: Specter

- Date Introduced: 2/13/09

- Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/09).

- Related Bills: H.R. 985

- Key Provisions:

- Section 2 provides that a federal entity may not compel a “covered person” to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred, that the testimony or document sought is essential to the investigation, prosecution, or defense, and any unauthorized disclosure has caused significant, clear, and articulable harm to national security; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; and (4) nondisclosure of the information be contrary to public interest. The content of any testimony or document compelled under this section must be: (1) limited to the purpose of verifying published information or describing surrounding circumstances relevant to the accuracy of the published information, and (2) be narrowly tailored in subject matter and period of time so as to avoid compelling production of peripheral, nonessential, or speculative information.

— Section 2 does not apply to information obtained as a result of eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the covered person; information necessary to prevent or mitigate death, kidnapping, or substantial bodily harm; and information that a federal court has found by a preponderance of the evidence that would assist in preventing acts of terrorism in the United States or significant harm to national security.

- *S. 537 - Sunshine in Litigation Act of 2009*

- Introduced by: Kohl
- Date Introduced: 3/5/09
- Status: Read twice and referred to the Senate Committee on the Judiciary (3/5/09).
- Related Bills: H.R. 1508
- Key Provisions:
 - Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court makes findings of fact that: (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.
 - Section 2 also provides: (1) there is a rebuttable presumption that the interest in protecting a person’s financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information.]
 - Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

- *S. 602 - Frivolous Lawsuit Prevention Act of 2009*

- Introduced by: Grassley
- Date Introduced: 3/16/09
- Status: Read twice and referred to the Senate Committee on the Judiciary (3/16/09).
- Related Bills: None
- Key Provisions:
 - Section 2 amends directly amends Civil Rule 11 by: (1) making the imposition of sanctions mandatory if the court determines subdivision (b) has been violated; (2) deleting current Rule 11(c)(4), which describes the nature of the sanction, and substituting the following, “[a] sanction imposed for violation of this rule may

consist of reasonable attorneys' fees and other expenses incurred as a result of the violation, directives of a nonmonetary nature, or an order to pay penalty into court or to a party"; and (3) amending Rule 11(c)(5) by making it explicit that monetary sanctions may be awarded against a party's attorney:

- S. 630 - *Statutory Time-Periods Technical Amendments Act of 2009*
 - Introduced by: Leahy
 - Date Introduced: 3/18/09
 - Status: Read twice and referred to the Senate Committee on the Judiciary (3/18/09).
 - Related Bills: H.R. 1626
 - Key Provisions:
 - The legislation makes changes to 28 separate statutory provisions to conform to the time computation rules amendments scheduled to take effect on December 1, 2009. The amendments made to the statutory deadlines take effect on December 1, 2009.

HOUSE BILLS

- H.R. 200 - *Helping Families Save Their Homes in Bankruptcy Act of 2009*
 - Introduced by: Conyers
 - Date Introduced: 1/6/09
 - Status: Referred to the House Committee on the Judiciary (1/6/09). Committee held hearings (1/22/09). Committee held mark-up session, adopted substitute, and reported favorably by a vote of 21-15 (1/27/09). House passed H.R. 1106 by a vote of 234-191, a bill that included provisions of H.R. 200 (3/5/09).
 - Related Bills: H.R. 225, S. 61
 - Key Provisions:
 - The legislation would authorize bankruptcy courts to modify both the interest and principal amount due on a mortgage on a debtor's principal residence. It would also require the mortgage lender to give notice to the debtor and the court of certain fees and charges incurred during the pendency of a Chapter 13 bankruptcy proceeding, and eliminate the pre-petition credit counseling requirement for chapter 13 filers facing foreclosure. (Under current law, a mortgage on a debtor's principal residence cannot be modified by a bankruptcy court.) The proposal to prohibit the addition of fees without notice to the court addresses situations in which lenders have added to the balances of mortgages fees that were imposed during the Chapter 13 proceedings, but without notice to the debtor or bankruptcy trustee.

- H.R. 429 - *To Permit the Televising of Supreme Court Proceedings*
 - Introduced by: Poe
 - Date Introduced: 1/9/09
 - Status: Referred to the House Committee on the Judiciary (1/9/09).

- Related Bills: S. 446
 - Key Provisions:
 - Section 1 amends **28 U.S.C. Chapter 45** by inserting a new section 678 requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.
- H.R. 985 - *Free Flow of Information Act of 2009*
 - Introduced by: Boucher
 - Date Introduced: 2/11/09
 - Status: Read twice and referred to the House Committee on the Judiciary (2/11/09). Mark up session held and House Judiciary Committee reported bill (3/25/09). H. Rept No. 111-61 filed (3/25/09). House passed by voice vote (3/31/09). Received in Senate and referred to Senate Committee on the Judiciary (4/1/09).
 - Related Bills: S. 448
 - Key Provisions:
 - Section 2 provides that a federal entity may not compel a “covered person” to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source’s identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.
- H.R. 1508- *Sunshine in Litigation Act of 2009*
 - Introduced by: Wexler
 - Date Introduced: 3/12/09
 - Status: Read twice and referred to the House Committee on the Judiciary (3/12/09).
 - Related Bills: S. 537
 - Key Provisions:
 - Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such

agreement, or (3) restricts access to court records in a civil case unless the court makes findings of fact that: (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

— Section 2 also provides: (1) there is a rebuttable presumption that the interest in protecting a person’s financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information.]

— Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

- H.R. 1626 - *Statutory Time-Periods Technical Amendments Act of 2009*

- Introduced by: Johnson

- Date Introduced: 3/19/09

- Status: Read twice and referred to the House Committees on the Judiciary, and Energy and Commerce (3/19/09). Passed House by voice vote (4/22/09). Passed Senate (4/27/09). Presented to President (4/30/09).

- Related Bills: S. 630

- Key Provisions:

- The legislation makes changes to 28 separate statutory provisions to conform to the time computation rules amendments scheduled to take effect on December 1, 2009. The amendments made to the statutory deadlines take effect on December 1, 2009.

SENATE RESOLUTIONS

- S.J. Res.

HOUSE RESOLUTIONS



One Hundred Eleventh Congress
of the
United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Tuesday,
the sixth day of January, two thousand and nine*

An Act

To make technical amendments to laws containing time periods affecting judicial proceedings.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the “Statutory Time-Periods Technical Amendments Act of 2009”.

SEC. 2. AMENDMENTS RELATED TO TITLE 11, UNITED STATES CODE.

Title 11, United States Code, is amended—

- (1) in section 109(h)(3)(A)(ii), by striking “5-day” and inserting “7-day”;
- (2) in section 322(a), by striking “five days” and inserting “seven days”;
- (3) in section 332(a), by striking “5 days” and inserting “7 days”;
- (4) in section 342(e)(2), by striking “5 days” and inserting “7 days”;
- (5) in section 521(e)(3)(B), by striking “5 days” and inserting “7 days”;
- (6) in section 521(i)(2), by striking “5 days” and inserting “7 days”;
- (7) in section 704(b)(1)(B), by striking “5 days” and inserting “7 days”;
- (8) in section 749(b), by striking “five days” and inserting “seven days”; and
- (9) in section 764(b), by striking “five days” and inserting “seven days”.

SEC. 3. AMENDMENTS RELATED TO TITLE 18, UNITED STATES CODE.

Title 18, United States Code, is amended—

- (1) in section 983(j)(3), by striking “10 days” and inserting “14 days”;
- (2) in section 1514(a)(2)(C), by striking “10 days” each place it appears and inserting “14 days”;
- (3) in section 1514(a)(2)(E), by inserting after “the Government” the following: “, excluding intermediate weekends and holidays.”;
- (4) in section 1963(d)(2), by striking “ten days” and inserting “fourteen days”;
- (5) in section 2252A(c), by striking “10 days” and inserting “14 days”;

H. R. 1626—2

(6) in section 2339B(f)(5)(B)(ii), by striking “10 days” and inserting “14 days”;

(7) in section 2339B(f)(5)(B)(iii)(I), by inserting after “trial” the following: “, excluding intermediate weekends and holidays”;

(8) in section 2339B(f)(5)(B)(iii)(III), by inserting after “appeal” the following: “, excluding intermediate weekends and holidays”;

(9) in section 3060(b)(1), by striking “tenth day” and inserting “fourteenth day”;

(10) in section 3432, by inserting after “commencement of trial” the following: “, excluding intermediate weekends and holidays”;

(11) in section 3509(b)(1)(A), by striking “5 days” and inserting “7 days”; and

(12) in section 3771(d)(5)(B), by striking “10 days” and inserting “14 days”.

SEC. 4. AMENDMENTS RELATED TO THE CLASSIFIED INFORMATION PROCEDURES ACT.

The Classified Information Procedures Act (18 U.S.C. App.) is amended—

(1) in section 7(b), by striking “ten days” and inserting “fourteen days”;

(2) in section 7(b)(1), by inserting after “adjournment of the trial,” the following: “excluding intermediate weekends and holidays,”; and

(3) in section 7(b)(3), by inserting after “argument on appeal,” the following: “excluding intermediate weekends and holidays,”.

SEC. 5. AMENDMENT RELATED TO THE CONTROLLED SUBSTANCES ACT.

Section 413(e)(2) of the Controlled Substances Act (21 U.S.C. 853(e)(2)) is amended by striking “ten days” and inserting “fourteen days”.

SEC. 6. AMENDMENTS RELATED TO TITLE 28, UNITED STATES CODE.

Title 28, United States Code, is amended—

(1) in section 636(b)(1), by striking “ten days” and inserting “fourteen days”;

(2) in section 1453(c)(1), by striking “not less than 7 days” and inserting “not more than 10 days”; and

(3) in section 2107(c), by striking “7 days” and inserting “14 days”.

H. R. 1626—3

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall take effect on December 1, 2009.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*

111TH CONGRESS
1ST SESSION

S. 630

To make technical amendments to laws containing time periods affecting
judicial proceedings.

IN THE SENATE OF THE UNITED STATES

MARCH 18, 2009

Mr. LEAHY (for himself, Mr. SPECTER, Mr. WHITEHOUSE, and Mr. SESSIONS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To make technical amendments to laws containing time
periods affecting judicial proceedings.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Statutory Time-Peri-
5 ods Technical Amendments Act of 2009”.

6 **SEC. 2. AMENDMENTS RELATED TO TITLE 11, UNITED**
7 **STATES CODE.**

8 Title 11, United States Code, is amended—

9 (1) in section 109(h)(3)(A)(ii), by striking “5-
10 day” and inserting “7-day”;

1 (2) in section 322(a), by striking “five days”
2 and inserting “seven days”;

3 (3) in section 332(a), by striking “5 days” and
4 inserting “7 days”;

5 (4) in section 342(e)(2), by striking “5 days”
6 and inserting “7 days”;

7 (5) in section 521(e)(3)(B), by striking “5
8 days” and inserting “7 days”;

9 (6) in section 521(i)(2), by striking “5 days”
10 and inserting “7 days”;

11 (7) in section 704(b)(1)(B), by striking “5
12 days” and inserting “7 days”;

13 (8) in section 749(b), by striking “five days”
14 and inserting “seven days”; and

15 (9) in section 764(b), by striking “five days”
16 and inserting “seven days”.

17 **SEC. 3. AMENDMENTS RELATED TO TITLE 18, UNITED**
18 **STATES CODE.**

19 Title 18, United States Code, is amended—

20 (1) in section 983(j)(3), by striking “10 days”
21 and inserting “14 days”;

22 (2) in section 1514(a)(2)(C), by striking “10
23 days” each place it appears and inserting “14 days”;

1 (3) in section 1514(a)(2)(E), by inserting after
2 “the Government” the following: “, excluding inter-
3 mediate weekends and holidays,”;

4 (4) in section 1963(d)(2), by striking “ten
5 days” and inserting “fourteen days”;

6 (5) in section 2252A(c), by striking “10 days”
7 and inserting “14 days”;

8 (6) in section 2339B(f)(5)(B)(ii), by striking
9 “10 days” and inserting “14 days”;

10 (7) in section 2339B(f)(5)(B)(iii)(I), by insert-
11 ing after “trial” the following: “, excluding inter-
12 mediate weekends and holidays”;

13 (8) in section 2339B(f)(5)(B)(iii)(III), by in-
14 serting after “appeal” the following: “, excluding in-
15 termediate weekends and holidays”;

16 (9) in section 3060(b)(1), by striking “tenth
17 day” and inserting “fourteenth day”;

18 (10) in section 3432, by inserting after “com-
19 mencement of trial” the following: “, excluding in-
20 termediate weekends and holidays,”;

21 (11) in section 3509(b)(1)(A), by striking “5
22 days” and inserting “7 days”; and

23 (12) in section 3771(d)(5)(B), by striking “10
24 days” and inserting “14 days”.

1 **SEC. 4. AMENDMENTS RELATED TO THE CLASSIFIED IN-**
 2 **FORMATION PROCEDURES ACT.**

3 The Classified Information Procedures Act (18
 4 U.S.C. App.) is amended—

5 (1) in section 7(b), by striking “ten days” and
 6 inserting “fourteen days”;

7 (2) in section 7(b)(1), by inserting after “ad-
 8 journment of the trial,” the following: “excluding in-
 9 termediate weekends and holidays,”; and

10 (3) in section 7(b)(3), by inserting after “argu-
 11 ment on appeal,” the following: “excluding inter-
 12 mediate weekends and holidays,”.

13 **SEC. 5. AMENDMENT RELATED TO THE CONTROLLED SUB-**
 14 **STANCES ACT.**

15 Section 413(e)(2) of the Controlled Substances Act
 16 (21 U.S.C. 853(e)(2)) is amended by striking “ten days”
 17 and inserting “fourteen days”.

18 **SEC. 6. AMENDMENTS RELATED TO TITLE 28, UNITED**
 19 **STATES CODE.**

20 Title 28, United States Code, is amended—

21 (1) in section 636(b)(1), by striking “ten days”
 22 and inserting “fourteen days”;

23 (2) in section 1453(c)(1), by striking “not less
 24 than 7 days” and inserting “not more than 10
 25 days”; and

1 (3) in section 2107(c), by striking “7 days” and
2 inserting “14 days”.

3 **SEC. 7. EFFECTIVE DATE.**

4 The amendments made by this Act shall take effect
5 on December 1, 2009.

○



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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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**ROBERT L. HINKLE
EVIDENCE RULES**

May 1, 2009

MEMORANDUM

To: Chief Judges, United States Courts

From: Honorable Lee H. Rosenthal 
Chair, Committee on Rules of Practice and Procedure

RE: CHANGES TO FEDERAL RULES THAT REQUIRE AMENDMENT OF TIME DEADLINES
IN LOCAL RULES AND STANDING ORDERS (**ACTION REQUESTED**)

On March 26, 2009, the Supreme Court approved amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. The changes are the result of a major project to make all the federal rules on calculating time periods simpler, clearer, and consistent. The amendments have been sent to Congress and are due to take effect on December 1, 2009.

The current rules exclude intermediate weekends and holidays for some short time periods, resulting in inconsistency and unnecessary complication. The amended rules are consistent and simple: count intermediate weekends and holidays for all time periods. All the deadlines in the Federal Appellate, Bankruptcy, Civil, and Criminal Rules were reviewed and most short periods extended to offset the shift in the time-computation rules and to ensure that each period is reasonable. The amended rules will affect some local rules and standing orders, especially those that set short deadlines. To maintain consistency with the national rules and to avoid confusion, we ask courts to review their local rules and standing orders and make necessary adjustments. It is important that the adjustments take effect on December 1, the same date as the national rule changes.

Neither the review nor the adjustments should be difficult. The ability to electronically search local rules and standing orders greatly simplifies the task. For example, an electronic search of any district court's local rules, using the key words "day," "week," and "hour," should quickly identify all or almost all the time deadlines that need adjustment.

The simple "days are days" approach to computing deadlines has the effect of shortening current periods less than 11 days in appellate, civil, and criminal proceedings and 8 days in bankruptcy proceedings. Virtually all short periods in the federal rules were lengthened to offset the change in the computation method — 5-day periods became 7-day periods and 10-day periods became 14-day periods — in effect maintaining the status quo. Periods shorter than 30 days were revised to be multiples of 7 days, to reduce the likelihood of ending on weekends.

Additionally, time periods in a few rules were extended because they were too short and impractical.¹ In total, 91 rules were changed. Congress passed legislation on April 27 adjusting time periods in 28 statutes that are similarly affected by the federal rules time-computation amendments (H.R. 1626). The legislation is awaiting the President's signature. Both the federal rules amendments and the legislation will take effect on December 1, 2009.

Amendments to local rules and standing orders are necessary because the federal rules for calculating time periods also apply to them. In most cases, only slight adjustments will be needed. A 10-day period that was effectively 14 days (because two weekends were excluded) should be lengthened to 14 days; a 5-day period that was effectively 7 days (because one weekend was excluded) should be lengthened to 7 days. Ideally, periods of less than 30 days should be revised to be a multiple of 7 days. Using terms such as "business days" or "court days" to describe how to compute a time period should be revised to use "days." Local provisions that are designed to fit with a period stated in the federal rules should be adjusted consistent with the federal rule changes. These conforming amendments to the local rules and standing orders should take effect on December 1, 2009, consistent with the effective date of the federal rules amendments.

Other changes to the federal time-computation rules affect how to tell when the last day of a period ends, how to compute hourly time periods, how to calculate a time period when the clerk's office is inaccessible, and how to compute backward-counted periods that end on a weekend or holiday. Courts are also asked to review their local rules and standing orders to determine whether any amendments are necessary to be consistent with these changes, especially provisions defining when the clerk's office is "inaccessible" for filing purposes.

The time-computation rules amendments are at www.uscourts.gov/rules. Separate power point presentations, which you may find helpful, explaining the amended rules and their operation in appellate, bankruptcy, and district court proceedings are at <http://www.uscourts.gov/rules/presentations.html>. If you have any questions, please contact John K. Rabiej, Chief, Rules Committee Support Office, at (202) 502-1820.

Thank you.

cc: Circuit Executives
District Court Executives
Clerks, United States Courts

¹ App. R. 4(a)(4)(A)(vi) (adjusting time to file a Civil Rule 60 motion that tolls appeal time); App. R. 4(a)(6)(B) (adjusting time for motion to reopen time to file appeal); Civ. R. 6(c) (adjusting time to serve motion and any affidavit supporting motion in opposition); Civ. R. 50, 52, and 59 (adjusting time to file certain posttrial motions); Civ. R. 54(d)(1) (adjusting timing of taxation of costs); Civ. R. 56 (establishing presumptive deadline for motions); Cr. R. 29, 33, and 34 (adjusting time to file certain posttrial motions and motion for judgment of acquittal); and Cr. R. 35 (adjusting deadline to file motion to correct technical errors in sentencing).



Thomas M. Susman
Director
Governmental Affairs Office

AMERICAN BAR ASSOCIATION
740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

April 13, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

I am writing on behalf of the American Bar Association to voice our strong opposition to S. 537, the “Sunshine in Litigation Act of 2009.”

The Act would change Federal Rule of Civil Procedure 26(c) by limiting a court’s ability to enter an order in a civil case (1) restricting disclosure of information obtained through discovery; (2) approving a settlement agreement restricting the disclosure of such information; or (3) restricting access to court records in civil cases – unless the court makes certain findings that the order would not restrict the disclosure of information relevant to the protection of public health or safety, or that the public interest in disclosure of such information is outweighed by a specific interest in maintaining the confidentiality of the information and that the protective order is no broader than necessary to protect the privacy interest asserted.

The ABA opposes S. 537 for two reasons. First, the bill would circumvent the Rules Enabling Act, the procedure established by Congress for revising rules in the federal courts. Second, the bill would impose additional, unnecessary requirements on, and restrict the discretion of, federal courts in ways that will only increase the burdens of litigation in both time and expense. The existing provisions of Rule 26 are currently operating to protect the public interest against unnecessary restrictions on information bearing on public health and safety, and protective orders are important to facilitate the prompt flow of discovery in litigation without imposing the additional burdens contemplated in the bill.

Rules Enabling Act Issues

S. 537 is an unwise retreat from the balanced and inclusive process established by Congress in the Rules Enabling Act. The Rules Enabling Act process is based on three fundamental concepts: (1) the essential, central role of the judiciary in initiating and formulating judicial rulemaking; (2) the use of procedures that permit full public participation, including participation by members

of the legal profession, in considering changes to the rules; and (3) congressional review before changes are adopted.

S. 537 would depart from this balanced and inclusive process. The failure to follow the processes in the Rules Enabling Act would frustrate the purpose of the Act and could do harm to the effective functioning of the judicial system.

Substantive Issues

The current version of Rule 26(c) and the case law applying it give judges appropriate authority to determine when to enter a protective order and what provisions should or should not be in it in light of the particular facts and circumstances of each case. There are three substantive flaws in the proposed legislation:

First, there is no demonstrable deficiency in the current version of Rule 26(c) that requires a change. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Rules Committee”) reported to this Committee in 2008 that empirical studies since 1991 show “no evidence that protective orders create any significant problem of concealing information about public hazards.” A copy of the Rules Committee’s letter of March 4, 2008, is attached to this letter.

Second, requiring particularized findings of fact before any protective order could be issued in *any* case would impose an enormous burden on both the courts and litigants.

Only a small fraction of civil cases involve issues that implicate the public health and safety. Yet, the bill would impose a broad rule that would apply to every civil case. Even in cases that arguably may bear on public health and safety issues, requiring a court to make detailed findings at the beginning of a case, possibly on a document-by-document basis, will impose an impossible burden on the court and the litigants. Protective orders facilitate the timely production of documents and permit challenges to particular documents after the parties have had a chance to review them and the case has evolved to the point when the parties and the court can understand their significance and context.

The Rules Committee correctly noted in its letter to this Committee that the proposed legislation “would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.”

Third, the requirement that judges entering an order approving a sealed settlement agreement must make the same particularized findings of fact necessary for discovery protective orders is also unnecessary. Only a small number of cases involve a sealed settlement agreement and only a portion of those cases involve a potential public health or safety hazard. In those cases that do, the complaints and other documents that are a matter of public record typically contain sufficient details about the alleged hazard or harm to apprise the public of the risk, the source of the risk,

The Honorable Patrick J. Leahy
April 13, 2009
Page 3

and the harm it allegedly causes. Sealing a settlement agreement in these cases would have no material impact on the public's ability to be informed of potential health or safety hazards.

The ABA has adopted policy regarding secrecy and coercive agreements on this very issue:

Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons, or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information;

Following adoption of this ABA policy, the Rules Committee and the Advisory Committee on Civil Rules of the Judicial Conference explored at length the need for changes in Rule 26(c) similar to the proposed changes in legislation such as S. 537. Both committees concluded that these changes are not warranted. They are not warranted for one overriding reason: the federal courts are already addressing these concerns when they consider whether to enter a protective order.

Conclusion

The current version of Rule 26(c) is and has been an appropriate, effective mechanism to protect the rights of both litigants and the public, without overburdening the administration of justice in the federal courts. Any proposed amendment to its provisions should be addressed through the existing Rules Enabling Act procedure. S. 537 would not serve the public interest.

Sincerely,



Thomas M. Susman

cc: Members, Senate Committee on the Judiciary

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Director
Governmental Affairs Office

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April 13, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Conyers:

I am writing on behalf of the American Bar Association to voice our strong opposition to H.R. 1508, the “Sunshine in Litigation Act of 2009.”

The Act would change Federal Rule of Civil Procedure 26(c) by limiting a court’s ability to enter an order in a civil case (1) restricting disclosure of information obtained through discovery; (2) approving a settlement agreement restricting the disclosure of such information; or (3) restricting access to court records in civil cases – unless the court makes certain findings that the order would not restrict the disclosure of information relevant to the protection of public health or safety, or that the public interest in disclosure of such information is outweighed by a specific interest in maintaining the confidentiality of the information and that the protective order is no broader than necessary to protect the privacy interest asserted.

The ABA opposes H.R. 1508 for two reasons. First, the bill would circumvent the Rules Enabling Act, the procedure established by Congress for revising rules in the federal courts. Second, the bill would impose additional, unnecessary requirements on, and restrict the discretion of, federal courts in ways that will only increase the burdens of litigation in both time and expense. The existing provisions of Rule 26 are currently operating to protect the public interest against unnecessary restrictions on information bearing on public health and safety, and protective orders are important to facilitate the prompt flow of discovery in litigation without imposing the additional burdens contemplated in the bill.

Rules Enabling Act Issues

H.R. 1508 is an unwise retreat from the balanced and inclusive process established by Congress in the Rules Enabling Act. The Rules Enabling Act process is based on three fundamental concepts: (1) the essential, central role of the judiciary in initiating and formulating judicial rulemaking; (2) the use of procedures that permit full public participation, including participation

by members of the legal profession, in considering changes to the rules; and (3) congressional review before changes are adopted.

H.R. 1508 would depart from this balanced and inclusive process. The failure to follow the processes in the Rules Enabling Act would frustrate the purpose of the Act and could do harm to the effective functioning of the judicial system.

Substantive Issues

The current version of Rule 26(c) and the case law applying it give judges appropriate authority to determine when to enter a protective order and what provisions should or should not be in it in light of the particular facts and circumstances of each case. There are three substantive flaws in the proposed legislation:

First, there is no demonstrable deficiency in the current version of Rule 26(c) that requires a change. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Rules Committee”) reported to this Committee in 2008 that empirical studies since 1991 show “no evidence that protective orders create any significant problem of concealing information about public hazards.” A copy of the Rules Committee’s letter of May 22, 2008, is attached to this letter.

Second, requiring particularized findings of fact before any protective order could be issued in *any* case would impose an enormous burden on both the courts and litigants.

Only a small fraction of civil cases involve issues that implicate the public health and safety. Yet, the bill would impose a broad rule that would apply to every civil case. Even in cases that arguably may bear on public health and safety issues, requiring a court to make detailed findings at the beginning of a case, possibly on a document-by-document basis, will impose an impossible burden on the court and the litigants. Protective orders facilitate the timely production of documents and permit challenges to particular documents after the parties have had a chance to review them and the case has evolved to the point when the parties and the court can understand their significance and context.

The Rules Committee correctly noted in its letter to this Committee that the proposed legislation “would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.”

Third, the requirement that judges entering an order approving a sealed settlement agreement must make the same particularized findings of fact necessary for discovery protective orders is also unnecessary. Only a small number of cases involve a sealed settlement agreement and only a portion of those cases involve a potential public health or safety hazard. In those cases that do, the complaints and other documents that are a matter of public record typically contain sufficient details about the alleged hazard or harm to apprise the public of the risk, the source of the risk,

The Honorable John Conyers, Jr.

April 13, 2009

Page 3

and the harm it allegedly causes. Sealing a settlement agreement in these cases would have no material impact on the public's ability to be informed of potential health or safety hazards.

The ABA has adopted policy regarding secrecy and coercive agreements on this very issue:

Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons, or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information;

Following adoption of this ABA policy, the Rules Committee and the Advisory Committee on Civil Rules of the Judicial Conference explored at length the need for changes in Rule 26(c) similar to the proposed changes in legislation such as H.R. 1508. Both committees concluded that these changes are not warranted. They are not warranted for one overriding reason: the federal courts are already addressing these concerns when they consider whether to enter a protective order.

Conclusion

The current version of Rule 26(c) is and has been an appropriate, effective mechanism to protect the rights of both litigants and the public, without overburdening the administration of justice in the federal courts. Any proposed amendment to its provisions should be addressed through the existing Rules Enabling Act procedure. H.R. 1508 would not serve the public interest.

Sincerely,



Thomas M. Susman

cc: Members, House Committee on the Judiciary



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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

March 12, 2009

Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your February 27, 2009 letter questioning fees charged for internet-based access to court records and the presence of personal information contained in electronically accessible court records. On behalf of the rules committees of the Judicial Conference, I will address the second question. Charging fees for public access to court records is not determined by the Federal Rules and is addressed in a separate letter.

The Judicial Conference and its rules committees share your commitment to protecting private information in court filings from public access. Over a decade ago, before electronic filing was adopted in the federal district and bankruptcy courts and well before enactment of the E-Government Act of 2002, the Judicial Conference began developing a policy to protect private information in electronic case files while ensuring internet-based public access to those files. The Judicial Conference privacy policy became effective in September 2001. Changes to the Federal Appellate, Bankruptcy, Civil, and Criminal Rules, largely incorporating the privacy policy and addressing other rules' aspects of protecting personal identifiers and other public information from remote electronic public access, became effective in December 2007, under the E-Government Act and pursuant to the Rules Enabling Act process.¹

The Judicial Conference has continued to examine how the privacy policy and rules are working in practice. Two Judicial Conference committees are reviewing the rules, the policy, and their implementation. The Administrative Office has also continued to reinforce effective implementation. The federal judiciary has been in the forefront of protecting privacy interests while ensuring public access to electronically filed information.

¹ Fed. R. App. P. 25(a)(5); Fed. R. Bank. P. 9037; Fed. R. Civ. P. 5.2; and Fed. R. Crim. P. 49.1.

In late 1999, a few federal courts served as pilot projects to test electronic filing. In 2009, the federal judiciary's Case Management/Electronic Case Files (CM/ECF) system has become fully operational in 94 district courts and 93 bankruptcy courts, and it will soon become operational in all 13 courts of appeals. As courts and litigants have acquired experience with nationwide electronic filing, new issues have emerged on how to balance privacy interests with ensuring public access to court filings.

The judiciary-wide privacy policy was adopted in September 2001 after years of study, committee meetings, and public hearings. The policy requires that court filings must be available electronically to the same extent that they are available at the courthouse, provided that certain personal identifiers are redacted from those filings by the attorney or the party making the filing. The personal identifiers that must be redacted include the first five digits of a social-security number, financial account numbers, the name of a minor, the date of a person's birth, and the home address in a criminal case. These redaction requirements were incorporated into the Federal Rules amendments promulgated in December 2007 after the public notice and comment period prescribed under the Rules Enabling Act. These rules, which also address other privacy protection issues, meet the requirements of the E-Government of 2002.

The 2001 Conference policy and the 2007 privacy rules put the responsibility for redacting personal identifiers in court filings on the litigants and lawyers who generate and file the documents. The litigants and lawyers are in the best position to know if such information is in the filings and, if so, where. Making litigants and lawyers responsible to redact such information has the added benefit of restraining them from including such information in the first place. Moreover, requiring court staff unilaterally to modify pleadings, briefs, transcripts, or other documents that are filed in court was seen to be impractical and potentially compromising the neutral role the court must play. For these reasons, the rules clearly impose the redaction responsibility on the filing party. The Committee Notes accompanying the Rules enacted in December 2007 state: "The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or non-party making the filing."² The courts have made great efforts to ensure that filers are fully aware of their responsibility to redact personal identifiers. Those efforts continue.

The reported instances of personal identifier information contained in court filings is disturbing and must be addressed. The Rules Committees' Privacy Subcommittee, which developed and proposed the 2007 privacy rules, is charged with the task of examining how the rules have worked in practice, what issues have emerged since they took effect on December 1, 2007, and why personal identifier information continues to appear in some court filings. The Privacy Subcommittee, which includes representatives from the Advisory Rules Committees as well as the Court Administration and Case Management Committee, will consider whether the federal privacy rules or the Judicial Conference privacy policy should be amended and how to

² Fed. R. Civ. P. 5.2 (Committee Note).

Honorable Joseph I. Lieberman

Page 3

make implementation more effective. The Subcommittee will review empirical data; the experiences of lawyers, court staff, and judges with electronic court filings; the software programs developed by some district and bankruptcy courts to assist in redacting personal identifier information; and other steps taken by different courts to increase compliance with the privacy rules.

While this work is going on, the judiciary is taking immediate steps to address the redaction problem. Court personnel have been trained in administering the privacy policy and rules; additional training is taking place. On February 23, 2009, the Administrative Office issued a written reminder to all Clerks of Court about the importance of having personal identifiers redacted from documents before they are filed and of the need to remind filers of their redaction obligations. Court clerks were directed to use a variety of court communications, such as newsletters, listserves, continuing legal education programs, and notifications on websites administered directly by the courts, to reach as many filers as possible, as effectively as possible. Plans are underway to modify the national CM/ECF system to include an additional notice reminding filers of their redaction obligation. In addition, all the courts have been asked to provide information on their experience with the privacy policy and rules. Early responses have included some promising approaches that the Privacy Subcommittee will consider for possible national adoption.

The Privacy Subcommittee does not underestimate the difficulty or complexity of the problems. Court filings can be voluminous. Some cases involve hundreds or even thousands of pages of administrative or state-court paper records that cannot be electronically searched. Redacting personal identifier information in certain criminal proceedings may interfere with legitimate law enforcement prosecutions. Erroneously redacting information can affect the integrity of a court record. The propriety of court staff changing papers filed in private civil litigation is an ongoing concern. Internet access to court filings present other privacy and security issues besides the redaction of the personal identifiers specified in the 2007 rules, and these issues need to be studied as well.

The resolution of these issues will involve important policy decisions that require careful and comprehensive consideration and input from the bench, bar, and public. The Judicial Conference and its Committees look forward to continuing this dialogue with you. If it would be helpful, we will be pleased to report on an ongoing basis to you or your staff on the work of the Privacy Subcommittee.

Sincerely,



Lee H. Rosenthal
Chair, Standing Committee on Rules of
Practice and Procedure

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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

February 27, 2009

The Honorable Lee H. Rosenthal
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Rosenthal

I am writing to inquire if the Court is complying with two key provisions of the E-Government Act of 2002 (P.L. 107-347) which were designed to increase public access to court records and protect the privacy of individuals' personal information contained in those records

As you know, court documents are electronically released through the Public Access to Court Electronic Records (PACER) system, which currently charges \$.08 a page for access. While charging for access was previously required, Section 205(e) of the E-Government Act changed a provision of the Judicial Appropriation Act of 2002 (28 U.S.C. 1913 note) so that courts "may, to the extent necessary" instead of "shall" charge fees "for access to information available through automatic data processing equipment."

The goal of this provision, as was clearly stated in the Committee report that accompanied the Senate version of the E-Government Act, was to increase free public access to these records. As the report stated: "[t]he Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. ... Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information."

Seven years after the passage of the E-Government Act, it appears that little has been done to make these records freely available – with PACER charging a higher rate than 2002. Furthermore, the funds generated by these fees are still well higher than the cost of dissemination, as the Judiciary Information Technology Fund had a surplus of approximately \$150 million in FY2006.¹ Please explain whether the Judicial Conference is complying with Section 205(e) of the E-Government Act, how PACER fees are determined, and whether the Judicial Conference is only charging "to the extent necessary" for records using the PACER system.

In addition I have concerns that not enough has been done to protect personal information contained in publicly available court filings, potentially violating another provision of the


¹ Judiciary Information Technology Fund Annual Report for Fiscal Year 2006

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E-Government Act.² A recent investigation by Carl Malamud of the non-profit Public.Resource.org found numerous examples of personal data not being redacted in these records. Given the sensitivity of this information and the potential for identity theft or worse, I would like the court to review the steps they take to ensure this information is protected and report to the Committee on how this provision has been implemented as we work to increase public access to court records.

I thank you in advance for your time and I look forward to your response.

Sincerely,



Joseph I. Lieberman
Chairman

² Section 205(c)(3) requires that rules be developed to “protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.”

TAB 3B



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 7, 2009

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.

Federal Rulemaking Website

At the request of the Bankruptcy Rules Committee, we created a new feature called “Quick Links” on Judiciary’s *Federal Rulemaking* web site. The new feature contains hyperlinks to frequently used Rules Committee records and information. The purpose of “Quick Links” is to gather in one place these popular links for faster, more efficient access to rules records.

We also posted on the web site audio recordings (“podcasts”) of the January 14, 2009, and February 2, 2009, public hearings held by the Civil Rules Committee on proposed amendments to Civil Rules 26 and 56; and of the April 6, 2009, public hearing held by the Criminal Rules Committee on proposed amendments to Criminal Rules 5, 12.3, 15, 21, and 32.1, which were published for comment in August 2008. The audio recordings are located at <http://www.uscourts.gov/rules/podcast.cfm>

We have also received, acknowledged, forwarded, and followed up on over 200 comments and requests to testify submitted to date on the proposed amendments published for comment in August 2008. The comments, requests, written testimony, and transcripts of the hearings are posted on the web site at <http://www.uscourts.gov/rules/proposed0809.html>

The office continues to add rules-related records to the web site. In April 2009, we retrieved, digitized, and scanned into our document management system hundreds of pages of missing rules committee records from Carol Ann Mooney, President of St. Mary’s College and former reporter to the Appellate Rules Committee.

We are working with other AO offices on a major redesign of the web site to make it even easier to use, navigate, and search for and locate rules-related documents. The new redesigned web site is expected to be operational in early fall 2009.

Documentum

The office recently completed a major project to digitize all paper records of the Rules Committees and imported them into Documentum, the office's document-management system. This provides users access to thousands of rules documents, including drafts of proposed rules amendments, committee minutes, committee reports, agenda items, comments and suggestions, memoranda, and correspondence. Upon successful completion of a pilot project with Professor Catherine Struve, access to Documentum will be available to committee members, reporters, and consultants.

Committee and Subcommittee Meetings

For the period from December 2008 to May 2009, the office staffed eight meetings and three public hearings, including one Standing Committee meeting, five advisory committee meetings, a special open subcommittee meeting on bankruptcy appeals, two public hearings on proposed amendments to Civil Rules 26 and 56, a public hearing on proposed Criminal Rules amendments, 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 Approved by the Supreme Court. On March 26, 2009, the Supreme Court approved proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, which were approved by the Judicial Conference at its September 2008 session. The amendments, which include over 90 time-computation provisions found in the rules, were transmitted to Congress and will become effective on December 1, 2009, unless Congress enacts legislation to reject, modify, or defer the amendments.

James N. Ishida

TAB 4

SUBJECT: Federal Judicial Center Activities

The Federal Judicial Center is pleased to provide this report on education and research activities that may be of interest to the Committee.

I. Education

The Center's calendar year 2009 educational activities are summarized below.

A. Education for Federal Judges

Orientation Programs. These programs are conducted on an as-needed basis to keep pace with nominations and appointments (eight programs are currently scheduled).

Continuing education/multisubject workshops. Circuit workshops were conducted for circuit and district judges in the D.C., Fourth, Sixth, and Ninth Circuits through June 2009; workshops for the Seventh and Eleventh Circuits, and a combined program for the Eighth and Tenth Circuits, will follow. National workshops include a conference for chief district judges, one workshop for bankruptcy judges, and two workshops for magistrate judges. Select sessions during most programs for judges are digitally recorded (audio only) and made available at FJC Online (<http://cwn.fjc.dcn>).

Special-focus Seminars. Topics addressed during this year's special-focus seminars for judges include the death penalty, e-discovery, employment law, environmental law, financial statements in the courtroom, intellectual property, law and genetics, law and terrorism, law and neuroscience, law and the media, law and society, humanities and science, and 42 U.S.C. Section 1983 litigation. Most of the preceding programs are cosponsored with law schools. A new

program, hands-on judge-to-judge information technology training, will be offered in September 2009.

Programs for judges and senior court staff together. Programs include two strategic planning workshops for district and bankruptcy court teams, an executive team workshop for chief district judges and their court unit executives, and an executive institute for chief bankruptcy judges and clerks of court. Two continuity of operations plan (COOP) workshops were pilot-tested in the Ninth Circuit in January and March. Teams consisting of judges, court unit executives, court staff, and federal public defenders attended the workshops, which were developed in collaboration with the Administrative Office and the Ninth Circuit. The Administrative Office will fund COOP workshops for judges and court unit executives in other circuits.

Monographs. The Center recently published a brief overview of patent litigation entitled *Anatomy of a Patent Case* and later this year will publish a more comprehensive *Patent Case Management Judicial Guide*. Other recent publications include updated, second editions of *A Primer on the Jurisdiction of the U.S. Courts of Appeals*; *Guide to the Judicial Management of Bankruptcy Mega-Cases*; and *Managing Class Action Litigation: A Pocket Guide for Judges*. Web-based outlines of recent case law developments in Section 1983 litigation and bankruptcy litigation have been updated and posted on FJC Online. *Sample Advisory on Protecting Privacy of Personal Information in Electronic Transcripts* was posted to the site in March 2009.

B. Legal Education for Court Attorneys

The 2009 training calendar includes nine legal education programs for staff attorneys, circuit mediators, and federal defender staff.

C. Education for Court Staff

Travel-based workshops and seminars offered this year for court staff include a biennial national conference for bankruptcy court clerks, chief deputies, bankruptcy administrators, and Bankruptcy Appellate Panel clerks; three leadership institutes (for new court unit executives, for court librarians, and for chief deputy clerks, deputy chief probation and pretrial services officers, and circuit staff in comparable positions); five programs for court managers (two for those new to the position and three for experienced managers); and a Phase II seminar for the 2008–2010 class (Class VII) of the Federal Court Leadership Program. The Center will also help facilitate a circuit executives' conference and Administrative Office district and bankruptcy court operations forums.

Among the travel-based programs for probation and pretrial services officers are an executive team seminar for chiefs and deputy chiefs; a program for new deputy chiefs (offered twice); three workshops for new supervisors and a new program for experienced supervisors; and two workshops, conducted in collaboration with the Administrative Office, to help districts develop strategies for implementing the new treatment services policy in *Monograph 109: The Supervision of Federal Offenders*. Class IX of the Center's Leadership Development Program for Probation and Pretrial Services Officers completed the three-year curriculum during a May 2009 seminar.

Complementing the above and other training presentations by Center staff are numerous web conferences, on-line e-learning programs, and in-court programs using Center-developed curricula and Center-trained faculty, such as the new *Code of Conduct for Judicial Employees* curriculum packaged program.

D. Training and curriculum development in support of Judicial Conference policies and Administrative Office programs

Center education specialists provide training and curriculum development assistance at the request of the Judicial Conference, the Administrative Office, and the courts. Center staff consult with subject-matter experts during planning and development meetings, design and write teaching materials (instructor and participant guides, overhead slides), produce video vignettes, and conduct or help faculty to conduct the training programs. The Center is working closely with the Administrative Office and Judicial Conference committees on the following projects: court compensation policies training (Judicial Conference Committee on Judicial Resources); judge's information technology (IT) training (Judicial Conference Committee on Information Technology); continuity of operations planning and space and facilities training (Administrative Office's Office of Facilities and Security).

E. Federal Judicial Television Network and Video Programs for Judges and Staff

Approximately eighteen new television programs will be broadcast via the Federal Judicial Television Network (FJTN) this year and most will be streamed over the judiciary's intranet on FJC Online. *The People's Panel*, an updated orientation video for federal court grand jurors, was distributed to all district courts in March 2009.

II. Research Highlights

Follow-up on the recently completed District Courtroom Use Study. Center staff continue to document and archive the huge amount of project data that were collected and analyzed. Since January of this year, staff have been meeting and conferring with staff of the Government Accountability Office (GAO). The GAO has been tasked with reviewing the study's methods and findings. The Center has responded to several GAO requests for project

information, without compromising the assurances the Center gave to judges and the courts about the use of the data.

Bankruptcy courtroom use study. The Committee on Court Administration and Case Management asked the Center to study the use of bankruptcy courtrooms. The Center has now designed and implemented a study of bankruptcy courtroom use that will closely mirror the research on district courtroom use.

Multidistrict litigation (MDL) case processing study. In response to a request from the chair of the Judicial Panel on Multidistrict Litigation, the Center commenced a study of MDL case processing, including an analysis of cases pending for three or more years.

Assistance to the Advisory Committee on Civil Rules with upcoming conference. The Center has been asked by the Committee for assistance with conducting a survey of attorneys regarding discovery, e-discovery, and related costs in civil cases, for use in a major conference the Committee plans to conduct in 2010 at Duke University Law School.

2010 National Sentencing Policy Institute. The Center has begun plans for a National Sentencing Policy Institute to be conducted in April 2010 in Fort Worth, Texas. The Center plans and conducts these institutes with the Criminal Law Committee in cooperation with the Federal Bureau of Prisons, the Office of Probation and Pretrial Services of the Administrative Office, and the U.S. Sentencing Commission.

III. Federal Judicial History and International Rule of Law Functions

The Center assists federal courts and others in developing information and teaching about the history of the federal judiciary. Nine units of the Center's Teaching Judicial History project, with materials related to notable federal trials, are available on the Center's sites on the courts'

intranet and the Internet. The Center has completed a revised version of *A Guide to the Preservation of Federal Judges' Papers* and is preparing a guide to research on federal court history.

The History of the Federal Judiciary website remains one of the most frequently consulted government sites, with many links to it from legal education, judicial reform, and news organizations. Recent additions to the site include a collection of nearly 600 photographs of historic courthouses, and the Center is now preparing a collection of on-line portraits of former judges.

The Center also provides information about the United States courts to judiciaries of other countries through informational briefings for visiting delegations, the dissemination of Center publications, resources on its Internet site, and international technical assistance projects. The Center also gathers information about foreign judicial systems that help the Center perform its other missions.

During the period October 3, 2008 through March 30, 2009, the Center hosted 22 delegations from abroad, including 226 judges, court officials, and scholars from 30 countries. Nations represented at these sessions included Afghanistan, Argentina, Georgia, Haiti, Indonesia, Italy, Japan, and Qatar.

In collaboration with the Leitner Center for International Law and Justice at Fordham Law School, the Center developed a series of workshops, on case management, opinion writing, and judicial ethics, held in Accra, Ghana, October 10–16, 2008. At the request of the American Bar Association Rule of Law Project, Center staff also provided assistance to the new judicial training center in Monrovia, Liberia, by delivering a program on instructional design and presentation skills to Liberian judges and magistrates.

The Center is currently hosting Judge Flavia Heine Peixoto, a federal judge from Rio de Janeiro, Brazil, as a Visiting Foreign Judicial Fellow. Judge Peixoto is conducting research on strategies used by the federal courts to manage intellectual property litigation.

IV. On-line Resources for Judges and Staff

The Center's judiciary intranet site, FJC Online, provides access to virtually all Center publications and resources, including program materials, streaming audio and video programs, research reports, and special collections on topics of interest to judges and staff.

TAB 5

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

To: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

From: Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure

Date: May 8, 2009

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met in San Francisco on February 2 and 3, 2009, and in Chicago on April 20 and 21, 2009. Draft Minutes of these meetings are attached.

Proposed amendments of Civil Rules 26 and 56 were published for comment in August 2008. The first of three scheduled hearings on these proposals was held through the morning on November 17, before the Committee's November meeting began. The remaining hearings were held on January 14, 2009, following the Standing Committee meeting in San Antonio, and on February 2 in San Francisco.

Four action items are presented in this report. Part I A recommends approval of a recommendation to adopt the amendments to Rule 26, with revisions from the proposal as published. Part I B recommends approval of a recommendation to adopt the amendments to Rule 56, with revisions of the proposal as published. Part I C recommends approval of a recommendation to delete "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c) as published in August 2007. Part II recommends publishing a revision of Supplemental Rule E(4)(f), deferring publication until a suitable time for publication along with other proposals.

Part III presents for discussion several items that will occupy the Committee in the near future.

I ACTION ITEMS FOR ADOPTION

A. Rule 26: Expert Trial Witnesses

The Committee recommends approval for adoption of the provisions for disclosure and discovery of expert trial witness testimony that were published last August. Small drafting changes are proposed, but the purpose and content carry on.

These proposals divide into two parts. Both stem from the aftermath of extensive changes adopted in 1993 to address disclosure and discovery with respect to trial-witness experts. One part creates a new requirement to disclose a summary of the facts and opinions to be addressed by an expert witness who is not required to provide a disclosure report under Rule 26(a)(2)(B). The other part extends work-product protection to drafts of the new disclosure and also to drafts of 26(a)(2)(B) reports. It also extends work-product protection to communications between attorney and trial-witness expert, but withholds that protection from three categories of communications. The work-product protection does not apply to communications that relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

These two parts are described separately. Each applies only to experts who are expected to testify as trial witnesses. No change is made with respect to the provisions that severely limit discovery as to an expert employed only for trial preparation.

New Rule 26(a)(2)(C): Disclosure of "No-Report" Expert Witnesses

The 1993 overhaul of expert witness discovery distinguished between two categories of trial-witness experts. Rule 26(a)(2)(A) requires a party to disclose the identity of any witness it may use to present expert testimony at trial. Rule 26(a)(2)(B) requires that the witness must prepare and sign an extensive written report describing the expected opinions and the basis for them, but only "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." It was hoped that the report might obviate the need to depose the expert, and in any event would improve conduct of the deposition. To protect these advantages, Rule 26(b)(4)(A) provides that an expert required to provide the report can be deposed "only after the report is provided."

The advantages hoped to be gained from Rule 26(a)(2)(B) reports so impressed several courts that they have ruled that experts not described in Rule 26(a)(2)(B) must provide (a)(2)(B) reports. The problem is that attorneys may find it difficult or impossible to obtain an (a)(2)(B) report from many of these experts, and there may be good reason for an expert's resistance. Common examples of experts in this category include treating physicians and government accident investigators. They are busy people whose careers are devoted to causes other than giving expert testimony. On the other hand, it is useful to have advance notice of the expert's testimony.

Proposed Rule 26(a)(2)(C) balances these competing concerns by requiring that if the expert witness is not required to provide a written report under (a)(2)(B), the (a)(2)(A) disclosure must state the subject matter on which the witness is expected to present evidence under Evidence Rule 702, 703, or 705, and "a summary of the facts and opinions to which the witness is expected to testify." It is intended that the summary of facts include only the facts that support the opinions; if the witness is expected to testify as a "hybrid" witness to other facts, those facts need not be

summarized. The sufficiency of this summary to prepare for deposition and trial has been accepted by practicing lawyers throughout the process of developing the proposal.

As noted below, drafts of the Rule 26(a)(2)(C) disclosure are protected by the work-product provisions of proposed Rule 26(b)(4)(B).

Rule 26(b)(4): Work-Product Protects Drafts and Communications

The Rule 26(a)(2)(B) expert witness report is to include “(ii) the data or other information considered by the witness in forming” the opinions to be expressed. The 1993 Committee Note notes this requirement and continues: “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.” Whatever may have been intended, this passage has influenced development of a widespread practice permitting discovery of all communications between attorney and expert witness, and of all drafts of the (a)(2)(B) report.

Discovery of attorney-expert communications and of draft disclosure reports can be defended by arguing that judge or jury need to know the extent to which the expert’s opinions have been shaped to accommodate the lawyer’s influence. This position has been advanced by a few practicing lawyers and by many academics during the development of the present proposal to curtail such discovery.

The argument for extending work-product protection to some attorney-expert communications and to all drafts of Rule 26(a)(2) disclosures or reports is profoundly practical. It begins with the shared experience that attempted discovery on these subjects almost never reveals useful information about the development of the expert’s opinions. Draft reports somehow do not exist. Communications with the attorney are conducted in ways that do not yield discoverable events. Despite this experience, most attorneys agree that so long as the attempt is permitted, much time is wasted by making the attempt in expert depositions, reducing the time available for more useful discovery inquiries. Many experienced attorneys recognize the costs and stipulate at the outset that they will not engage in such discovery.

The losses incurred by present discovery practices are not limited to the waste of futile inquiry. The fear of discovery inhibits robust communications between attorney and expert trial witness, jeopardizing the quality of the expert’s opinion. This disadvantage may be offset, when the party can afford it, by retaining consulting experts who, because they will not be offered as trial witnesses, are virtually immune from discovery. A party who cannot afford this expense may be put at a disadvantage.

Proposed Rules 26(a)(4)(B) and (C) address these problems by extending work-product protection to drafts of (a)(2)(B) and (C) disclosures or reports and to many forms of attorney-expert communications. The proposed amendment of Rule 26(a)(2)(B)(ii) complements these provisions by amending the reference to “information” that has supported broad interpretation of the 1993 Committee Note: the expert’s report is to include “the facts or data or other information considered by the witness” in forming the opinions. The proposals rest not on high theory but on the realities of actual experience with present discovery practices. The American Bar Association Litigation Section took an active role in proposing these protections, drawing in part from the success of similar protections adopted in New Jersey. The published proposals drew support from a wide array of organized bar groups, including The American Bar Association, the Council of the ABA Litigation Section, The American Association for Justice, The American College of Trial Lawyers

Federal Rules Committee, the American Institute of Certified Public Accountants, the Association of the Federal Bar of New Jersey Rules Committee, the Defense Research Institute, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges' Association, the Federation of Defense & Corporate Counsel, the International Association of Defense Council, the Lawyers for Civil Justice, the State Bar of Michigan U.S. Courts Committee, and the United States Department of Justice.

Support for these proposals has been so broad and deep that discussion can focus on just two proposed changes, one made and one not made. Otherwise it suffices to recall the three categories of attorney-expert communications excepted from the work-product protection: those that

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

The change made adds a few words to the published text of Rule 26(b)(4)(B):

(B) * * * Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a), regardless of the form in which ~~of~~ the draft is recorded.

The published Committee Note elaborated the “regardless of form” language by stating that protection extends to a draft “whether oral, written, electronic, or otherwise.” Comments and testimony expressed uncertainty as to the meaning of an “oral draft.” The comments and testimony also reflected the drafting dilemma that has confronted this provision from the beginning. Rule 26(b)(3) by itself extends work-product protection only to “documents and tangible things.” Information that does not qualify as a document or tangible thing is remitted to the common-law work-product protection stemming from *Hickman v. Taylor*. As amended to reflect discovery of electronically stored information, moreover, Rule 34(a)(1) may be ambiguous on the question whether electronically stored information qualifies as a “document” in a rule — such as Rule 26(b)(3) — that does not also refer to electronically stored information. Responding to these concerns, the Discovery Subcommittee recommended that the “regardless of form” language be deleted, substituting “protect written or electronic drafts” of the report or disclosure. Lengthy discussion by the Committee, however, concluded that it is better to retain the open-ended “regardless of form” formula, but also to emphasize the requirement that the draft be “recorded.” The Committee Note has been changed accordingly.

The change not made would have expanded the range of experts included in the protection for communications with the attorney. The invitation for comment pointed out that proposed Rule 26(b)(4)(C) protects communications only when the expert is required to provide a disclosure report under Rule 26(a)(2)(B). Communications with an expert who is not required to give a report fall outside this protection. (The Committee Note observes that Rule 26(b)(4)(C) “does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.”) The invitation asked whether the protection should be extended further. Responding to this invitation, several comments suggested that the rule text either should protect attorney communications with any expert witness disclosed under Rule 26(a)(2)(A), or — and this was the dominant mode — should protect attorney communications with an expert who is an employee of a party whose duties do not regularly involve giving expert testimony. These comments argued that communications with these employee experts involve the same problems as communications with other experts.

Both the Subcommittee and the Committee concluded that the time has not come to extend the protection for attorney-expert communications beyond experts required to give an (a)(2)(B) report. The potential need for such protection was not raised in the extensive discussions and meetings held before the invitation for public comment on this question. There are reasonable grounds to believe that broad discovery may be appropriate as to some “no-report” experts, such as treating physicians who are readily available to one side but not the other. Drafting an extension that applies only to expert employees of a party might be tricky, and might seem to favor parties large enough to have on the regular payroll experts qualified to give testimony. Still more troubling, employee experts often will also be “fact” witnesses by virtue of involvement in the events giving rise to the litigation. An employee expert, for example, may have participated in designing the product now claimed to embody a design defect. Discovery limited to attorney-expert communications falling within the enumerated exceptions might not be adequate to show the ways in which the expert’s fact testimony may have been influenced.

Three aspects of the Committee Note deserve attention. An explicit but carefully limited sentence has been added to state that these discovery changes “do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.* * * *.” The next-to-last paragraph, which expressed an expectation that “the same limitations will ordinarily be honored at trial,” has been deleted as the result of discussions in the Advisory Committee, in this Committee, and with the Evidence Rules Committee. And the Note has been significantly compressed without sacrificing its utility in directing future application of the new rules.

17 duties as the party's employee regularly
18 involve giving expert testimony. The report
19 must contain:

- 20 **(i)** a complete statement of all opinions the
21 witness will express and the basis and
22 reasons for them;
- 23 **(ii)** the facts or data considered by the
24 witness in forming them;
- 25 **(iii)** any exhibits that will be used to
26 summarize or support them;
- 27 **(iv)** the witness's qualifications, including a
28 list of all publications authored in the
29 previous 10 years;
- 30 **(v)** a list of all other cases in which, during
31 the previous 4 years, the witness
32 testified as an expert at trial or by
33 deposition; and
- 34 **(vi)** a statement of the compensation to be
35 paid for the study and testimony in the
36 case.

- 37 **(C) *Witnesses Who Do Not Provide a Written***
38 ***Report.*** Unless otherwise stipulated or
39 ordered by the court, if the witness is not
40 required to provide a written report, this
41 disclosure must state:
- 42 **(i)** the subject matter on which the witness
43 is expected to present evidence under
44 Federal Rule of Evidence 702, 703, or
45 705; and
 - 46 **(ii)** a summary of the facts and opinions to
47 which the witness is expected to testify.
- 48 **(D) *Time to Disclose Expert Testimony.*** A party
49 must make these disclosures at the times and
50 in the sequence that the court orders. Absent
51 a stipulation or a court order, the disclosures
52 must be made:
- 53 **(i)** at least 90 days before the date set for
54 trial or for the case to be ready for trial;
55 or

56 (ii) if evidence is intended solely to
57 contradict or rebut evidence on the
58 same subject matter identified by
59 another party under Rule 26(a)(2)(B) or
60 (C), within 30 days after the other
61 party's disclosure.

62 (E) *Supplementing the Disclosure.* The parties
63 must supplement these disclosures when
64 required under Rule 26(e).

65 * * * * *

66 (b) **Discovery Scope and Limits.**

67 * * * * *

68 (4) **Trial Preparation: Experts.**

69 (A) *Deposition of an Expert Who May Testify.*
70 A party may depose any person who has been
71 identified as an expert whose opinions may
72 be presented at trial. If Rule 26(a)(2)(B)
73 requires a report from the expert, the
74 deposition may be conducted only after the
75 report is provided.

76 **(B) *Trial-Preparation Protection for Draft***
77 ***Reports or Disclosures.*** Rules 26(b)(3)(A)
78 and (B) protect drafts of any report or
79 disclosure required under Rule 26(a)(2),
80 regardless of the form in which the draft is
81 recorded.

82 **(C) *Trial-Preparation Protection for***
83 ***Communications Between a Party's***
84 ***Attorney and Expert Witnesses.*** Rules
85 26(b)(3)(A) and (B) protect communications
86 between the party's attorney and any witness
87 required to provide a report under Rule
88 26(a)(2)(B), regardless of the form of the
89 communications, except to the extent that the
90 communications:

- 91 **(i)** relate to compensation for the expert's
92 study or testimony;
93 **(ii)** identify facts or data that the party's
94 attorney provided and that the expert

95 considered in forming the opinions to
96 be expressed; or
97 **(iii)** identify assumptions that the party's
98 attorney provided and that the expert
99 relied on in forming the opinions to be
100 expressed.

101 **(D) *Expert Employed Only for Trial***
102 ***Preparation.*** Ordinarily, a party may not, by
103 interrogatories or deposition, discover facts
104 known or opinions held by an expert who has
105 been retained or specially employed by
106 another party in anticipation of litigation or
107 to prepare for trial and who is not expected to
108 be called as a witness at trial. But a party
109 may do so only:

110 **(i)** as provided in Rule 35(b); or
111 **(ii)** on showing exceptional circumstances
112 under which it is impracticable for the
113 party to obtain facts or opinions on the
114 same subject by other means.

- 115 (E) **Payment.** Unless manifest injustice would
116 result, the court must require that the party
117 seeking discovery:
- 118 (i) pay the expert a reasonable fee for time
119 spent in responding to discovery under
120 Rule 26(b)(4)(A) or (D); and
- 121 (ii) for discovery under (D), also pay the
122 other party a fair portion of the fees and
123 expenses it reasonably incurred in
124 obtaining the expert’s facts and
125 opinions.
- 126 * * * * *

COMMITTEE NOTE

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel. ~~Together, these changes provide broadened disclosure regarding some expert testimony and require justifications for disclosure and discovery that have proven counterproductive.~~

~~The rules first addressed discovery as to trial-witness experts when Rule 26(b)(4) was added in 1970, permitting an interrogatory about expert testimony. In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Influenced by the Committee Note to Rule 26(a)(2), mMany courts read the disclosure provision for disclosure in the report of “data or other information considered by the expert in forming the opinions” to authorize call for disclosure or discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses, often called “core” or “opinion” work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot. At the same time, attorneys often feel compelled to adopt an excessively guarded attitude toward their interaction with testifying experts that impedes effective communication, and: eExperts might adopt strategies that protect against discovery but also interfere with their effective work; such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers’ memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.~~

~~Rule 26(a)(2)(B) is amended to specify that disclosure is only required regarding “facts or data” considered by the expert witness, deleting the “or other information” phrase that has caused difficulties. Rule 26(a)(2)(C) is added to mandate disclosures regarding testimony of expert witnesses not required to provide expert reports. Rule 26(b)(4) is amended to provide work-product protection for draft reports and attorney-expert communications, although this protection does not extend to communications about three specified topics.~~

Rule 26(a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment to ~~Rule 26(a)(2)(B)~~ is intended to alter the outcome in cases that have relied on the 1993 formulation ~~in as one ground for~~ requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit the disclosure requirement to material of a factual nature by excluding; ~~as opposed to~~ theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered received by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Rule 26(a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of regarding the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. ~~It requires disclosure of information that could have been obtained by a simple interrogatory under the 1970 rule, but now depends on more cumbersome discovery methods. This disclosure will enable parties to determine whether to take depositions of these witnesses, and to prepare to question them in deposition or at trial. It is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.~~

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B). ~~Reasoning that having a report before the deposition or trial testimony of all~~

expert witnesses is desirable. *See Minnesota Min. & Manuf. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 461 (D. Minn. 1998) (requiring written reports from employee experts who do not regularly provide expert testimony on the theory that doing so is “consistent with the spirit of Rule 26(a)(2)(B)” because it would eliminate the element of surprise); *compare Duluth Lighthouse for the Blind v. C.B. Bretting Manuf. Co.*, 199 F.R.D. 320, 325 (D. Minn. 2000) (declining to impose a report requirement because “we are not empowered to modify the plain language of the Federal Rules so as to secure a result we think is correct”). With the addition of Rule 26(a)(2)(C) disclosure for expert witnesses exempted from the report requirement, courts should no longer be tempted to overlook Rule 26(a)(2)(B)’s limitations on the full report requirement.

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C) with regard to their expert opinions. This The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Rule 26(a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Rule 26(b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which of the draft is recorded, whether ~~oral~~, written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide ~~comparable~~ work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery routine ~~wholesale discovery~~. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule ~~does not itself protect~~ provides no protection for communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). ~~The rule~~ It does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all discovery regarding the work of expert witnesses. ~~The most frequent method is by deposition of the expert, as authorized by Rule 26(b)(4)(A), but the protections of (B) and (C) apply to all forms of discovery.~~

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party’s attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, ~~it may happen that~~ a party may be is involved in a number of suits about a given product or service, and may retain that a particular expert witness ~~to will~~ testify on that party’s behalf in several of the cases. In such a situation, ~~the a court should recognize that this~~ protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party’s attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert’s study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result ~~in of~~ the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert ~~the expert witness personally or by another person associated with the expert in providing study or testimony in relation to the action.~~ Compensation paid to an organization affiliated with the expert is included as compensation

for the expert's study or testimony. The objective is to permit full inquiry into such potential sources of bias.

Second, ~~consistent with Rule 26(a)(2)(B)(ii),~~ under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. ~~In applying this exception, courts should recognize that the word "considered" is a broad one, but this exception is limited to those facts or data that bear on the opinions the expert will be expressing, not all facts or data that may have been discussed by the expert and counsel. And t~~The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert ~~witness~~ to assume the truth of that certain testimony or evidence is true, or the correctness of another expert's conclusions ~~that certain facts are true, for purposes of forming the opinions they will express. Similarly, counsel may direct the expert witness to assume that the conclusions of another expert are correct in forming opinions to be expressed.~~ This exception is limited to those assumptions that the expert actually did rely upon in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under tThe amended rule, ~~does not absolutely prohibit~~ discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures. ~~But such discovery is permitted regarding attorney-expert communications or draft reports only in limited circumstances and by court order. A party seeking~~ No such discovery must ~~may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be~~

able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37. A contention that required disclosure or discovery has not been provided is not a ground for broaching the protection provided by Rule 26(b)(4)(B) or (C), although it may provide grounds for a motion under Rule 37(a).

In the rare case in which a party does make this a showing of such a substantial need for further discovery and undue hardship, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Rules 26(b)(4)(B) and (C) focus only on discovery. But because they are designed to protect the lawyer's work product, and in light of the manifold disclosure and discovery opportunities available for challenging the testimony of adverse expert witnesses, it is expected that the same limitations will ordinarily be honored at trial. Cf. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (work-product protection applies at trial as well as during pretrial discovery).

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

B. Rule 56

The Advisory Committee recommends approval for adoption, with changes, of the proposal to revise Rule 56 that was published last August. This proposal has been considered extensively by this Committee in January and June 2008 and again in January 2009. As requested by this Committee, the invitation for public comment was more detailed than the usual invitation. Pointed questions were addressed not only to broad aspects of the proposal but also to fine details. This strategy worked well. The written comments and testimony at three hearings were sharply focused and responded well to the questions that had been presented. Substantial changes were made in response to this complex and often conflicting advice. The result is a leaner and stronger summary-judgment procedure. Everything that remains in the proposed rule was included in the published proposal. Everything that was deleted or modified was addressed by the invitation for comments. The Advisory Committee agreed unanimously that there is no need to republish the proposal for another round of comments addressed to the issues that were so successfully raised and addressed in the first round.

The two issues that figured most prominently in the comments and testimony will be discussed first. The first is restoration of “shall,” replacing the Style Project’s “should” as the direction to grant summary judgment when there is no genuine dispute as to any material fact. The second is deletion of the “point-counterpoint” procedure that figured prominently in subdivision (c). Other significant changes will be discussed by summarizing each subdivision.

“Shall” Restored

The conventions adopted by the Style Project prohibited any use of “shall” because it is inherently ambiguous. The permitted alternatives were “must,” “should,” and — although infrequently — “may.” Faced with these choices, the Style Project adopted “should.” The Committee Note cited a Supreme Court decision and a well-known treatise for the proposition that “should” better reflects the trial court’s seldom-exercised discretion to deny summary judgment even when there is no genuine dispute as to any material fact and the movant seems entitled to judgment as a matter of law. This change drew virtually no reaction during the extended comment period provided for the Style Project. But it drew extensive comment during the present project.

Studying these comments persuaded the Committee that “shall” must be restored as a matter of substance. From the beginning and throughout, the Rule 56 project was shaped by the premise that it would be a mistake to attempt to revise the summary-judgment standard that has evolved through case-law interpretations. There is a great risk — indeed a virtual certainty — that adoption of either “must” or “should” will gradually cause the summary-judgment standard to evolve in directions different from those that have been charted under the “shall” direction. The Style Project convention must yield here, even if nowhere else in any of the Enabling Act rules.

The divisions between the comments favoring “should” and those favoring “must” are described at length in the summary of comments and testimony. The comments favoring “must” rely at times on the language of opinions and on the Rule 56 standard that summary judgment is

directed when the movant is “entitled” to judgment as a matter of law. More functionally, they emphasize the importance of summary judgment as a protection against the burdens imposed by unnecessary trial, and also against the shift of settlement bargaining that follows denial of summary judgment. The comments favoring “should” focus on decisions that recognize discretion to deny summary judgment even when there appears to be no genuine dispute as to any material fact. They also focus on the functional observation that a trial-court judge may have good grounds for suspecting that a trial will test the evidence in ways not possible on a paper record, showing there is, after all, a genuine dispute. And trial-court judges point out that a trial may consume much less court time than would be needed to determine whether summary judgment can be granted — time that is pure waste if summary judgment is denied, or if it is granted and then reversed on appeal. Still more elaborate arguments also have been advanced for continuing with “should.”

Faced with these comments, and an extensive study of case law undertaken by Andrea Kuperman, the Committee became convinced that neither “must” nor “should” is acceptable. Either substitute for “shall” will redirect the summary-judgment standard from the course that has developed under “shall.” Restoring “shall” is consistent with two strategies often followed during the Style Project. The objection to “shall” is that it is inherently ambiguous. But time and again ambiguous expressions were deliberately carried forward in the Style Project precisely because substitution of a clear statement threatened to work a change in substantive meaning. And time and again the Style Project accepted “sacred phrases,” no matter how antique they might seem. The flood of comments, and the case law they invoke, demonstrate that “shall” had become too sacred to be sacrificed.

The proposed Committee Note includes a relatively brief explanation of the reasons for restoring “shall,” including quotations from Supreme Court opinions that seem to look in different directions.

“Point-Counterpoint” Eliminated

The published proposal included as subdivision (c)(2) a detailed provision establishing a 3-part procedure for a summary-judgment motion. The movant must file a motion identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought; a separate statement of material facts identified in separately numbered paragraphs; and a brief. This was the “point.” The opposing party must file a correspondingly numbered response to each fact, and might identify additional material facts. This was the initial “counterpoint.” The movant then could reply to any additional fact stated by the nonmovant. There was no provision for a surreply by the nonmovant. This procedure was based on local rules in some 20 districts, and was closely modeled on similar provisions in the proposed Rule 56 recommended by this Committee to the Judicial Conference in 1992.

The Committee, after considering the public comments and testimony, has concluded that although the point-counterpoint procedure is worthy, and often works well, the time has not come to mandate it as a presumptively uniform procedure for most cases. The comments and testimony

showed the perils of misuse and suggested that there is less desire for national uniformity than might have been expected.

This part of the proposal provoked a near avalanche of comments. Many comments were favorable, urging that a point-counterpoint procedure focuses the parties and the motion in a disciplined and helpful way. But many of the comments were adverse. Perhaps the most negative comments from practicing lawyers came from those who represent plaintiffs in employment-discrimination cases. They protested that time and again the point-counterpoint procedure fractures consideration of the case, focusing only on “undisputed” “historic” “facts” that are the subject of direct testimony, diverting attention from the need to consider the inferences that a jury might draw from both undisputed facts and disputed facts. Defendants, moreover, have taken to stating hundreds of facts even in simple cases. A plaintiff is hard-put to undertake the work of responding to so many facts, most of them irrelevant and many of them simply wrong. In addition, they protested that Rule 56 procedure stands trial procedure upside-down. At trial the plaintiff opens and closes. On summary judgment the defendant opens and — if there is no opportunity to surreply — also closes. Some complained that defendant employers seem to deliberately manipulate this inversion, making a motion in vague general terms and withholding a clear articulation of their positions until a reply, without the right to file a surreply without leave of court.

Beyond the division in the trial bar, comments came from an unusually high number of district judges. Most of these comments urged that even if the point-counterpoint procedure works well in some cases, and even if it works well in most cases in some districts, the time has not come to adopt it as a presumptively uniform national procedure, even if coupled with permission to opt out by order in any specific case. These comments were backed by extensive experience both with motions presented by point-counterpoint procedure and with motions presented in other forms.

Individual judges with experience in both procedures included two judges from Alaska, which does not have a point-counterpoint procedure, who for many years have accepted regular and hefty assignments of cases in Arizona, which does have a point-counterpoint procedure. Judges John W. Sedwick and H. Russel Holland reported that the point-counterpoint procedure takes longer and is less satisfactory than their own procedure. The District Judges in Arizona have been so impressed by this testimony that they are reconsidering their own procedure.

Courts that have had and abandoned point-counterpoint local rules provide a broader-based perspective. Two illustrations suffice. Judge Claudia Wilken explored the experience in the Northern District of California. See 08-CV-090, and the summary of testimony on February 2. California state courts adopted a point-counterpoint procedure in 1984. From 1988 to 2002 the Northern District had a parallel local rule. The rule was abandoned. It made more work and required more time to decide a motion. It was inefficient and created extra expense. The facts set out in the separate statements were repeated in the supporting memoranda; the separate statements “were supernumerary, lengthy, and formalistic.” Responses often included “objections,” and often included statements of purportedly undisputed facts that were repeated in the supporting memoranda. The objections often were no more than semantic disputes. And matters became really complicated in the face of cross-motions. “[T]he statement of undisputed material facts is a format

that particularly lends itself to abuse by the game-playing attorneys and by the less competent attorneys.” In addition, this format does not lend itself to coherent consideration of fact inferences. Narrative statements are better. “You need to know facts that are not material to understand what happened.”

Judge David Hamilton recounted the experience in the Southern District of Indiana, which had a point-counterpoint local rule from 1998 to 2002. See 08-CV-142, and the summary of testimony on February 2. Motions often asserted hundreds of facts, and “became the focus of lengthy debates over relevance and admissibility.” There was an exponential increase in motions to strike. The separate documents “provided a new arena for unnecessary controversy. We began seeing huge, unwieldy and especially expensive presentations of many hundreds of factual assertions with paragraphs of debate about each one of these.” In one case with a routine motion “the defendant tried to dispute 582 of the plaintiff’s 675 assertions of undisputed material facts.” But the system can work if the statement of undisputed facts is required as part of the brief; the page limits on briefs force appropriate concision and focus. It remains possible to deal with fact inference in this setting, to establish “a convincing mosaic of circumstantial evidence,” by a response that says “See my whole brief. It’s all my evidence. It’s circumstantial.”

The recommendation to abandon the point-counterpoint procedure simplifies proposed subdivision (c). As a matter of drafting, it eliminates the need to refer to “motion, response, and reply.” It facilitates reorganization of the remaining subdivisions. More importantly, it averts any need to determine whether a right to surreply should be added. The arguments in favor of a surreply seem compelling, but a right to surreply could easily degenerate to a proliferation of useless papers in many cases.

Abandoning the point-counterpoint procedure does not mean abandoning the “pinpoint” citation requirement published as proposed subdivision (c)(4)(A) and now promoted to become subdivision (c)(1)(A). The requirement of specific record citations is so elemental that a reminder might seem unnecessary. Regular experience shows that the reminder is in fact useful.

Subdivision (a)

Identifying claim or defense: As published, proposed subdivision (c)(2)(A)(i) required that the motion identify each claim or defense — or the part of each claim or defense — on which summary judgment is sought. This encouragement to clarity has been incorporated in subdivision (a).

“Shall”: The decision to restore “shall” is explained above.

“If the movant shows”: From the beginning in 1938, Rule 56 has directed that summary judgment be granted if the summary-judgment materials “show” there is no genuine issue of material fact. “Show” is carried forward for continuity, and because it serves as an important reminder of the Supreme Court’s statement in the *Celotex* opinion that a party who does not have the burden of production at trial can win summary judgment by “showing” that the nonmovant does not have evidence to carry the burden.

Stating reasons to grant or deny: The public comments addressed matters that were considered in framing the published proposal. No change seems indicated.

Subdivision (b)

Time to respond and reply: As published, subdivision (b) included times to respond and to reply. The Committee recommends that these provisions be deleted. Elimination of the point-counterpoint procedure from subdivision (c) leaves the proposed rule without any formal identification of response or reply. It would be possible nonetheless to carry forward the times to respond or reply. The concepts seem easily understood. But the decision to honor local autonomy on the underlying procedure suggests that the national rule should not suggest presumptive time limits. The published proposal recognized that different times could be set by local rule. Whatever measure of uniformity might result from default of local rules — or adoption of the national rule times in local rules — seems relatively unimportant.

The Committee considered at length the particular concern arising from the decision in the Time Project to incorporate the proposed times to respond and reply in Rule 56 as the Supreme Court transmitted it Congress last March. It may seem awkward to adopt time provisions in 2009 and then abandon them in a rule proposed to take effect in 2010. This concern was overcome by deeper considerations. It seems likely that the proposed Rule 56, if adopted, will not be considered for amendment any time soon. It is better to adopt the best rule that can be devised. And the appearance of abrupt about-face is not likely to stir uneasiness about the process. The time provisions in the 2009 Time Project version are set out in Rule 56(a) and (c). The 2010 rule is completely rewritten, with the only time provision in Rule 56(b). The appearance is not so much one of indecisiveness as one of complete overhaul into a new organic whole.

The published proposal set times “[u]nless a different time is set by local rule or the court orders otherwise in the case.” The emphasis on a case-specific order was designed to emphasize the intention that general standing orders should not be used. “[I]n the case” has been removed at the suggestion of the Style Consultant, Professor Kimble, who observes that use of this phrase in one rule may generate confusion in all the other rules that refer to court orders without limitation. The risk posed by a general standing order setting a different time is alleviated by Rule 83(b), which prohibits any sanction or other disadvantage for noncompliance with any requirement not in the Civil Rules or a local rule “unless the alleged violator has been furnished in the particular case with actual notice of the requirement.”

Subdivision (c)

Point-Counterpoint: The major change in subdivision (c) is elimination of the point-counterpoint provisions of (c)(2), as explained above. The other subdivisions have been rearranged to reflect this change. No comment objected to this provision, and many judges specifically supported it.

“Pinpoint” citations: The Committee readily concluded that deletion of the point-counterpoint provisions does not detract from the utility of requiring citations to the parts of the record that support summary-judgment positions. This provision has been moved to the front of the subdivision, becoming (c)(1). Paragraph (1) also carries forward the provisions recognizing that a party can respond that another party’s record citations do not establish its positions, and recognizing the Celotex “no-evidence” motion.

Admissibility of supporting evidence: As published, proposed subdivision (c)(5) recognized the right to assert that material cited to support or dispute a fact “is not admissible in evidence.” This provision has become subdivision (c)(2), and is modified to recognize an assertion that the material “cannot be presented in a form that would be admissible in evidence.” The change makes this provision parallel to proposed subdivision (c)(4), which carries forward from present Rule 56(e)(1) the requirement that an affidavit set out facts that would be admissible in evidence. More importantly, the change reflects the fact that summary judgment may be sought and opposed by presenting materials that are not themselves admissible in evidence. The most familiar examples are affidavits or declarations, and depositions that may not be admissible at trial.

Materials not cited: As published, the proposal provided that the court need consider only materials called to its attention by the parties, but recognized that the court may consider other materials in the record. Notice under proposed Rule 56(f) was required before granting summary judgment on the basis of materials not cited by the parties, but not before denying summary judgment on the basis of such materials. This provision, published as subdivision (c)(4)(B) and carried forward as (c)(3), has been revised to delete the notice requirement. Some of the comments had urged that notice should be required before either granting or denying summary judgment on the basis of record materials not cited by the parties. Consideration of these comments led to the conclusion that there are circumstances in which it is proper to grant summary judgment without additional notice. A party, for example, may file a complete deposition transcript and cite only to part of it. The uncited parts may justify summary judgment. Notice is required under subdivision (f), however, if the court acts to grant summary judgment on “grounds” not raised by the parties.

Accept for purposes of motion only: Subdivision (c)(3) of the published proposal provided that “A party may accept or dispute a fact either generally or for purposes of the motion only.” This provision is withdrawn. It was added primarily out of concern for early reports that point-counterpoint procedure may elicit inappropriately long statements of undisputed facts. A party facing such a statement might conclude that many of the stated facts are not material and that it is more efficient and less expensive simply to accept them for purposes of the motion rather than undertake the labor of attacking the materials said to support the facts and combing the record for counterpoint citations. Elimination of the point-counterpoint proposal removes the primary reason for including this provision. The provision, moreover, creates a tension with subdivision (g). Subdivision (g) provides that if the court does not grant all the relief requested by the motion, it may order that a material fact is not genuinely disputed and is established in the case. Several comments expressed fear that no matter how carefully hedged, an acceptance for purposes of the motion might become the basis for an order that there is no genuine dispute as to a fact accepted “for purposes of the motion.” The advantages of recognizing in rule text the value of accepting a fact for purposes

of the motion only do not seem equal to the difficulties of drafting to meet this risk. The Committee Note to Subdivision (g) addresses the issue.

Affidavits or declarations: Proposed subdivision (c)(4) carries forward from present Rule 56(e)(1), with only minor drafting changes. It did not provoke any public comment.

Subdivision (d)

Subdivision (d) addresses the situation of a nonmovant who cannot present facts essential to justify its opposition. It carries forward present Rule 56(f) with only minor changes. A few comments urged that explicit provision should be made for an alternative response: “Summary judgment should be denied on the present record, but if the court would grant summary judgment I should be allowed time to obtain affidavits or declarations or to take discovery.” This suggestion was rejected for reasons summarized in one pithy response: “No one wants seriatim Rule 56 motions.” The Committee Note addresses a related problem by noting that a party who moves for relief under Rule 56(d) may seek an order deferring the time to respond to the motion.

Subdivision (e)

Subdivision (e) was published in a form integrated with the point-counterpoint procedure. It has been revised to reflect withdrawal of the point-counterpoint procedure. It fits with courts that adopt point-counterpoint procedure on their own, particularly by recognizing the power to “consider [a] fact undisputed for purposes of the motion.” This power corresponds to local rules that a fact may be “deemed admitted” if there is no proper response. But paragraph (3) emphasizes that summary judgment cannot be granted merely because of procedural default — the court must be satisfied that the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to judgment. Subdivision (e) also fits with procedures that do not include point-counterpoint. In its revised form, it also applies to a defective motion, recognizing authority to afford an opportunity to properly support a fact or to issue another appropriate order that may include denying the motion.

Subdivision (f)

Subdivision (f) expresses authority to grant summary judgment outside a motion for summary judgment. It reflects procedures that have developed in the decisions without any explicit anchor in the text of present Rule 56. After giving notice and a reasonable opportunity to respond, the court may grant summary judgment for a nonmovant, grant the motion on grounds not raised by the parties, or consider summary judgment on its own. The proposal drew relatively few comments.

As published, subdivision (f) required notice and a reasonable opportunity to respond before a court can deny summary judgment on a ground not raised by the parties. This provision caused second thoughts in the Committee. The Committee concluded that notice should not be required before denying a motion on what might be termed “procedural” grounds — the motion is filed after the time set by rule or scheduling order, the motion is “ridiculously overlong,” and the like. It does

not seem feasible to draft a clear distinction that would require notice before denying a motion on “merits” grounds not raised by the parties and denying a motion on “procedural” grounds not raised by the parties. The Committee proposes that subdivision (f) be revised by deleting “deny” from paragraph (2): “(2) grant ~~or deny~~ the motion on grounds not raised by the parties * * *.”

Subdivision (g)

Subdivision (g) carries forward present Rule 56(d), providing in clearer terms that if the court does not grant all the relief requested by the motion it may enter an order stating that any material fact is not genuinely in dispute and treating the fact as established in the case. It drew few comments. The Committee recommends it for adoption as published.

The Committee Note has been amended to address the concern that a party who accepts a fact for purposes of the motion only should not fear that this limited acceptance will support a subdivision (g) order that the fact is not genuinely disputed and is established in the case.

Subdivision (h)

Subdivision (h) carries forward present Rule 56(g)’s sanctions for submitting affidavits or declarations in bad faith. As published it made two changes — it made sanctions discretionary, not mandatory, and it required notice and a reasonable time to respond. It is recommended for adoption with one change, the addition of words recognizing authority to impose other appropriate sanctions in addition to expenses and attorney fees or contempt.

Several comments suggested that subdivision (h) be expanded to establish cost-shifting when a motion or response is objectively unreasonable. The standard would go beyond Rule 11 standards. The Committee concluded that cost-shifting should not be adopted.

Rule 56: Clean Draft

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE**

Rule 56. Summary Judgment

- 1 **(a) Motion for Summary Judgment or Partial Summary**
2 **Judgment.** A party may move for summary judgment,
3 identifying each claim or defense — or the part of each
4 claim or defense — on which summary judgment is
5 sought. The court shall grant summary judgment if the
6 movant shows that there is no genuine dispute as to any
7 material fact and the movant is entitled to judgment as
8 a matter of law. The court should state on the record the
9 reasons for granting or denying the motion.
- 10 **(b) Time to File a Motion.** Unless a different time is set by
11 local rule or the court orders otherwise, a party may file
12 a motion for summary judgment at any time until 30
13 days after the close of all discovery.
- 14 **(c) Procedures.**

- 15 (1) ***Supporting Factual Positions.*** A party asserting
16 that a fact cannot be or is genuinely disputed must
17 support the assertion by:
- 18 (A) citing to particular parts of materials in the
19 record, including depositions, documents,
20 electronically stored information, affidavits
21 or declarations, stipulations (including those
22 made for purposes of the motion only),
23 admissions, interrogatory answers, or other
24 materials; or
- 25 (B) showing that the materials cited do not
26 establish the absence or presence of a
27 genuine dispute, or that an adverse party
28 cannot produce admissible evidence to
29 support the fact.
- 30 (2) ***Asserting That a Fact Is Not Supported by***
31 ***Admissible Evidence.*** A party may assert that the
32 material cited to support or dispute a fact cannot be

33 presented in a form that would be admissible in evidence.

34 (3) *Materials Not Cited.* The court need consider only
35 the cited materials, but it may consider other
36 materials in the record.

37 (4) *Affidavits or Declarations.* An affidavit or
38 declaration used to support or oppose a motion
39 must be made on personal knowledge, set out facts
40 that would be admissible in evidence, and show
41 that the affiant or declarant is competent to testify
42 on the matters stated.

43 (d) **When Facts Are Unavailable to the Nonmovant.** If a
44 nonmovant shows by affidavit or declaration that, for
45 specified reasons, it cannot present facts essential to
46 justify its opposition, the court may:

- 47 (1) defer considering the motion or deny it;
48 (2) allow time to obtain affidavits or declarations or to
49 take discovery; or
50 (3) issue any other appropriate order.

- 51 **(e) Failing to Properly Support or Address a Fact.** If a
52 party fails to properly support an assertion of fact or
53 fails to properly address another party’s assertion of fact
54 as required by Rule 56(c), the court may:
- 55 **(1)** give an opportunity to properly support or address
56 the fact;
- 57 **(2)** consider the fact undisputed for purposes of the
58 motion;
- 59 **(3)** grant summary judgment if the motion and
60 supporting materials — including the facts
61 considered undisputed — show that the movant is
62 entitled to it; or
- 63 **(4)** issue any other appropriate order.
- 64 **(f) Judgment Independent of the Motion.** After
65 giving notice and a reasonable time to respond, the
66 court may:
- 67 **(1)** grant summary judgment for a nonmovant;
- 68 **(2)** grant the motion on grounds not raised by a party;
- 69 or

70 (3) consider summary judgment on its own after
71 identifying for the parties material facts that may
72 not be genuinely in dispute.

73 (g) **Failing to Grant All the Requested Relief.** If the court
74 does not grant all the relief requested by the motion, it
75 may enter an order stating any material fact — including
76 an item of damages or other relief — that is not
77 genuinely in dispute and treating the fact as established
78 in the case.

79 (h) **Affidavit or Declaration Submitted in Bad Faith.** If
80 satisfied that an affidavit or declaration under this rule
81 is submitted in bad faith or solely for delay, the court —
82 after notice and a reasonable time to respond — may
83 order the submitting party to pay the other party the
84 reasonable expenses, including attorney’s fees, it
85 incurred as a result. An offending party or attorney may
86 also be held in contempt or subjected to other
87 appropriate sanctions.

COMMITTEE NOTE

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that a party the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases. ~~The source of contemporary summary-judgment standards continues to be three decisions from 1986: *Celotex Corp. v. Catrett*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; and *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574.~~

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine “issue” becomes genuine “dispute.” “Dispute” better reflects the focus of a summary-judgment determination. As explained below, “shall” also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase “partial summary judgment” to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

“Shall” is restored to express the direction to grant summary judgment. The word “shall” in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace “shall” with “should” as part of the Style Project, acting under a convention that prohibited any use of “shall.” Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions — “must” or “should” — is suitable in light of the case law on

whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948).” with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”). Eliminating “shall” created an unacceptable risk of changing the summary-judgment standard. Restoring “shall” avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court’s discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) [were consolidated and substantially revised as part of the time computation amendments that took effect in 2009.] These provisions are adapted by new subdivision (b) to fit the context of amended Rule 56. The timing for each step is directed to filing, are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time

to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

~~Subdivision (b)(2) sets an alternative filing time for a nonmovant served with a motion before the nonmovant is due to file a responsive pleading. The time the responsive pleading is due is determined by all applicable rules, including the Rule 12(a)(4) provision governing the effect of serving a Rule 12 motion.~~

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

~~The subdivision (c) procedure is designed to fit the practical needs of most cases. Paragraph (1) recognizes the court's authority to direct a different procedure by order in a case that will benefit from different procedures. The order must be specifically entered in the particular case. The parties may be able to agree on a procedure for presenting and responding to a summary-judgment motion, tailored to the needs of the case. The court may play a role in shaping the order under Rule 16.~~

~~—The circumstances that will justify departure from the general subdivision (c) procedures are variable. One example frequently suggested reflects the (c)(2)(A)(ii) statement of facts that cannot be genuinely disputed. The court may find it useful, particularly in complex cases, to set a limit on the number of facts the statement can identify.~~

~~—Paragraph (2) spells out the basic procedure of motion, response, and reply. It directs that contentions as to law or fact be set out in a separate brief. Later paragraphs identify the methods of supporting the positions asserted, recognize that the court is not obliged to search the record for information not cited by a party, and carry forward the authority to rely on affidavits and declarations.~~

— Subparagraph (2)(A) directs that the motion must describe each claim, defense, or part of each claim or defense as to which summary judgment is sought. A motion may address discrete parts of an action without seeking disposition of the entire action.

— The motion must be accompanied by a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment. Many local rules require, in varying terms, that a motion include a statement of undisputed facts. In some cases the statements and responses have expanded to identification of hundreds of facts, elaborated in hundreds of pages and supported by unwieldy volumes of materials. This practice is self-defeating. To be effective, the motion should focus on a small number of truly dispositive facts:

— The response must, by correspondingly numbered paragraphs, accept, dispute, or accept in part and dispute in part each fact in the Rule 56(c)(2)(A)(ii) statement. Under Rule 56(c)(3), a response that a material fact is accepted or disputed may be made for purposes of the motion only.

— The response may go beyond responding to the facts stated to support the motion by concisely identifying in separately numbered paragraphs additional material facts that preclude summary judgment.

— The movant must reply — using the form required for a response — only to additional facts stated in the response. The reply may not be used to address materials cited in the response to dispute facts in the Rule 56(c)(2)(A)(ii) statement accompanying the motion. Except for possible further rounds of briefing, the exchanges stop at this point. A movant may file a brief to address the response without filing a reply, but this brief cannot address additional facts stated in the response unless the movant files a reply.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and

judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A)(4)(A) ~~addresses~~ describes the ways to support a statement or dispute of fact. Item (i) ~~Subparagraph (A)~~ describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support the its facts positions. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Direction to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B)(4)(A)(ii) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2)(5) provides that a ~~response or reply may be used to challenge the admissibility of~~ party may assert that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. ~~The statement in the response should include no more than a concise identification of the basis for the challenge. The challenge can be supported by argument in the brief, or may be made in the brief alone. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge~~

admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)~~(3)(4)(B)~~ reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties. ~~If the court intends to rely on uncited record material to grant summary judgment it must give notice to the parties under subdivision (f).~~

Subdivision (c)~~(4)(6)~~ carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)~~(1)(A)(4)(A)(i)~~ that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) ~~should consider~~ may seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a ~~response or reply does not comply with Rule 56(c) party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c) requirements, when there is no response, or when there is no reply to additional facts stated in a response. As explained below, summary judgment cannot be granted by default even if there is a complete failure to~~

respond to the motion or reply, much less when an attempted response ~~or reply~~ fails to comply with all Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to ~~respond or reply in proper form~~ properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) — show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of ~~direct~~ facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper ~~responses and replies~~ presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an

adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant ~~or deny~~ a motion on legal or factual grounds not raised by the ~~motion, response, or reply parties~~; or consider summary judgment on its own. In many cases it may prove useful ~~to act by inviting first to invite~~ a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion ~~under subdivision (c)(2)(A)(i)~~. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that

it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with ~~two~~ three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. See Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

18 entitle the movant to summary
19 judgment; and

20 **(iii)** a brief of its contentions on the law or
21 facts.

22 **(B)** *Response and Brief by the Opposing Party.*

23 A party opposing summary judgment:

24 **(i)** must file a response that, in
25 correspondingly numbered paragraphs,
26 accepts or disputes — or accepts in part
27 and disputes in part — each fact in the
28 movant’s statement;

29 **(ii)** may in the response concisely identify
30 in separately numbered paragraphs
31 additional material facts that preclude
32 summary judgment; and

33 **(iii)** must file a brief of its contentions on
34 the law or facts.

35 **(C)** *Reply and Brief.* The movant:

36 (i) must file, in the form required by Rule
37 56(c)(2)(B)(i), a reply to any additional
38 facts stated by the nonmovant; and

39 (ii) may file a reply brief.

40 (3) *Accept or Dispute Generally or for Purposes of*
41 *Motion Only.* A party may accept or dispute a fact
42 either generally or for purposes of the motion only.

43 (4) *Citing Support for Statements or Disputes of*
44 *Fact; Materials Not Cited.*

45 (A) *Supporting Fact Positions.* A statement that
46 a fact cannot be genuinely disputed or is
47 genuinely disputed must be supported by:

48 (i) citation to particular parts of materials
49 in the record, including depositions,
50 documents, electronically stored
51 information, affidavits or declarations,
52 stipulations (including those made for
53 purposes of the motion only),
54 admissions, interrogatory answers, or
55 other materials; or

56 (ii) a showing that the materials cited do
57 not establish the absence or presence of
58 a genuine dispute, or that an adverse
59 party cannot produce admissible
60 evidence to support the fact.

61 **(B) *Materials not Cited.*** The court need consider
62 only materials called to its attention under
63 Rule 56(c)(4)(A), but it may consider other
64 materials in the record:

65 (i) to establish a genuine dispute of fact; or

66 (ii) to grant summary judgment if it gives
67 notice under Rule 56(f).

68 **(5) *Assertion that Fact is Not Supported by***
69 ***Admissible Evidence.*** A response or reply to a
70 statement of fact may state that the material cited
71 to support or dispute the fact is not admissible in
72 evidence.

73 **(6) *Affidavits or Declarations.*** An affidavit or
74 declaration used to support a motion, response, or
75 reply must be made on personal knowledge, set out

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76 facts that would be admissible in evidence, and
77 show that the affiant or declarant is competent to
78 testify on the matters stated.

C. Rule 8(c): Discharge in Bankruptcy

The Committee recommends approval for adoption of the proposal to delete “discharge in bankruptcy” from the list of affirmative defenses in Rule 8(c)(1). The proposal was published in August 2007. The proposal was suggested by bankruptcy judges and approved by other experts, who argued that statutory changes had superseded the former status of discharge as an affirmative defense. The Department of Justice provided the only arguments resisting this proposal. Because the question was important to the Department, this issue was withheld when the other August 2007 proposals were recommended and accepted for adoption. Continuing discussions failed to persuade the Department to withdraw from its position. Advice was sought from the Bankruptcy Rules Committee, which voted — over the Department’s sole dissent — to approve adoption of the recommendation.

The statutory basis for deleting the description of discharge in bankruptcy as an affirmative defense is set out in the attached memorandum that Judge Wedoff prepared for the Bankruptcy Rules Committee. The Minutes of the Civil Rules Committee discussion that was guided by Judge Wedoff also are helpful. The decisions cited in the memorandum make two important points. First, every court that has considered the impact of 11 U.S.C. § 524(a) on Rule 8(c) has concluded that discharge in bankruptcy can no longer be characterized as an affirmative defense. Second, courts that have looked only to Rule 8(c) without considering the statute have concluded — not surprisingly — that discharge is an affirmative defense. This confusion shows that there is no point in further delay. It is time to decide whether to make the change.

The Department of Justice remains concerned that the effects of discharging a debt arise only if the debt in fact was discharged. A general discharge does not always discharge all outstanding debts. A creditor should be able both to secure a determination whether a particular debt has been discharged, and to collect a debt that was not discharged. These concerns are explored in the attached memorandum from Acting Assistant Attorney General Hertz. They may warrant adding a few sentences to the Committee Note as a brief reminder of the procedures for seeking to determine the creditor’s rights. These sentences are enclosed by brackets to prompt discussion of the recurring need to define the value of offering advice that goes beyond explaining the immediate purpose of the rule text.

The Department of Justice would like to include some additional advice in the final sentence of the bracketed material in the Committee Note. The full sentence would read: “The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor’s claim, and in such a proceeding the debtor may be required to respond.” The Committee believes that whatever value there may be in providing the advice in the bracketed sentences, the additional advice suggested by the Department is both unnecessary and beyond the appropriate scope of a Civil Rule Note.

The Committee recommends approval for adoption of this amendment of Rule 8(c)(1), and approval of the Committee Note.

II ACTION ITEM FOR PUBLICATION

Supplemental Rule E(4)(f)

Supplemental Rule E(4)(f) provides:

(f) *Procedure for Release From Arrest or Attachment.* Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

The question is whether to delete the final sentence as superseded by subsequent statutory and rule developments.

Professor David J. Sharpe, in 07-CV-D, wrote for a Maritime Law Association working group that the two statutes have been repealed. (The "official" edition of the Rules, 110th Congress, 2d Sess., Committee Print No. 6, for use of the Committee on the Judiciary of the House of Representatives, notes the repeal of these statutes in 1983.) Deletion of the reference to these statutes seems warranted; publication should flush out any arguments that other statutes should be invoked.

The question whether to delete the reference to forfeiture actions is somewhat more complicated. New Supplemental Rule G, added in 2006, "governs a forfeiture action in rem arising from a federal statute." But under Rule G(1), if Rule G does not address an issue, "Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply." Under Rule G(3)(a) and (b) some civil forfeitures are begun by arrest, but others are not. Rule G(8)(d) provides a petition for release of property held for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f). The Department of Justice has noted that "[b]ecause there never have been post-arrest hearings in forfeiture cases," thanks to Rule E(4)(f), there was no reason to say more in Rule G. All of this leaves the possibility that arguments will be made to apply Rule E(4)(f) after an arrest of property for forfeiture if the exception in E(4)(f) for forfeiture actions is deleted. It seems likely that most courts would find in Rule G an evident purpose to provide a generally comprehensive procedure for forfeiture actions. But it is not clear that all courts will reach this result. Nor is it clear what policy arguments might be made for applying Rule E(4)(f), apart from the broad argument that there always should be an opportunity to seek a hearing when a court order deprives a person of ordinary control of property. It may be better to recommend publication in a form that offers an alternative stating explicitly that Rule G excludes Rule E(4)(f), inviting comment on the need for this statement.

The Committee recommends publication for comment of this amendment, which is set out in Appendix B.

III INFORMATION ITEMS

Rule 45

The Discovery Subcommittee has been asked to carry forward its initial examination of Rule 45. Many possible questions have been identified. In some ways the most difficult choice will be whether to undertake a complete review of all of Rule 45, reasoning that a second project will not likely be undertaken for several years, or whether to focus on a more manageable set of the more important questions.

Two questions were prominent among the early reasons for examining Rule 45. Some courts have concluded that Rule 45(c)(3)(A)(ii) impliedly authorizes nationwide service of a trial subpoena addressed to a party's officer because it states limits — 100 miles or within the state — only for a person who is neither a party nor a party's officer. This is an improbable reading in face of the express general limits in Rule 45(b)(2), and it has raised concerns of misuse or even abuse.

A second common problem arises when a nonparty seeks relief from a subpoena issued by a court different from the court where the main action is pending. The nonparty can apply to the main-action court for a protective order under Rule 26(c)(1). But a proceeding to enforce the subpoena can be brought only in the court that issued it. Forcing the nonparty to travel to the main-action court to contest the subpoena may impose an undesirable burden. But the main-action court may be in a better position to understand the importance of the discovery in the context of the action, and to integrate this dispute in overall case management. Courts have struggled to find ways to balance these competing concerns.

Several other problems may be noted without implying any ranking of importance.

Rule 45(b)(1) requires that notice be served on each party before serving the person addressed by a subpoena to produce documents, electronically stored information, or tangible things. It does not require notice to other parties when production occurs. Neither does it require notice to other parties of negotiations about compliance between the party who served the subpoena and the person directed to produce. Additional notices might improve the functioning of the rule.

Rule 45(c)(2)(B)(ii) directs that if a person commanded to produce objects, production may be required only by an order that “must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.” Questions have been raised whether the only way to secure protection is by objecting. Questions also have been raised as to what “expense” is covered — does it include, for example, attorney fees spent to determine what items are relevant, responsive, and not subject to claims of privilege or other protection?

Questions as to location begin with the 100-mile limit that applies in several circumstances. This limit was included in the First Judiciary Act, and apparently traces still further back in common-law practice. Times and travel have changed. Should this limit be reconsidered in general? Or should it at least be reconsidered for document production, which often can be accomplished as readily in one place as another?

Complaints have been made about times to comply. Rule 45(c)(2)(B) directs that an objection to a document subpoena “be served before the earlier of the time specified for compliance or 14 days after the subpoena is served.” That seems to imply that the time for compliance can be set at less than 14 days. Is that appropriate? And when must a privilege log be filed in relation to the time to

object? There also are complaints that attempts are made to use Rule 45 to circumvent discovery cut-offs: is that a real problem, and is it better addressed by a rule amendment or by encouraging more explicit case-management orders?

The only means of enforcement specified in Rule 45 is the contempt sanction of Rule 45(e). Should some other sanctions be added?

A variety of other questions may well be put aside. Examples include preservation by a nonparty — preservation obligations have been put aside in earlier discovery projects. Real problems seem to arise from prehearing discovery subpoenas issued by arbitrators, but the questions seem better addressed outside Rule 45.

Rule 45 plays a vital role in nonparty discovery. Great care will be taken to avoid reaching beyond changes that can be recommended with confidence.

Rule 4(i)(3): Service on United States Officer or Employee

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

Personal service, and perhaps particularly service at home, can be unsettling and even dangerous. The question has been raised whether some alternative may be appropriate. The most likely alternative will be to work by analogy to Rule 4(e)(2)(C), which allows service by delivery to an agent authorized by appointment or by law to receive service. The challenge would be to identify a process for designating agents free from conflicting interests and likely to convey prompt notice to the individual defendant.

Preliminary discussion has suggested the possibility that the problems of providing for service on an agent are different for judicial branch employees than for employees of other branches. Suitable agents might include the United States Attorney, the clerk of court, the court itself, or the Administrative Office. Judges may be particularly distinctive defendants for additional reasons. The broad scope of judicial immunity means that most claims against them are likely to be frivolous. Problems of security and harassment may be great.

This topic is important. It may be too difficult to yield a solution either by amending Rule 4 or by proposing legislation. The Committee will study it further, beginning with an effort to gain fact information about service on judges, including actual service experiences and security problems encountered by security officers.

Appellate-Civil Rules Questions

The Appellate and Civil Rules intersect at many points, particularly with respect to appeal time and also with respect to appealability. At least two current Appellate Rules Committee projects require attention by both committees. One raises the question whether Civil Rule 58 should be

amended to require entry of judgment on a separate document when the original judgment is altered or amended on one of the five post-judgment motions enumerated in Rule 58(a). The other addresses the divergent approaches taken by the courts of appeals to attempts to “manufacture finality” in order to achieve present review of a ruling that otherwise would not be appealable as a final judgment. These questions are described fully in the Report of the Appellate Rules Committee.

The two committees have created a joint subcommittee to work on these questions and others that might benefit from joint consideration — new questions may arise from the Bankruptcy Rules Committee’s examination of the Bankruptcy Rules provisions on appeals. The six subcommittee members include three members of the Appellate Rules Committee and three members of the Civil Rules Committee. Judge Steven Colloton will chair the subcommittee.

2010 Conference

Planning for the 2010 Conference has progressed well. It will be held on May 10 and 11 at the Duke University Law School. Judge John Koeltl chairs a large planning committee. The foundations have been laid for new empirical work and authors have been found to present principal papers. The agenda for two full days of discussion has been pretty well set.

The goal of the conference is to determine whether there are problems with federal civil procedure that should be addressed by legislation, court rules, education of bench and bar, or other means. One perspective is provided by asking whether it is true that litigants are increasingly choosing state courts in cases that once would have been brought to a federal court, and if so whether the cause is federal pretrial procedure.

Important empirical work for the Conference will be done by the Federal Judicial Center. The Center will undertake a survey of discovery and related issues built on revisions of the survey it undertook for the Committee in 1997. The survey instrument has been developed and responses will be sought over the early summer. Preliminary results should be available by fall. The Committee is grateful for the Center’s continuing support in this vitally important project.

Empirical work also will be done by the American Bar Association Litigation Section, which will send to all its members with identified e-mail addresses a revised form of the survey by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System. That survey itself is very interesting, as demonstrated by the presentation at the January meeting of this Committee. Again, this help is most welcome.

The RAND Institute is working on e-discovery. It is hoped that this work will progress at a rate that will enable presentation at the conference. It also is hoped that additional empirical work will be done by Professor Theodore Eisenberg of Cornell.

Appendix A — Proposed Amendments to Rule 8(c), Rule 26, and Rule 56 for Transmission to Judicial Conference and Memoranda from Judge Wedoff and the Department of Justice on Proposed Amendment to Rule 8(c)

Appendix B — Proposed Amendment to Supplemental Rule E for Public Comment

Appendix C — Draft Minutes of April 2009 Meeting and Final Minutes of February 2009 Meeting

TAB 5A

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE¹**

Rule 8. General Rules of Pleading

1

* * * * *

2

(c) Affirmative Defenses.

3

(1) *In General.* In responding to a pleading, a

4

party must affirmatively state any avoidance

5

or affirmative defense, including:

6

• accord and satisfaction;

7

• arbitration and award;

8

• assumption of risk;

9

• contributory negligence;

10

• ~~discharge in bankruptcy;~~

11

• duress;

12

• estoppel;

13

• failure of consideration;

14

• fraud;

¹New material is underlined; matter to be omitted is lined through.

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- 15 • illegality;
- 16 • injury by fellow servant;
- 17 • laches;
- 18 • license;
- 19 • payment;
- 20 • release;
- 21 • res judicata;
- 22 • statute of frauds;
- 23 • statute of limitations; and
- 24 • waiver.
- 25 * * * * *

COMMITTEE NOTE

“[D]ischarge in bankruptcy” is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons it is confusing to describe discharge as an affirmative defense. [But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether a claim was

excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor’s claim.]

COMMITTEE NOTE SHOWING REVISIONS

“[D]ischarge in bankruptcy” is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. ~~These consequences of a discharge cannot be waived. If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim. For these reasons it is confusing to describe discharge as an affirmative defense. [But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor’s claim.]~~

Changes Made After Publication and Comment

No changes were made in the rule text.

The Committee Note was revised to delete statements that were over-simplified. New material was added [to provide a reminder of the means to determine whether a debt was in fact discharged.]

Summary of Comments: 2007 Publication

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, writes at length to argue that “discharge in bankruptcy” should not be deleted from the Rule 8(c) list of affirmative defenses. Alternatively, the Committee Note should explain that the change is intended to require that creditors plead that the debt was excepted from discharge, and should not observe that the effect of a discharge ordinarily is determined by the bankruptcy court that entered the discharge.

It is recognized that the 9th Circuit BAP in 2005 ruled that a 1970 bankruptcy code amendment invalidated the “discharge in bankruptcy” provision of Rule 8(c); it is argued that whether or not the decision is correct as to the effects of the 1970 amendment, it is wrong after adoption of the 1978 Code. The 1970 amendment reflected fears that creditors would bring actions on discharged debts, hoping for defaults that would waive the discharge defense. Now sanctions for willful violations of the discharge injunction provide adequate deterrence. In any event, if the debt was discharged the debtor can invoke Rule 60(b) to vacate the judgment or can ask the bankruptcy court to enforce the discharge injunction.

The central point is that not all debts of a bankruptcy debtor are discharged even if the debtor is “discharged.” Some debts are excepted.

One category of debts are not dischargeable only if declared not dischargeable by the bankruptcy court during the bankruptcy case; these are the only debts within the exclusive determination of the bankruptcy court — the creditor must advance these grounds of nondischargeability in the bankruptcy case or lose them.

Other debts are automatically excepted from discharge by operation of law; there is no need to raise nondischargeability in the bankruptcy case. Such debts include tax debts governed by 11 U.S.C. § 523(a)(1) — disputes frequently arise on the (a)(1)(C) question whether the debtor made any willful attempt to defeat the tax. At some point someone needs to plead to this question.

A debt also is not discharged if the creditor is not given notice of the bankruptcy case in time to file a claim. Because of this possibility, it is urged that “a debtor who responds to a post-discharge complaint on a debt that may well be excepted from discharge” without raising discharge as a defense should not be able to avoid the ensuing judgment. [It is not said how common this event is as compared to other grounds for nondischargeability, nor why the judgment should not be void under the governing statute if indeed the creditor had the required notice.]

The Committee Note observation about determination of the effect of a discharge by the bankruptcy court that entered the discharge is countered by observing that bankruptcy jurisdiction is conferred on the district courts (and the bankruptcy courts as units of the district courts).

It also is argued that a judgment on a debt that was arguably excepted from discharge must be accorded res judicata effect; this argument migrates into the assertion that if discharge is deleted as an affirmative defense the Committee Note should recognize that the result is to shift to the

creditor the burden of pleading nondischargeability. At least if the pleaded ground of nondischargeability is “plausible,” the debtor should not be able to completely ignore the action on the claimed debt. (The idea seems to be that if the plaintiff pleads nondischarge and the defendant fails to deny the allegation, nondischarge is admitted.)

It also is argued that the statutory provision barring waiver of the provisions on the discharge injunction and voiding a judgment addresses only contractual waivers, not waiver by failure to plead discharge as an affirmative defense.

And it is noted that nonbankruptcy courts have concurrent jurisdiction to determine the application of a specific exception to discharge.

A particular problem arises from tax debts. The government often sues both the tax debtor and a fraudulent transferee, seeking a personal judgment against the debtor on the theory that the tax debt was not dischargeable because of a willful attempt to defeat payment and also judgment against the transferee. The debtor rushes to the bankruptcy court with a complaint to determine dischargeability. If the bankruptcy court proceeds, the government is at risk that a victory declaring the debt not dischargeable is not binding in the separate action against the transferee, while a ruling that the debt was discharged forecloses any action against the transferee. It is better to avoid dual litigation of the same issue by retaining jurisdiction in the district court where the collection action was filed.

Finally, it is urged that no apparent hardship has resulted from Rule 8(c), and that state practice commonly also treats discharge as an affirmative defense.

Response: Deletion of “discharge in bankruptcy” from the Rule 8(c) catalogue of affirmative defenses was recommended with confidence by bankruptcy judges. The detailed Department of Justice comments suggested the need for further advice. Professor Jeffrey Morris, Reporter for the Bankruptcy Rules Committee, generously took up the request for help and provided this response:

RESPONSE TO DOJ COMMENT ON CIVIL RULE 8(c)

The Department is correct, in part, in noting that creditors may pursue in either state or federal courts the collection of debts that are not discharged. It is also correct in noting that bankruptcy courts have exclusive jurisdiction only over dischargeability actions under § 523 (a)(2), (4), and (6) as provided by § 523(c). Furthermore, the Department is correct that the bankruptcy courts have concurrent jurisdiction with other federal courts and state courts to determine the dischargeability of claims excepted from the discharge under the other subparagraphs in § 523(a) of the Bankruptcy Code. I do not believe that these correct statements, however, lead to the conclusion that Rule 8(c) should not be amended to delete “discharge in bankruptcy” from the list of affirmative defenses.

The Civil Rules Committee noted in its materials published in connection with the publication of the proposed amendment to Rule 8(c) that § 524(a)(1) provides that any judgment that

is obtained at any time is void to the extent that the judgment purports to determine the personal liability of the debtor with respect to a discharged debt. The premise of the deletion of “discharge in bankruptcy” from the list of affirmative defenses is that the statute operates to prevent any such judgment from being effective. There should be no need for a debtor to affirmatively assert the discharge as a defense in an action based on a discharged claim. That is true without regard to whether the creditor is a governmental unit, or any other type of creditor. If the underlying claim is allegedly nondischargeable under § 523(a)(2), (4), or (6), and the creditor does not act timely in the bankruptcy court to obtain an order that the debt is excepted from the discharge, that creditor is permanently enjoined under § 524(a)(2) from attempting to collect that debt. Moreover, if the creditor violates that injunction and obtains a judgment, that judgment is void (note that it is void and not voidable) under § 524(a)(1). This statutory scheme is, and is intended to be, self executing. Requiring a debtor (who has already been told not to worry about a creditor who holds a discharged debt) to affirmatively plead the bankruptcy discharge is inconsistent with this system.

The Department notes that this system actually predates the 1978 Code, and the Civil Rules Committee’s materials also highlight that fact. Those materials state that § 524(a)(1) and its predecessor statute both created an injunction against the collection of discharged debts and against any attempts to collect those debts. In fact, one need not go too far back to find (off the top of my head, I think it was in 1966 or so) that debtors once had to apply for a discharge, and the failure to do so resulted in a debtor going through the process but receiving no discharge even though no grounds existed on which to object to the discharge. This led to the change in the default rule from “no discharge unless requested by the debtor” to “discharge granted unless an objection is successfully obtained by a party in interest.” Retaining the discharge as an affirmative defense is inconsistent with over 40 years of bankruptcy law.

The Department is correct that many kinds of debts are not discharged. Of course, for those debts, the debtor/defendant cannot affirmatively or otherwise plead the defense of a bankruptcy discharge. The only impact of maintaining the requirement that debtors affirmatively plead the discharge defense is to obtain judgments more easily in cases in which the debtor otherwise files an answer. Thus, under the DOJ view, if debtor/defendants file no answer, default judgments can be entered. If they file an answer but do not include an available bankruptcy discharge defense, then the discharge defense is waived. This directly contradicts § 524(a) and should not be permitted under the Civil Rules.

It is this statutory scheme that makes deletion of “discharge in bankruptcy” from Rule 8(c) appropriate and, indeed, necessary. The other issues about concurrent jurisdiction and the like raised by DOJ are all correct, but not truly relevant. The closest question the Department raises has very little to do with DOJ whose most likely problems will arise under the tax and student loan nondischargeability categories. That is, under § 523(a)(3), creditors whose claims are not listed in the bankruptcy case can later assert in any court with jurisdiction that their claim was not discharged in the bankruptcy case. The Department’s brief discussion of the issue, however, is misleading in my opinion. In fact, the vast majority of individual debtor bankruptcy cases are no asset cases. The overwhelming majority of courts that have considered the issue have held that claims that were not listed in the debtor’s case are nonetheless discharged. Section 523(a)(3) is effectively limited to the

protection of the holders of claims that suffered by virtue of not receiving notice of the case. These creditors are those who could not timely file an action under § 523(a)(2), (4), or (6), or creditors who would have shared in a distribution of the estate's assets if they had been able to file a proof of claim in a timely fashion. Because most of the individual debtor cases are no asset cases, § 523(a)(3) plays a limited role.

My bottom line – the Rule should be amended as proposed. The Committee Note, however, should also be amended to avoid the suggestion made in the last sentence of the Note. The sentence certainly does not state that the bankruptcy court has exclusive jurisdiction over all matters relating to the discharge, but it could be misunderstood as meaning that bankruptcy courts have this exclusive jurisdiction. It is clear to me that the Committee had no such intention. The Note merely states what I think is the most regular result when an issue of the extent of the bankruptcy discharge is raised. But, amending the Committee Note to replace the last sentence with something along the following lines might be more appropriate.

**Rule 26. Duty to Disclose; General Provisions
Governing Discovery²**

1 **(a) Required Disclosures.**

2 * * * * *

3 **(2) *Disclosure of Expert Testimony***

4 **(A) *In General.*** In addition to the
5 disclosures required by Rule 26(a)(1),
6 a party must disclose to the other
7 parties the identity of any witness it
8 may use at trial to present evidence
9 under Federal Rule of Evidence 702,
10 703, or 705.

11 **(B) *Witnesses Who Must Provide a***
12 ***Written Report.*** Unless otherwise
13 stipulated or ordered by the court, this

²In the Rule, material added after the public comment period is indicated by double underlining, and material deleted after the public comment period is indicated by underlining and overstriking. In the Note, new material is indicated by underlining and deleted material by overstriking.

14 disclosure must be accompanied by a
15 written report — prepared and signed
16 by the witness — if the witness is one
17 retained or specially employed to
18 provide expert testimony in the case or
19 one whose duties as the party's
20 employee regularly involve giving
21 expert testimony. The report must
22 contain:

23 (i) a complete statement of all
24 opinions the witness will
25 express and the basis and
26 reasons for them;

27 (ii) the facts or data ~~or other~~
28 ~~information~~ considered by the
29 witness in forming them;

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- 30 (iii) any exhibits that will be used
31 to summarize or support them;
- 32 (iv) the witness's qualifications,
33 including a list of all
34 publications authored in the
35 previous 10 ~~ten~~ years;
- 36 (v) a list of all other cases in
37 which, during the previous 4
38 ~~four~~ years, the witness
39 testified as an expert at trial or
40 by deposition; and
- 41 (vi) a statement of the
42 compensation to be paid for
43 the study and testimony in the
44 case.

45 (C) Witnesses Who Do Not Provide a
46 Written Report. Unless otherwise

47 stipulated or ordered by the court, if
48 the witness is not required to provide
49 a written report, ~~this the~~ Rule
50 26(a)(2)(A) disclosure must state:

51 **(i)** the subject matter on which
52 the witness is expected to
53 present evidence under
54 Federal Rule of Evidence 702,
55 703, or 705; and

56 **(ii)** a summary of the facts and
57 opinions to which the witness
58 is expected to testify.

59 **(D)** *Time to Disclose Expert Testimony.*

60 A party must make these disclosures
61 at the times and in the sequence that
62 the court orders. Absent a stipulation

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63 or a court order, the disclosures must
64 be made:

65 (i) at least 90 days before the date
66 set for trial or for the case to
67 be ready for trial; or

68 (ii) if evidence is intended solely
69 to contradict or rebut evidence
70 on the same subject matter
71 identified by another party
72 under Rule 26(a)(2)(B) or (C),
73 within 30 days after the other
74 party's disclosure.

75 **(ED)** *Supplementing the Disclosure.* The
76 parties must supplement these
77 disclosures when required under Rule
78 26(e).

79 * * * * *

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97 (C) Trial-Preparation Protection for
98 Communications Between a Party's
99 Attorney and Expert Witnesses.
100 Rules 26(b)(3)(A) and (B) protect
101 communications between the party's
102 attorney and any witness required to
103 provide a report under Rule
104 26(a)(2)(B), regardless of the form of
105 the communications, except to the
106 extent that the communications:
107 (i) Relate to compensation for
108 the expert's study or
109 testimony;
110 (ii) Identify facts or data that the
111 party's attorney provided and
112 that the expert considered in

113 forming the opinions to be
114 expressed; or
115 **(iii)** Identify assumptions that the
116 party's attorney provided and
117 that the expert relied upon in
118 forming the opinions to be
119 expressed.

120 **(DB)** *Expert Employed Only for Trial*
121 *Preparation.* Ordinarily, a party may
122 not, by interrogatories or deposition,
123 discover facts known or opinions held
124 by an expert who has been retained or
125 specially employed by another party
126 in anticipation of litigation or to
127 prepare for trial and who is not
128 expected to be called as a witness at
129 trial. But a party may do so only:

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- 130 (i) as provided in Rule 35(b); or
131 (ii) on showing exceptional
132 circumstances under which it
133 is impracticable for the party
134 to obtain facts or opinions on
135 the same subject by other
136 means.

137 ~~(E)~~ **Payment.** Unless manifest injustice
138 would result, the court must require
139 that the party seeking discovery:

- 140 (i) pay the expert a reasonable fee
141 for time spent in responding to
142 discovery under Rule
143 26(b)(4)(A) or ~~(D)~~; and
144 (ii) for discovery under ~~(D)~~, also
145 pay the other party a fair
146 portion of the fees and

147 expenses it reasonably
148 incurred in obtaining the
149 expert's facts and opinions.
150 * * * * *

COMMITTEE NOTE

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive

and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Rule 26(a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Rule 26(a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue

detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Rule 26(a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Rule 26(b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party’s attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party’s behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party’s attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert’s study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work

done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely upon in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

Changes Made After Publication and Comment

Small changes to rule language were made to conform to style conventions. In addition, the protection for draft expert disclosures or reports in proposed Rule 26(b)(4)(B) was changed to read "regardless of the form in which the draft is recorded." Small changes were also made to the Committee Note to recognize this change to rule language and to address specific issues raised during the public comment period.

**SUMMARY OF TESTIMONY AND COMMENTS
RULE 26 DRAFT AMENDMENTS, 2008-09**

Rule 26(a)(2)(B) -- “facts or data”

Washington, D.C.

Stephen B. Pershing, Esq. (Amer. Ass’n Justice) (testimony and 08-CV-52): The proposed substitution of “facts or data” for “facts or other information” would clearly place within Rule 26(b)(3) work product protection any documentary or other tangible “information” that counsel exchanges with a testifying expert beyond “facts or data.” AAJ favors this change.

Written Comments

Robert J. Giuffra, Esq. (08-CV-174) (Federal Bar Council of 2d Cir.): The Council supports the proposed amendment to Rule 26(a)(2)(B)(ii).

Rule 26(a)(2)(C) -- Disclosure requirement

Washington, D.C.

Stephen Morrison, Esq. (testimony and 08-CV-050): I fully support addition of this provision to the rules. This disclosure requirement is a rational requirement and does not impose a heavy burden.

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): This amendment creates a new category I call "disclosure experts." One concern would be that local rules or Rule 16 orders often limit the number of expert witnesses a party can call. How are these witnesses to be counted? This is not a matter that can, perhaps, be precisely controlled by the national rules, but at least it would be desirable if the Committee Note said something about the expectation whether these witnesses should be counted toward the maximum number of expert witnesses to be permitted.

Debra Tedeschi Herron, Esq. (testimony and 08-CV-45): I agree with the proposed amendment to Rule 26(a)(2). Having an attorney-prepared summary protects both sides so as to promote fairness and avoid trial by ambush.

Latha Raghavan (testimony and 08-CV-051): The proposed rule seems to solve the dilemma of determining the extent of disclosure necessary for employees who are "experts" due to the nature of their employment, but do not ordinarily testify as experts. Where I practice, the magistrate judges often say that if a witness is going to offer testimony covered at all by Fed. R. Evid. 702 there should be a full report. For the clients I represent, this is a major expense, and also raises issues of attorney-client privilege on occasion. This amendment will reduce complaints about surprise and deal with the risk of preclusion at trial for the employer. I strongly support this amendment.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The AAJ supports this change. It provides adequate disclosure of expert opinion and thereby permits informed decisions about whether to depose the proposed witness. At the same time, it avoids burdening witnesses who have not made themselves available to be burdened with such litigation concerns as preparing a full report. The handling of "mixed" witnesses under the rule is welcome, as it imposes the report requirement flexibly based on the character of the testimony rather than rigidly by witness identity. Excluding Fed. R. Evid. 701 witnesses from the list of those for whom disclosure is required is a correct decision also, because it honors the distinction between lay and expert testimony.

San Antonio

Hon. G. Patrick Murphy (S.D. Ill.): These proposed changes look sensible to me. This way, people will not be ambushed by testimony from nonretained expert witnesses.

Wayne Mason (Fed. of Def. & Corp. Counsel) (testimony and 08-CV-125): The proposed rule is sound. It provides a sound scheme for precluding employee experts from disclosure requirements.

G. Edward Pickle, Esq. (testimony and 08-CV-110): Requiring in-house experts who don't regularly provide expert testimony to file full reports would be wasteful. The proposed disclosure should be sufficient without imposing that burden. The world outside the courtroom does not revolve around litigation.

Cary E. Hiltgen, Esq. (president elect of DRI) (testimony and 08-CV-117): This proposed change will be most beneficial and alleviate any concerns about unfair surprise like those often argued when disputes arise over the Rule 26 report requirement's exception for certain witnesses who provide expert testimony. Making this change to the rule would reduce the temptation for courts to conclude that full reports are required from these witnesses despite their exemption from the report requirement. As things now stand, attorneys feel compelled to submit an expert report to avoid any potential dispute if none is supplied. Their fear is not unfounded, as many courts have insisted on reports despite the exception in the current rule.

San Francisco

Kevin J. Dunne, Esq.: It would be desirable to have more certainty on who's an expert required to be disclosed.

Peter O. Glaessner, Esq.: I am concerned about situations in which I cannot get the information needed to provide the disclosure required under proposed Rule 26(a)(2)(C). As a defense lawyer, I may sometimes want to list plaintiff's treating doctor as a witness. But I'm ethically precluded from asking the doctor about his or her opinions outside the context of a deposition. So I am unfairly constrained by the requirement to provide disclosure on that. This is basically a timing issue; the problem would exist if disclosure is required before I can take the deposition of the treating doctor.

Marc E. Williams (president of DRI) (testimony and 08-CV-135): I strongly support the addition of summary disclosure for expert witnesses who are not required to provide a report. Presently, lawyers may feel obliged to prepare a full report even for experts who are not really required to provide reports under the rule. This amendment would eliminate this trying conundrum by ensuring that the parties are able accurately to ascertain the rule's distinction between employees who do not provide expert opinions in the regular course of their duties and those hired to provide an expert opinion.

Daniel J. Herling, Esq. (testimony and 08-CV-129): I support this change. It would go far in reducing the number and scope of arguments relating to who is an expert and who is not.

Kimberly D. Baker, Esq. (testimony and 08-CV-139): I encourage the adoption of the proposed changes to Rule 26(a)(2)(C). The change will allow all parties to get to the task at hand

-- discussing the facts of the case openly and candidly with the experts and formulating opinions that relate to the disputed issues. A summary of the opinions offered will apprise opposing counsel of the opinions held, and counsel can then further explore the factual basis and assumptions underlying the opinions and prepare for cross-examination of the witness.

Written Comments

Gregory P. Joseph, Esq. (08-CV-055): The proposed disclosure is similar in substance to the pre-1993 interrogatory inquiry about expert testimony. The timing is a bit vexing. There is no set time for the new disclosure except “at the times and in the sequence that the court orders” under Rule 26(a)(2)(D). Until pretrial orders are amended to cover these new disclosures, they may be made at any time up until 90 days before trial. Identical timing for these disclosures and the Rule 26(a)(2)(B) reports is implicit. But the reality is that the timing of the reports currently required is governed by pretrial orders. It will take a substantial period of time for pretrial orders to uniformly cover these new disclosures. Gamesmanship will be possible because the opponent is forced to respond with expert rebuttal within 30 days. If the new disclosures occur in the middle of intense discovery or motion practice, it may be very challenging to arrange the expert testimony necessary to respond to them within 30 days. In addition, the rule against a second deposition of a witness could present difficulties if the person so designated has already been deposed before disclosure. Leave to take a second deposition to deal with the expert disclosures should not be required. Instead, the party making the disclosure should have the burden to show that a second deposition is inappropriate if that is the party’s position.

Patrick Allen, Esq. (08-CV-041): Change is needed. Presently various courts take different approaches, and there are often situations in which the lawyer knows and can name his or her expert as required by Rule 26(a)(2)(A) but is unable to accompany that disclosure with the expert’s report. The problem is that the timing is too strict. There should be more flexibility for providing the Rule 26(a)(2)(B) expert report. Perhaps the time should be set forth specifically in the rule.

Hon. Frank H. Easterbrook (7th Circuit) (08-CV-056): In Rule 26(a)(2)(B)(iv), the word “authored” appears as a verb. Use of this word as a verb is becoming more common, but it is not standard usage and is inappropriate for formal writing. The word survived re-stylization but should be fixed now. It is also imprecise. Suppose an expert wrote in 1996 a paper that was published in 1998. Should that be included in a list of publications prepared in 2007? Indeed, the advent of Internet circulation has made “publication” itself ambiguous. In addition, a sentence in amended Rule 26(a)(2)(D) begins “Absent a stipulation.” This use of “absent” is an archaic legalism that should not be employed in modern writing.

Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform (08-CV-061): We strongly support this amendment that substitutes an attorney summary disclosure for preparation of a full report by a trial witness expert who is not required to provide a report under Rule 26(a)(2)(B). This change confirms the original intent in 1993 of exempting employee “experts” from the report requirement. Under the actual regime now found in many places, an abundance

of caution causes most parties to submit a written report even of “exempt” employees to avoid the risk of adverse consequences later on. It is burdensome and unreasonable for the employee expert to have to compile the various materials required for such a report, particularly when the employee has spent many years at the company and has gained expertise through on-the-job experience.

Wendy S. Goggin, Esq. (Chief Counsel, U.S. Dep’t of Justice -- Drug Enforcement Administration) (08-CV-084): We anticipate that many attorneys will still want to take a deposition of the expert even after receiving the new disclosure, and therefore question whether the requirement will meet the goal of reducing litigation costs.

Charles Miers, Esq. (08-CV-112): I strongly support the changes to Rule 26(a)(2)(C). Under the current rules, I am often forced either to submit a full Rule 26 report for employee experts or risk having the district court preclude them from offering any testimony that may be considered “expert” in nature. Receiving or providing a Rule 26 report for an employee provides little benefit in my experience, adds to the costs of litigation, and generally provides nothing more than what the new rule requires, a summary of the facts and opinions known by the witness. The parties usually attempt to reach an agreement whereby each party’s employees who may be considered “experts” are exempt from the current report requirement. The amendment will prevent manipulation of the rule.

Prof. Stephen D. Easton (08-CV-169): I support the amendment to Rule 26(a)(2)(C) regarding disclosures from experts not required to prepare written reports.

U.S. Dep’t of Justice (08-CV-180): The Department supports the concept of requiring written disclosure of the anticipated testimony of witnesses such as treating physicians and employees of a party. A written disclosure of an employee’s testimony ordinarily should be sufficient for purposes of discovery and will be less time-consuming and burdensome than requiring the employee to prepare and submit an elaborate report. The Department recommends, however, that the rule state more clearly that attorney-client privilege and/or work product protections should apply to communications between the attorney and the employee. This could be accomplished through rule text or, at least, through mention of the existence of such protections in the Committee Note. For example, the Note could add: “Communications between an attorney and the client’s employees often will be privileged. Otherwise privileged communications between an attorney and the client’s employee will remain privileged even if the employee is an expert who does not provide a written report under Rule 26(a)(2)(C).”

Robert J. Giuffra, Esq. (08-CV-174) (Federal Bar Council of 2d Cir.): The Council urges that proposed Rule 26(a)(2)(C) not be adopted. If it is adopted, we recommend clarifying that the rule does not apply to party witnesses involved in the underlying facts in dispute. We also recommend that the requirement for a summary not apply when the expert is available to a party only through compulsory process or when a deposition of the expert has been taken and has covered the subjects for which the witness is expected to present expert evidence. We fear that the amended rule is likely to provide new grounds for disputes and unlikely to streamline discovery. These disputes are most likely when parties are experts in their fields. It is unclear

how fully the disclosures mandated by the proposed rule would apply to party witnesses who are both experts in their fields and percipient party witnesses. Such party witnesses often testify that they believed their own conduct met relevant professional standards (in professional malpractice or fraud cases, for example). The proposed rule could be read to apply to all such witnesses (although we question whether that is its intent). With nonparty percipient witnesses, there may be situations where counsel are unable to obtain summaries of the sort set forth in the amended rule except through compulsory process. Without further definition, parties may not agree on the degree of detail required to provide a “summary of facts and opinion.” We recognize that the current report requirement may be too limiting in situations in which expert testimony is proffered by a party’s employee who lack direct factual involvement and for whom expert reports are not provided. We believe that it would be preferable to leave such isolated instances to the courts’ discretion in managing their cases rather than adding a new rule requiring summaries and introducing additional points of dispute. If the rule is added, the Committee should clarify that it does not apply to party witnesses involved in the underlying facts in dispute, or when the expert witness is available to the party only through compulsory process.

Reuben A. Ginsburg (08-CV-176) (Chair, St. Bar of California Comm. on Admin. of Justice): The Committee believes that the required disclosure of the “facts” to which the witness is expected to testify in proposed (a)(2)(C)(ii) is too broad. There may, for example, be individuals who are expected to testify as both a percipient witness and an expert witness, and the Committee believes that the disclosure requirement should apply only to the basis for expected expert opinions (which would include any facts upon which the expected opinion is based). We therefore recommend that the new subdivision be rewritten as follows: “a summary of the facts ~~and~~ opinions to which the witness is expected to testify and the expected basis and reasons for those opinions.”

Thaddeus E. Morgan, Esq. (Chair, U.S. Courts Comm. of the State Bar of Michigan) (08-CV-184): The Michigan Committee voted to urge adoption of the proposed amendment to Rule 26(a)(2). The proposed amendment conforms the rule to the actual practice used in the Sixth Circuit regarding expert witnesses who are not “specially retained.” See *Fielden v. CSX Transp., Inc.*, 482 F.3d 866 (6th Cir. 2007).

American Institute of Certified Public Accountants (08-CV-185): This amendment effectively balances the cost of providing an expert report with a simpler disclosure that affords fairness with regard to the exchange of the key facts, information and opinion the expert will present at trial.

Rule 26(b)(4) -- generally

Washington, D.C.

Theodore B. Van Itallie, Jr., Esq., Assoc. Gen. Counsel, Johnson & Johnson (testimony and 08-CV-040): I am enthusiastic about the Committee's decision to confront the unforeseen consequences of the 1993 Committee Note to Rule 26(a)(2)(B). Inquiry into all communications between experts and counsel has multiplied expense with little benefit to the parties, and has contributed to the costly practice in our cases of retaining two experts. Although as an original matter it might be preferable to employ the approach used in Australia (where it is unheard of for counsel to steer or direct the contribution of experts), the Committee's second choice solution of reasonably protecting the interactions between counsel and expert makes sense. Perhaps at some point the Committee could consider an entirely different approach to expert witnesses by encouraging selection by the court.

R. Matthew Cairns, Esq., Defense Research Institute (testimony and 08-CV-57): I generally support the position set forth by the Lawyers for Civil Justice in support of the changes to Rule 26 (08-CV-061). I have not found that the current regime of disclosure impedes me in retaining university professors or the like as expert witnesses because they are unwilling to adhere to the strictures that result from the disclosure regime.

Stephen Morrison, Esq. (testimony and 08-CV-050): I support the amendments providing protection for attorney-expert communications. Acrobatic maneuvering by attorneys to avoid creating discoverable draft reports and communications does nothing for the integrity of our discovery process. Although thorough exploration of opposing experts is important, requiring production of all drafts and communications creates an economic divide. Clients who can afford to hire consulting experts are protected, but those who cannot afford to do so are denied protection. The need to engage in this acrobatic maneuvering is an obstacle to hiring the best sort of academic experts, who bridle at the artificiality of what the current rules require.

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): On behalf of the IADC, we totally endorse the extension of work product protection to draft reports and attorney-expert communications. One problem that will arise, however, is the fact that with mass tort litigation like the cases I work on, the same experts may be called in cases in state court and federal court. So the protections that apply in federal court may not be respected by state courts, and that may curtail their value.

Debra Tedeschi Herron, Esq. (testimony and 08-CV-45): I favor extending work product protections to drafts and -- subject to the three exceptions -- to attorney-expert communications. This amendment will promote fairness in the discovery process and promote comprehensive discussions between counsel and the expert witnesses.

Latha Raghavan (testimony and 08-CV-051): I favor the changes. It is essential that attorneys in the trenches be able to communicate freely with experts to fully develop and

understand the issues in the case. Ethical obligations prevent the attorney from dictating ultimate opinions of the experts. But free exchanges -- including draft reports -- are essential to effective interaction. It is impossible for the expert to opine without first having extensive communication with counsel. Forcing discovery of such communications and draft reports discourages full and effective representation. "The 'gotcha' moment of revealing that an attorney had some input in the process of obtaining the final expert report may feel good for the moment when revealing the lack of integrity of opposing counsel or expert, however, such a moment is often misleading since it ignores the complexity of litigation." I strongly support the rule changes.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): AAJ is the largest plaintiff lawyer organization in the country. Although there is a small minority of lawyers who favor complete independence of expert witnesses, the vast majority of our members favor these amendments. Lawyers representing both plaintiffs and defendants agree that practice under the 1993 expert discovery amendments has become preoccupied with a search for counsel's work product that takes up time better spent focusing on the expert's conclusions themselves. We understand that it is often essential for lawyers and expert witnesses to work together, and that the work product of each is laced with the work of the other. But discovery of material passed by the lawyer to the expert almost inevitably intrudes into attorney work product. The crucial thing is to eliminate the squabbling that has become so pervasive. If there is a problem with the amendments, it is perhaps that they don't go far enough. Rule 26(b)(3) still is limited to documents and tangible things, a limitation not adopted in proposed 26(b)(4)(C). The Committee should address that feature of Rule 26(b)(3). For the present, the reality is that experienced lawyers regularly stipulate around the provisions of the 1993 amendments, recognizing that they do not need this material and that expansive interpretations of Rule 26(a)(2) have produced negative consequences. AAJ members with experience using the New Jersey state-court practice -- which provides work product protection like that proposed here for the federal courts -- have found that providing protection has had the welcome result that squabbling has been curtailed. Another feature of the amendment is that it is critically important when the lawyer and the expert are separated by many time zones. If the lawyer is on the East Coast of the U.S. and the expert is in Singapore, modern technology provides manifold methods for communicating, but the 1993 amendments mean that using those methods creates the sort of information that is routinely held discoverable.

Alfred W. Cortese, Jr., Esq.: Speaking for Lawyers for Civil Justice, I can report that a few believe there ought to be free and open discovery of all communications between lawyers and expert witnesses, but the large majority of members favor the proposed changes. The proposed amendments are probably the best way to provide the protection that is needed.

San Antonio

Hon. G. Patrick Murphy (S.D. Ill.): The Rule 26 changes look sensible and helpful to me.

Wayne Mason, Esq. (Fed. Def. & Corp. Counsel) (testimony and 08-CV-125): The proposed rules provide a well-reasoned framework for protection of counsel/expert communication and an expert's draft reports. This will provide needed clarification of the roles played by experts and counsel in litigation. Too often well-funded clients routinely retain both a testifying and a consulting expert.

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): In a large number of cases, far too much time is expended in wasteful deposition discovery, especially with expert witnesses. The purpose of a deposition of an expert witness should be to explore the validity of the opinions themselves. Instead, what often happens is that lawyers spend unnecessary time exploring what the lawyer and the witness talked about, whether draft reports contain minor, and usually insignificant, factual misstatements, and the mechanics by which the final report came into being. On one occasion I got a draft report of an opposing expert that had a nugget of gold in it, but that once-in-a-career experience is not a reason to spend all this time and money on the hunt for another nugget. The proposed amendments should cut down on this activity, and also provide protection to the attorney-expert communications that permit communication without wasteful measures to avoid creating a draft report or other discoverable material. It is not a surprise that expert witnesses often act as advocates for the side for which they testify. There are hired guns, it is true, but the rule provisions are not likely to affect their behavior. The problems come up when you try to hire the honest expert who is uncomfortable with the process. This rule will have a positive effect, enabling lawyers to hire leading figures.

G. Edward Pickle, Esq. (testimony and 08-CV-110): I applaud the changes recommended. Expert witness and consulting fees have become one of the most significant economic burdens of litigation, generally taking a back seat only to attorney fees and the costs of electronic discovery. The current regime regularly more than doubles the expert expenses of a party because counsel must retain a second set of experts to receive confidential expert advice. That is the only way to protect the lawyer's thought processes. The proposed rule would solve this problem by allowing one expert to serve as both the consulting advisor and the testifying expert. Protecting draft reports would also produce benefits. The proposed amendment is a sensible, common sense approach, and reflects what had been common practice in most jurisdictions into the 1980s. An expert witness either is or is not capable of defending a position; the substance of discussions with counsel does not aid in assessing that topic.

Cary E. Hiltgen, Esq. (president-elect of DRI) (testimony and 08-CV-117): The protection for draft reports will not only further efficiency, but also serve accuracy interests in the process of working with expert witnesses. The fear that drafts will be disclosed under the current regime creates barriers between the attorney and the expert witness. These barriers complicate litigation and drive up expenses. The protection of attorney-expert communications is also important. The fear of discovery now prevents most written communication and limits even verbal

communication. Ultimately, the expert is working on behalf of the client, much the same as the attorney. The opinions of the experts -- good and bad -- need to be reviewed thoroughly and discussed in order to prepare effectively for trial.

Keith B. O'Connell, Esq. (Tex. Ass'n of Defense Counsel) (testimony and 08-CV-116): We support the Rule 26 amendments for the reasons articulated by the International Ass'n of Defense Counsel.

San Francisco

Kevin J. Dunne, Esq.: The changes are terrific. This is not a position distinctive for a defense lawyer like me. Within the last six months, I've had plaintiff's counsel in two different cases call me and ask that I agree to stipulate out of the current federal disclosure regime regarding draft reports and attorney-expert communications. Expert discovery has become crazy under the current regime. I have to hire a consulting expert to whom I can say "I think this is a weakness, do you?" The current preoccupation with "collateral" matters during depositions and at trial is distracting and disruptive. Lawyers will spend their entire time questioning about the back-and-forth between the expert and the lawyer. This is undesirable.

Peter O. Glaessner, Esq.: I strongly support the changes.

Daniel J. Herling, Esq. (testimony and 08-CV-129): I support the changes. They will not only eliminate the verbal gymnastics that many attorneys engage in while discussing a case with an expert, but also eliminate the fiction that drafts are not prepared or that they are systematically eliminated by virtue of the word processing equipment being used by the expert. It will also allow a much more thorough vetting of the proffered opinions.

Thomas A. Packer, Esq.: I support the changes. From the practitioner's standpoint, this is a real breath of fresh air. Right now, attorneys may feel that they can only communicate with their experts by phone or in person. E-mail is clearly better, except for the discovery consequences. This change allows us to practice in the 21st century.

Kimberly D. Baker, Esq. (testimony and 08-CV-139): Time is often wasted by asking why a particular word was used in one report versus another or similar queries about changed formats, etc., which can be more productively and cost efficiently used for real discovery. Once the cloak of protection from discovery is draped around the attorney-expert communications, a more expansive exchange of information can occur and both parties can focus on the facts and developing opinions, rather than writing and rewriting reports. Lawyers have to hire duplicative witnesses, at great cost.

Loren Kieve, Esq.: The ABA Civil Discovery standards have endorsed provisions like the ones in the proposed rule since 1999. We support the proposed amendments. Good lawyers do this now by stipulation; it's time to put these provisions in the rule.

Donald F. Zimmer, Jr., Esq. (testimony and 08-CV-140): The practice of having to retain two experts on the same topic (one to testify, one with whom the client and attorney can freely consult) is expensive and contributes to a legal fiction which need not be perpetuated.

Peter S. Pearlman, Esq. (Co-Chair, Rules Comm., Assoc. of Fed. Bar of New Jersey) (testimony and 08-CV-153): The Trustees of the Association unanimously assented to writing to support these rules changes. It is unique for the Trustees to do something unanimously. These changes build on the New Jersey experience under revisions to New Jersey State Court practice since 2002. In New Jersey, practitioners have reported a positive experience with this rule. Operating under the rule, lawyers can focus on the substance of the proposed opinions. Sometimes parties with weak positions try to draw attention away from the content of the opinions to focus instead on the largely irrelevant side show of “who said what to whom,” or what language changed from draft one to draft two to draft three. The rule enables more effective communication between counsel and expert, permitting the expert to formulate a thorough, relevant opinion with a solid empirical basis. Under the prior system (comparable to the federal regime), inquiry into collateral issues frequently took on a life of its own entirely, creating satellite litigation, substantially increasing the cost of litigation, and making it more cumbersome. Experienced federal litigators prefer the New Jersey State Court regime, and stipulate around the current federal regime. We are aware that some academic commentators (see 08-CV-070) favor moving toward the expert witness practices of the legal systems of some foreign countries. But those foreign systems are not adversarial, and rely instead on a state-appointed inquisitor to supplant much of the function of counsel. None provides the extraordinary disclosure and discovery requirements that the federal system imposes. The academics also urge that providing this sensible protection will somehow make expert reports less reliable. We cannot see how taking the focus off the collaborative process of the lawyer and the expert and instead focusing on the content of the opinion will do that. They also suggest that adoption of the proposed amendment will contribute somehow to the decline of ethical conduct. None has been observed in New Jersey since the new rule went into effect over six years ago.

Written Comments

Leslie R. Weatherhead, Esq. (08-CV-003): I oppose the proposed change, not on the ground of any of the specified mechanics. I do not dispute the proffered efficiencies, or doubt that lawyers are routinely agreeing not to ask one another’s experts searching questions about how the lawyers reworded their drafts. I do not doubt that the proposed rule will make trial practice cheaper by obviating expensive dodges lawyers and experts employ. But I very much doubt that, by validating those dodgy practices, we will take trial practice in the direction in which it ought to go. Expert testimony under our evidence rules is an extraordinary exception to the usual rules, and it affords these witnesses rhetorical tools of great power. I think that this privilege produces an implied covenant between the expert and the court, but this covenant has been strained as lawyers became more creative and paid experts-for-hire more willing to put the interests of the litigants ahead of the experts’ devotion to craft and profession. The Supreme Court, in *Daubert*, has devoted considerable attention to the tendency of expert witnesses to break the bonds of professional restraint. Viewed in terms of these concerns, I am completely unconvinced that a rule

change that simply yields to the partisan instincts and habits of the lawyers is a good thing. Rather than validate the fun and games being played by the lawyers, the rules should more strongly condemn them.

William M Griffin III, Esq. (08-CV-007): The proposed changes are wrong-headed. Experts are the only ones who can express opinions as witnesses, but if that opinion has been created by a lawyer or with the help of a lawyer, the jury needs to be aware of that fact. Obviously, a jury needs to know that the person who actually drafted and created the expert's "opinion" is, in fact, the attorney. Today, so many experts are "for hire" that many will say almost anything depending on how they are paid. To further protect these individuals from the light of cross-examination is a travesty. The entire background on the expert and his communications with the attorney who hired him should be brought into the open before the jury.

Kenneth A. Lazarus, Esq. (08-CV-008): Our current litigation system permits expert witnesses to express opinions and does not limit them to matters on which they have personal knowledge. The assumption is that expert witnesses are facilitating the search for truth. The proposed amendments would completely undermine this assumption, suggesting instead the expert witnesses are really advocates, simply another part of the litigation team. This change would facilitate greater deception and manipulation in the presentation of a case, and thereby undermine public respect for law.

Robert L. Rothman, Esq. (Chair, ABA Section of Litigation) (08-CV-038): The Council of the ABA Section of Litigation wholeheartedly supports the proposed amendments of Rule 26 dealing with expert witnesses. The proposed changes are consistent with existing ABA policy and meet the needs of the practicing bar and the public in fulfilling the mandate of Rule 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding."

Patrick Allen, Esq. (08-CV-041): I am especially pleased with the protections included in the proposed amendments to Rule 26(b)(4). Should these changes become effective in federal court, I will seek adoption of a similar rule under the Ohio Rules of Civil Procedure. Our firm recently was required to hire an outside expert to try to retrieve electronic communications between the attorney and the expert witness at considerable expense.

Gregory P. Joseph, Esq. (08-CV-055): I strongly favor the Rule 26 amendments for the reasons detailed in the article attached to the comment. The problem originated in the 1993 amendment to Rule 26, which was construed to open the door to discovery of all communications between the lawyer and the retained expert. These amendments would close the door to almost all discovery of those communications. Among other things, this change means that attorney-client privileged materials, which formerly might be presumptively discoverable upon disclosure to an expert witness, are not stripped of their protection. I have received a draft of a law professors' comment letter (08-CV-070), and found it distinctly unpersuasive. First, they maintain that the amendments will adversely affect the search for truth. They ignore the exceptions in proposed Rule 26(b)(4)(C), which permit open discovery into facts and assumptions provided by counsel. They also ignore *Daubert*, and the burden placed on proponent counsel of proving the

reliability of their expert's testimony. Second, they assert that the current practice is an expression of the basic value of independence of the expert. The kindest thing one can say about this notion is that it is unburdened by exposure to reality. Expert independence is best maintained by a free exchange of ideas between lawyer and expert. Third, they opine that the fact that the current regime causes lawyers and experts to engage in avoidance behavior demonstrates that there are problems with expert testimony requiring further "safeguards." This ipse dixit ignores the reason for the "evasive measures" -- lawyers curtail their written communications with experts to avoid creating highly distortable testimony and exhibits for their adversaries. Hiring two sets of experts may make sense in academia, where every case is worth every conceivable cost, but not in the real world. Fourth, they argue that allowing further inquiry upon a showing of good cause is tautological because there will always be such a need. But the real issue is the merit or lack of merit of the expert's opinion; inquiry into the factual predicate or the reliability or methodology or the fit may or may not implicate counsel/expert interaction. Current practice broadly permits extensive discovery, requires the engagement of multiple experts, and otherwise imposes enormous, pointless costs.

Chris Kitchell (Chair, American College of Trial Lawyers Federal Civil Rules Committee) (08-CV-060): The College fully supports the proposed changes to Rule 26. In our judgment, these proposed changes provide an appropriate balance between the disclosure obligations that are necessary for the parties to develop their cases and prepare for trial, on the one hand, and the burden and expense that frequently results from the discovery of draft reports and communications with counsel, on the other.

Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform (08-CV-061): On balance, LCJ and ILR support the core amendments that would protect work product and attorney-expert communications. Some of our members are opposed to protecting such communications and drafts, preferring open discovery as a bulwark against threats to the integrity of expert testimony. However, an overwhelmingly large majority of our members support the changes because the small benefits of open discovery do not justify the cost and burden of protecting such communications and the erosion of attorney work product protection. The widespread interpretation of the 1993 amendments to justify broad discovery has handicapped counsel in their efforts to provide vigorous and effective defense for the client. An attorney's collaboration with the expert is a logical and, in the current environment, a necessary extension of the analysis in *Hickman v. Taylor*. This collaboration often takes the form of exchanging drafts. The "solution" of employing two sets of experts inflicts an unnecessary and often substantial expense on the client.

Professors John Leubsdorf and William Simon (and 35 other law professor signatories) (08-CV-070): We write as tenured academics who have often been retained as expert witnesses or consultants in connection with litigation. We oppose the proposed changes to Rule 26(b)(4). They entrench a partisan relationship between the retaining lawyer and the expert witnesses that has long been recognized as the prime source of the pathologies of expert testimony. The lawyer can influence the expert too easily, but the amendment would drastically restrict cross-examination, which is the main safeguard against lawyer influence over expert witnesses. Such

a change would be directly contrary to the changes many scholars have long advocated in our system of expert testimony. Most foreign legal systems avoid partisanship by having experts appointed by the court. Although that has not been done in this country, *Daubert* reflects the view that we need additional, not fewer, safeguards to protect the reliability and integrity of expert evidence. Instead, the proposed amendment embraces the practice of treating experts as paid advocates rather than as learned observers and interpreters. We think that discovery as now allowed is valuable even if it is true that it usually fails to yield evidence (a claim that has not been empirically investigated). Knowing that their interactions will be scrutinized, experts can be expected to write their own reports, and lawyers to avoid proposing drastic changes in reports. The avoidance behaviors that the amendment is proposing to eliminate seem to us to show that the change would be a bad one. Making it more attractive to use the same expert as a witness and consultant seems to us to get things backward. Such a witness faces still greater temptations to provide testimony that will vindicate his or her advice in regard to settlement and the like.

Charles Miers, Esq. (08-CV-112): I support the addition of these protections. In my practice, I have often entered into agreements with opposing counsel to circumvent the current regime's requirements and direct that neither side will produce draft reports. By now, most experienced experts know not to put anything down on paper until they are ready to create a "final" report to avoid discovery. This maneuvering interferes with the free exchange of information.

Phil R. Richards, Esq. (08-CV-121): I am opposed to this amendment. Traditionally experts have been considered witnesses who are removed from the partisan positions of those who retain them and come into court to render an unbiased opinion based on their unique knowledge. In some jurisprudence, experts are deemed witnesses of the court, rather than the parties. One of the best assurances that an expert is being forthright in testimony is the ability of the opposing lawyers to obtain all documents and communications related to the formation and rendering of the expert's opinion.

Robert L. Rothman (ABA Section of Litigation) (08-CV-128): We favor the amendments because we believe that they will focus the courts on the substance of the expert's opinion, reduce litigation expense for all concerned and advance the command of Rule 1. We are convinced, as experienced trial lawyers, that the costs of the 1993 amendments far outweigh any theoretical benefits of allowing the parties to explore every nook and cranny of the communications between counsel and expert. We have seen a letter from some academics (08-CV-070) taking issue with the proposed amendments. These academics' views are strikingly lacking in qualitative or quantitative evidence. In contrast, the practicing bar, on both sides of the "v," overwhelmingly supports the proposed amendments. These practicing lawyers know that they still will be able to cross-examine and test the opposing expert based on what matters -- the content and quality of the expert's report and testimony. Since 1999, the ABA's Civil Discovery Standards have recommended that attorneys stipulate to an arrangement like the one provided by the proposed amendments. The professors say that the proposed amendments are "contrary to the changes many scholars have long advocated in our system of expert testimony," and that "[m]ost foreign judicial systems seek to avoid this partisanship by having experts appointed by the court, often from a list

of certified experts.” We are not told who these scholars are or their experience with or background in U.S. civil litigation. The invocation of foreign legal systems overlooks the fact that most do not have an adversarial system, and none has the exceptional disclosure and discovery mechanisms of the U.S. system. The professors say they seek to promote more reliable expert testimony, but offer no evidence that focusing expert discovery on the expert’s opinion is less reliable if the expert is permitted to develop that testimony through discussions with counsel. The professors seek “a pure and untrammelled world of litigation,” again presumably based largely on the continental inquisitorial system, when they object that the amendments risk “compounding the ambiguity and confusion that currently clouds the role of testifying expert witnesses.” There is no ambiguity or confusion in the real world of litigation in the U.S. An expert is hired by one side to make a presentation that favors that side. Jurors know that. If, for some reason, they do not know that, opposing counsel will make that clear. If the case is tried to the court, the court will also know that. The expert’s testimony will stand or fall, and be accepted or not, based on its content and credibility, not on any preliminary steps that led to it.

John A.K. Grunert, Esq. (08-CV-159): Generally the proposed amendments to Rule 26 are well-conceived and well-drafted.

Federal Magistrate Judges Ass’n (08-CV-161): The FMJA believes the proposed changes bring needed national uniformity to discovery practices relating to experts which will establish brighter lines for counsel’s decisionmaking and reduce the number of areas over which there could be a dispute. But neither Rule 26(b)(4)(B) and (C) nor the Committee Note addresses questions related to preservation of draft expert reports and the necessity for filing privilege logs when Rule 26 is asserted to protect the disclosure of this sort of work product material. Although these two subjects currently are covered by various circuit authorities, it would be helpful to set forth some clarification, either in the Rule or in the Committee Note, regarding whether the changes in the Rule were intended to alter any of those authorities.

Prof. Stephen D. Easton (08-CV-169): Although I applaud the Committee’s interest in reducing disclosure and discovery expenses, I oppose these changes as wrong-headed. “As one who has spent much of the last decade advocating for more, not less, disclosure and discovery regarding the potentially insidious relationship between retaining attorneys and hired experts,” I seek to reinforce the adversary system, not replace it. Unlike many academics who call for replacing party-selected expert witnesses with court experts, I do not believe that would be beneficial. But the cross-examiner needs full discovery and disclosure of the extent of the retaining attorney’s influence over the expert. For full discussion, see Stephen D. Easton, *Attacking Adverse Experts* (ABA Litigation Section 2008), especially chapters 4 and 5. Experts are the only witnesses who can be paid, and paid handsomely, for their testimony. The lawyers are in effect their paymasters, and it is crucial that their influence on the testimony be fully explored. One of the most important ways for the lawyer to influence the expert is through control of the information provided to the expert. Beyond that, the lawyer can control the content of the expert’s report. “By foreclosing the discovery of information about the attorney’s editing of ‘the expert’s’ report, the proposed amendments would give the attorney carte blanche to massively rewrite -- or even write ab initio -- the expert’s report and thereby influence her final opinion, free

of any concern that opposing counsel might expose this influence to jurors. This is a major step in the wrong direction.”

Robert J. Giuffra, Esq. (08-CV-174) (Federal Bar Council of 2d Cir.): We generally recommend adopting the proposed amendments to Rule 26(b)(4). But we worry that, because the proposed protections are not absolute, there is likely to be collateral litigation over the applicability and scope of the protection, and some lawyers may therefore continue the very practices the Committee is hoping to end. The amendments are a welcome attempt to solve the problems currently facing litigation practice with regard to expert witnesses. The Committee’s depiction of the problems is accurate. The amendments would encourage open and free communication between attorneys and experts, and would address inefficiencies and ineffectiveness in the current disclosure requirements. But we fear that, as worded, the amendments may not have their intended effects. The protection provided by invocation of Rule 26(b)(3) is not absolute, and invites highly fact-specific determinations that would engender uncertainty over the protection for given communications, although the discussion in the Committee Note about the difficulty of making a showing of need will provide comfort to practitioners. We are also concerned that the amendments fail to address the situation of a party’s involvement in multiple suits -- and in particular instances in which one of the suits is in state court. This omission may mean that the amendments fail to achieve their purposes. A state court may be unwilling to afford Rule 26(b)(3) protection despite the provisions of the amendments.

U.S. Dep’t of Justice (08-CV-180): The Department supports the proposed amendments. The Department concludes that, on balance, the benefits of this proposal outweigh its disadvantages. Although it understands the concerns of some who say that the amendments will enable attorneys to have undue influence over the expert’s report and opinions, the Department concludes that the discovery explicitly permitted under the amended rule -- regarding the facts or data the attorney provided to the expert and the assumptions the attorney provided -- ordinarily should be sufficient to enable the attorney to determine if an expert’s opinions have been improperly influenced by the attorney.

Thaddeus E. Morgan, Esq. (Chair, U.S. Courts Comm. of the State Bar of Michigan) (08-CV-184): The Michigan Committee voted to urge adoption of the proposed amendment to Rule 26. The amendments will enhance the effective use of expert witnesses and decrease litigation costs.

American Institute of Certified Public Accountants (08-CV-185): We support this proposed amendment. It is important for CPA experts to collaborate with counsel to develop and revise theories and opinions. The current open-ended discovery rules chill the process. Limiting the expert discovery as done by the amended rules would not only limit the need for and cost of consulting experts, but also focus expert discovery on issues that bear on the testifying experts’ final opinions.

Extent of Rule 26(b)(4)(C) Protection

Washington, D.C.

Theodore B. Van Itallie, Jr., Esq., Assoc. Gen. Counsel, Johnson & Johnson (testimony and 08-CV-040): Regarding those expert witnesses not required to make a report under Rule 26(b)(2), and therefore not protected by the proposed amendments to Rule 26(b)(4), it should first be true that their draft disclosures are protected. Rule 26(b)(4)(B) would protect those. Regarding attorney-expert communications, I think I would contend that work product protection applies to those communications. The thrust of the proposed changes to Rule 26(b)(4) is to retract the broad intrusion into attorney-expert communications that was introduced by the 1993 amendments. With that intrusion retracted, I would think that the argument that work product applies to attorney communications with experts not specially retained would be valid.

R. Matthew Cairns, Esq., Defense Research Institute (testimony and 08-CV-57): The protection provided by Rule 26(b)(4)(C) is too limited. It extends only to attorney communications with the expert and not with the expert's staff. But just as attorneys often rely on paralegals or others in their offices to prepare cases, so do expert witnesses. A university professor, for example, may use graduate students in the professor's doctoral program to assist in research, and counsel may deal with those students on a day-to-day basis as the expert's team works on the conclusion to be presented, and preparing the expert's report. The Committee Note should make clear that attorney communications with the expert's assistants are protected just as are attorney communications directly with the expert. Additionally, consideration should be given to extending Rule 26(b)(4)(C) to communications with in-house experts who do not regularly testify as expert witnesses even though they are not required to provide a report under Rule 26(a)(2). To make suitable disclosure under the new disclosure requirements for such witnesses, counsel will have to communicate with them, so those communications arguably should be protected as well. The current draft does not adequately explain why Rule 26(b)(4)(C) protection does not extend to such communications, or why the two types of expert witnesses are treated differently. I have not formed a conclusion on whether the protection should be expanded, but urge further thought about the subject. A major concern here is the attorney-client privilege; the in-house person may or may not be within the "control group" under New Hampshire attorney-client privilege law, but the communications with that person should be covered. So the in-house person is different from other expert witnesses not required to provide a report, such as the treating physician. Indeed, in New Hampshire, plaintiff's counsel can freely communicate with plaintiff's doctor, but defense counsel can't. If in a deposition of the doctor we ask what plaintiff's lawyer said to the doctor we encounter a privilege objection and have to suspend the deposition to work around that problem. Regarding underlings, he finds that he does have to interact with them when he cannot reach the retained expert (such as a university professor), but has not to date been impeded by the disclosure rules in engaging in strategic interaction with retained expert witnesses.

Stephen Morrison, Esq. (testimony and 08-CV-050): I favor including protection for attorney communications with the expert's assistants within the protection.

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): In the defense bar, there is a debate about whether to favor extending protections to cover those expert witnesses who don't have to provide a report. Some argue that the attorney-client privilege is an uncertain protection. As a lawyer who has represented many companies sued in mass tort litigation, I know that in-house scientific people are often the most helpful to me in understanding the issues. They are likely not to be people who regularly testify as expert witnesses, so they would not have to prepare reports. But I really need to be able to talk strategy with them. So that consideration might cause me to favor extending protection beyond those experts required to prepare a report. But on balance I am opposed to that extension because of the importance of allowing defendants to challenge treating doctors. Those witnesses are likely to be viewed by the jury as the most important expert witnesses, both because they have long-term involvement with the plaintiff and because they are regarded as truly independent, while an employee of defendant is not. It used to be that we could often obtain by agreement an opportunity to talk to the treating doctor, but since the passage of HIPAA -- with its stringent rules on patient confidentiality -- that is no longer possible. So from the defense side, the only way I can talk to the doctor is in a deposition. And I know that plaintiff counsel sometimes tell treating doctors things that prejudice them against my clients. If I could not ask about that I could not do an adequate job for my clients. That is too high a price to pay to insulate my discussions with my client's in-house experts. Regarding grad students and others who assist the expert witnesses, I've never asked them their opinions about the issues raised in the case. I have found, however, that if discovery is a possibility I will be cautious about talking to those people.

Alfred W. Cortese, Jr., Esq.: LCJ does not yet have a uniform position on whether the protection should be extended to all expert witnesses rather than only those specially retained. Similarly, LCJ is not certain of its position on whether communications with the expert's staff should be protected. On these topics, we may submit further comment.

San Antonio

Wayne Mason, Esq. (Fed. of Def. & Corp. Counsel) (testimony & 08-CV-125): We favor extending the protections to include "disclosure experts" who are not specially retained but would be subject to disclosure under the changes to Rule 26(a)(2). Lawyers need to communicate with these people, and they need to communicate with the lawyer. The attorney-client privilege may apply to some of these people, but often does not apply. In the defense community there is a debate about whether protecting communications between counsel and the plaintiff's treating doctor is desirable. Although some of our members have concerns regarding physicians, on balance we believe that the better-reasoned approach is to provide work product protection for communications with all witnesses who do not provide a written report. In my view, the three exceptions to protection under the proposed amendment sufficiently equip me to interrogate the treating doctor even if the communications with plaintiff's counsel are generally protected. I do not need more, and protection as to the in-house witnesses of my client who will offer partly expert testimony is more important. Handling waiver of this protection is uncertain. That comes down to whether this is a "privilege" or a "protection." This protection should extend also to communications with the employees and representatives of expert witnesses.

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): I support extending the work product protection to disclosure experts. I am willing to give up the right to cross plaintiff's treating doctor about what the plaintiff lawyer said. I need to be able to talk freely with the company's employees who will give expert testimony. I also need to talk freely to the company's employees who will not give expert testimony. Although I have some concern about the possibility that the opposing lawyer will be able to influence expert witnesses, I view it as a trade off, and believe the protection is more important than the opportunity to examine the other side's expert witnesses. I also think that the protection should extend to the staff of the expert. I need to be able to communicate with them. They are conduits between me and the expert. In fact, I've had an instance in which the staff members were deposed.

G. Edward Pickle, Esq. (testimony and 08-CV-110): I favor extending the protection to attorney communications with those witnesses not required to provide a report. There is a trade-off from the defense side in thus insulating the communications between the plaintiff lawyer and treating doctors, but it is worth it. For in-house experts, the proposed disclosure provisions of amended Rule 26(a)(2)(C) would provide information, and further discovery would be allowed. We should avoid becoming more demanding.

Stephen Pate, Esq. (vice president, Fed. of Corp. & Defense Counsel): At first I did not agree with Wayne Mason's view (see above). But on reflection I have come to agree with him. There is a trade off between the benefit of inquiry into communications between my opponent and his or her experts and the burdens of similar inquiry about my communications with mine.

San Francisco

Marc E. Williams (president of DRI) (testimony and 08-CV-135): I support the extension of protection to communications with expert witnesses to include employee witnesses not required to prepare a report. Work product protections are essential to the litigation process, and providing additional protection for these people outweighs any potential additional costs. By extending this protection, the Committee would help to ensure that parties are able to gather information free from the underlying threat of having to divulge that information at a later date. This is important with in-house experts who possess a unique, and sometimes highly sensitive, familiarity with the relevant subject matter. This person may be a former employee no longer employed by the company. These sorts of people are not specially retained. This protection would apply where the attorney-client privilege leaves off. It would probably be possible to "specially retain" these people and make them eligible for protections (response to question). It could also be true that similar concerns apply to purely fact witnesses, and that there would be complications in dealing with witnesses whose information consisted of a blend of factual and expert knowledge (response to question).

Daniel J. Herling, Esq. (testimony and 08-CV-129): I favor extending protection to employees who are not required to prepare a report. The problems come up with employees who have expertise; this is a gray area about whether they are "testifying experts." We know that under the current view anything we say to retained experts is open to discovery. But with others things

are not so clear. For example, suppose an IP opinion letter was written ten years ago. I need to find somebody to tell me whether the assumptions made in the letter are correct. If I choose to vet this through the same person I use as a nonretained expert, I may open up discovery inappropriately. You should think more about this issue.

Thomas A. Packer, Esq.: The protection should apply to all expert employees, whether or not they have to prepare a report. The rule should not disadvantage a company just because the experts are in-house. According work product protection is important to attorney interaction with these employees. The attorney-client privilege should apply for all lawyer interaction with the employee about purely factual matters, and also for expert opinion testimony they might give about those factual matters. But it is not clear that the privilege would also apply when these employees are instead doing extra work -- beyond the factual information they received as employees from involvement in the underlying events. That's where the expanded protection the rule provides for communications between the expert and employee is important.

Donald F. Zimmer, Jr., Esq. (testimony and 08-CV-140): Employees of a party who may offer minimal expert opinion testimony should be excused from the report requirements, and work product protection should extend to them under proposed Rule 26(b)(4)(C).

Peter S. Pearlman, Esq. (Co-Chair, Rules Comm., Assoc. of Fed. Bar of New Jersey) (testimony and 08-CV-153): The 2002 New Jersey rule providing work product protection for lawyer-expert communications provides protection only for communications with experts "retained or specially employed." This limitation has not caused difficulty in New Jersey.

Written comments

Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform (08-CV-061) and Supplemental Comments (08-CV-181): We believe that there should be protection for communications between counsel and the expert's staff, researchers, and assistants. Although these people are not expected to testify, they provide input into the expert's report. Often an expert bases a report and resulting testimony on the work of a team of individuals. Therefore, we think that the Note should mention this possibility and provide protection for the attorney's communications with these important people. Supplemental comments: Protection should be extended to those disclosure experts who are employed by the party making the disclosure. The assumption seemingly made that they would not be involved as deeply in the development of case strategy as retained experts is not consistent with our members' experience. Instead, in-house scientists, engineers, and technical personnel are often the most knowledgeable individuals regarding the matters at issue. The initial education of trial counsel therefore comes from employee experts, and these experts are very important in helping trial counsel to winnow down important concepts from a mass of documents and theories, as well as explaining the reasonableness of a party's conduct. The current Committee Note is clear that no attempt was made to exclude protection of communications between disclosure experts and counsel, but the amendments should explicitly extend work product protection to disclosure experts who are employees of the party making the disclosure (but not to other disclosure experts). Such experts

are likely to be viewed by the jury as having a degree of bias in favor of the party, while nonemployee experts (such as police officers, federal investigators, government officials and treating physicians) are more likely to be viewed as uninfluenced by counsel. With investigators, for example, full discovery of conversations between them and counsel may bear on whether “the sources of information or other circumstances indicate lack of trustworthiness” under Fed. R. Evid. 803(8). Moreover, communications between the disclosure expert and counsel are not likely to fall within any of the three exceptions to proposed Rule 26(b)(4)(C). The protection should also be extended explicitly to communications between the attorney and the expert’s staff. Staff members can play an integral role in the research, development, and preparation phases of the expert report and opinion, which may often be a collaborative effort of a group of individuals. The solution to this issue would be to add a few words to the Committee Note to clarify that the work product protection extends to an expert’s staff, including individuals that assist the expert in developing the expert report and the overall provision of expert services. Earlier cases treated experts as “agents” of the attorney. As the Committee has heard, the question of discovery from these people has come up in litigation, and the handling of it should be clarified in the Committee Note. All members of the litigation team, including experts and their staff, must have the ability to examine the facts, reach conclusions, and speak freely in order to render effective legal services. We therefore urge that the Committee Note at lines 59-62 be amended as follows: “The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney expert communications between attorneys and experts, including staff working at their direction.”

Charles Miers, Esq. (08-CV-112): I believe that the comment to the rule should make clear that protection is provided for communications between the lawyer and the expert’s staff, researchers, or assistants who are not expected to testify, but who may provide input to or assist with certain portions of the expert’s report. For example, in an environmental clean-up case, one expert may be expected to testify, but she may have received assistance from a team of experts (hydrologists, environmental engineers, chemical engineers, etc.).

Robert L. Rothman (ABA Section of Litigation) (08-CV-128): We have considered the question raised by the invitation for comment on whether the protection for communications should be limited to communications between counsel and an expert required to make a report. We believe the answer is “it depends.” If, for example, the testimony comes from someone who is essentially a fact witness -- the archetype being a treating physician -- then communications between counsel and that witness should be discoverable. If the witness is more akin to a retained expert -- for example an employee of a party, such as an in-house mechanical engineer whose opinion is sought on a matter within her scientific expertise -- then the rationale for maintaining traditional work product protection for communications between counsel and the witness would seem to apply.

John A.K. Grunert, Esq. (08-CV-159): I am concerned about three things. First, the Committee Note discussion of extending protection to “oral” draft reports and communications introduces uncertainty. Rule 26(b)(3), by its terms, applies only to documents and tangible things, so either proposed Rules 26(b)(4)(B) and (C) do not mean what they say, or Rule 26(b)(3) does

not mean what it says, or the Committee Note is wrong. It is unwise to promulgate a rule that will generate disputes. One solution would be to strike the statements in the Committee Note on this topic. This Note discussion seems to be about “oral draft” reports, but that is a phrase not found in ordinary English usage. The language of the proposed rules accomplishes the goal without the need for mention in the Note. Another solution would be to redraft the proposed rules to remove the language about form of communication and substitute (as to proposed Rule 26(b)(4)(C)) the statement that the protection “applies to oral communications between the party’s attorney and any such witness.” There would be no need to mention oral drafts in (B) because “draft” does not include anything oral. Second, the protection for communications should apply also to some experts not required to prepare reports. The attorney’s communications with some “nonretained” experts -- treating doctors or police accident reconstructionists, for example -- should not be protected. But communications with a corporate defendant’s employee should be protected. Third, The rule should explicitly provide protection for communications with non-testifying experts whenever they might be deposed. This could be done by amending current Rule 26(b)(4)(B), now to be redesignated 26(b)(4)(D), to add such protection there.

Rule 26(b)(4) -- Effect on *Daubert* Decisions

Washington, D.C.

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): I know that some have suggested that the adoption of these discovery changes will have an impact on *Daubert* decisions. I see no reason to expect that to happen. I regularly litigate *Daubert* issues, and can think of no instance in which attorney-expert communications or draft reports played a role in making a decision whether a given witness could offer opinion testimony. For purposes of discrediting the opposing expert's testimony, I don't care about what the lawyer said to the expert; I only need to be able on cross examination to challenge the opinion as given. If somebody wants to improve the handling of expert witnesses on this front, one should be dealing more aggressively with speaking objections and nonresponsive "answers" from expert witnesses. Often I come out of a seven-hour expert deposition with about an hour and a half of real testimony.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): AAJ members see no reason for wanting access to attorney-expert communications or draft reports to do a thorough job preparing for *Daubert* issues. Probing interaction between the experts and opposing counsel does not really matter. What matters is challenging the opinions on their merits.

Rule 26(b)(4)(C) -- Exceptions to protection provided

Washington, D.C.

Debra Tedeschi Herron, Esq. (testimony and 08-CV-45): The exceptions further fairness in the discovery process while the rule affords appropriate protection for attorney-expert communications.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The three exceptions show that these amendments are not really anti-disclosure provisions. The three exceptions cover all an attorney would sensibly want or need to challenge an opposing expert. Going further would raise risks of rekindling the squabbling that was produced by the 1993 amendments. For example, maybe there would be some value to know about assumptions the lawyer told the expert to make that the expert did not rely on in reaching the opinion to be presented, but that is really not important. And enabling discovery would increase the risk of the sort of squabbling about unimportant points that has become so pervasive and that these amendments are seeking to end.

Alfred W. Cortese, Jr., Esq.: The exceptions permit adequate inquiry to get at the validity of the expert opinion.

San Antonio

Wayne Mason (Fed. of Def. & Corp. Counsel) (testimony and 08-CV-125): The three exceptions to protection of attorney-expert communications are generally sufficient to permit needed inquiry.

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): The three exceptions provide significant ability to inquire about pertinent matters even when the protections afforded by the amended rule apply.

Written Comments

Norman W. Edmund (founder of Edmund Scientific Co.) (08-CV-005): The exception permitting discovery regarding communications that “identify assumptions that the party’s attorney provided and that the expert relied upon in forming the opinions to be expressed” should be revised to “and identify how they have applied the steps or stages of the scientific method in forming the opinions.” This change would respond to the directive in *Daubert* that “scientific knowledge” is information “derived by the scientific method.” The comment attaches research reports from the commentator’s website www.scientificmethod.com on the nature and operation of the scientific method. Included is a 14-step set of stages or ingredients for scientific testimony that may be used for expert witnesses and an analysis of the Supreme Court’s treatment of the methodology and the scientific method.

Patrick Allen, Esq. (08-CV-041): Because there are exceptions to the protection provided, it still may happen that attorney-expert communications are subject to discovery. I now find myself using the telephone to avoid creating electronic records of my communications with expert witnesses. Avoiding the costs of unearthing such electronic communications, which can be considerable, would be desirable.

Professors John Leubsdorf and William Simon (and 35 other law professor signatories) (08-CV-070): We find it difficult to understand the exception to the protection provided for situations in which the party shows that it has a substantial need and cannot obtain the substantial equivalent without undue hardship. Taking the ordinary work product attitude toward this question, it seems to us that it will always be true that the information shielded by the amendment is necessary, since the amendment bars discovery and the expert will rarely be free to speak with opposing counsel. So it would seem that discovery would always be available through this exception.

Committee on Civil Litigation, U.S. Dist. Ct., E.D.N.Y. (08-CV-098): We endorse the goal stated on p. 7 of the Advisory Committee's report supporting questioning of an expert on why the expert considered (or did not consider) certain factors, why the expert used (or did not use) certain approaches or methodologies, and why the expert did (or did not) attempt to draw certain types of conclusions, even if the answers to such questions involve communications with counsel. In our experience, such questions and answers are important elements of expert discovery and inquiry at trial. But the language of the proposed rule does not appear to allow for such questions. Only three exceptions are carved out of proposed Rule 26(b)(4)(C), and it is not clear to us that these three exceptions allow for the types of questions discussed on p. 7 of the report. For example, a party attempting to elicit deposition testimony regarding counsel's directions to an expert to use a certain approach or not to draw a certain conclusion would not appear to fall within any of those three specified conclusions. We therefore think a fourth exception should be added: "(iv) relate to matters such as why the expert considered (or did not consider) certain factors, why the expert used (or did not use) certain approaches or methodologies, and why the expert did (or did not) attempt to draw certain types of conclusions." We believe that this addition is important to ensure the opportunity to make these important inquiries.

Joan Harrington, Esq. (08-CV-151): I support the Committee on Civil Litigation of the U.S. District Court in the E.D.N.Y. regarding the need to revise the proposed rule to clarify that questioning will be allowed on why the expert considered (or did not consider) certain factors.

American Institute of Certified Public Accountants (08-CV-185): The exceptions allow for discovery to an extent that provides assurances that appropriate information will continue to be available. We believe, however, that Rule 26(b)(4)(C)(ii) and Rule 26(a)(2)(B)(ii) should be rewritten to limit disclosure and discovery to information "relied upon" rather than "considered by" the expert witness.

Rule 26(b)(4) -- Use at Trial; Rules Enabling Act

Washington, D.C.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The proposed Committee Note properly indicates that cross-examination at trial about matters protected under the amendment should not be allowed. The “cf.” citation to *United States v. Nobles*, 422 U.S. 225 (1975) gives some guidance on the point. The Note could not give more guidance without exceeding the Committee’s proper role under the Rules Enabling Act. We note that *Nobles* has been followed in both civil and criminal cases. It would be good for the Note also to address the interaction of proposed Rule 26(b)(4)(C) and Fed. R. Evid. 612. In addition, it would be desirable for the Note to address the possibility of discovery or use of such material in subsequent litigation. In our view, protection should be extended, and the Note should encourage courts to give the protection the greatest reasonable effect.

San Antonio

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): I have seen the Committee Note about use at trial, and expect that most judges would honor it. At the same time, work product protection is not a privilege. It is not likely that attorneys will often ask questions at trial they don’t know the answer to, so providing a protection through discovery is likely, as a practical matter, to be significant. But I would expect some attorneys to try to do it, and would file a motion in limine if I saw this coming. I would not hire consulting experts just to avoid the risk that inquiry at trial might be allowed. But if the Committee Note discussion were removed I would be concerned about this problem. It would almost be better -- if the draft Note discussion were dropped after the public comment period -- that it had never been there.

San Francisco

Peter S. Pearlman, Esq. (Co-Chair, Rules Comm., Assoc. of Fed. Bar of New Jersey) (testimony and 08-CV-153): The argument that the proposed amendment cannot be made without an act of Congress is misdirected. The proposed amendment does not modify an evidentiary privilege. In fact, it addresses the work-product doctrine, not the attorney-client privilege. The work-product doctrine is not among the privileges codified in the Federal Rules of Evidence. Case law has recognized from the doctrine’s inception in *Hickman v. Taylor* that it was not a privilege. The sorts of privileges involved in the Federal Rules of Evidence were different. Case law has therefore specifically recognized that work product protection is not a “privilege” and therefore is outside the scope of Fed. R. Evid. 501. In fact, the 1993 amendments were adopted through these same Rules Enabling Act mechanisms. To the extent those amendments are seen as having removed an evidentiary privilege, they suffer from the same infirmity as is suggested with regard to the current amendments. All these proposed amendments do is to return us to where we were before 1993.

Written Comments

Kenneth A. Lazarus, Esq. (08-CV-008): There is presently no privilege that prevents inquiry at trial into the matters sought to be protected by this amendment. But unless this information is excluded at trial, the proposed amendments may be counter-productive. If, however, the goal is to prevent inquiry at trial, the right way to address the question is head-on by amending the Federal Rules of Evidence. Indeed, by attempting to create what arguably amounts to a qualified privilege in Rule 26, you may inadvertently invite an eventual constitutional challenge on the Rules Enabling Act under the *Chadha* principle.

Patrick Allen, Esq. (08-CV-041): I believe it would be appropriate to include protection from disclosure whether in discovery or in trial. If draft opinions are not discoverable before trial, the subject of draft opinions should not be raised at trial.

Gregory P. Joseph, Esq. (08-CV-055): Academic commentators (08-CV-070) argue that this amendment would somehow run afoul of the Rules Enabling Act because it is effectively “modifying a privilege.” This argument proves too much. If returning the state of discovery to essentially where it was prior to the adoption of the 1993 amendments does that, the argument actually proves that the 1993 amendment itself violated the Rules Enabling Act. For discussion of that possibility, see Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97 (1996). It is impossible to argue that the proposed amendment can run afoul of the Act without conceding that the 1993 amendments -- which created the problems now being corrected -- did so first.

Professors John Leubsdorf and William Simon (and 35 other law professor signatories) (08-CV-070): The purpose and effect of the amendment are to extend the attorney client privilege to cover a broad range of communications between lawyers and testifying experts, and it therefore may be subject to 28 U.S.C. § 2074(b)’s requirement for affirmative adoption by Congress. The amendment is plainly meant not only to forbid discovery on these topics, but also to prevent their use as evidence at trial. Unless it bars inquiry at trial, it will not accomplish its declared goals. But placing materials beyond the scope of inquiry both in discovery and at trial is precisely what privilege rules do. Moreover, the grounds of the amendment are precisely the same as those relied on to support most privileges: the asserted value of a class of private communications, and the fear that they will be discouraged if outsiders can inquire into them. This concern about the role of Congress is reinforced by the recent experience with Evidence Rule 502, which Congress did adopt as written, but only with a lengthy explanatory Statement of Congressional Intent.

Robert L. Rothman (ABA Section of Litigation) (08-CV-128): There is no problem with rulemaking authority here. The current provisions in Rule 26 were adopted in 1993 through the normal Rules Enabling Act mechanism. No one suggested at that time that this required an Act of Congress. To the extent that courts interpreted those 1993 changes as removing an attorney’s communications with a testifying expert from work-product protection, there is no reason why a further rule amendment cannot make clear that these communications are now protected as attorney work product. All this amendment does is return the rule to its pre-1993 status. If the

argument were correct, the 1993 amendment itself would have been invalid because it “abolished” an evidentiary privilege. By the same token, we do not anticipate these issues to be raised at trial, because work product objections would properly prevent inquiry there too, and keep the trial focused on the issues that matter -- in this situation the substance of and support for the expert’s opinion.

Prof. Stephen D. Easton (08-CV-169): If the proposed amendments are adopted, a civil attorney conducting a cross-examination would almost never ask an expert about the extent to which a retaining attorney influenced her opinion, because the cross-examiner would not know the answer to that question.

Rule 56. Summary Judgment

- 1 **(a) Motion for Summary Judgment or Partial**
2 **Summary Judgment.** A party may move for
3 summary judgment, identifying each claim or defense
4 — or the part of each claim or defense — on which
5 summary judgment is sought ~~on all or part of a claim~~
6 ~~or defense.~~ The court ~~should~~ shall grant summary
7 judgment if the movant shows that there is no genuine
8 dispute as to any material fact and ~~a party~~ the movant
9 is entitled to judgment as a matter of law. The court
10 should state on the record the reasons for granting or
11 denying the motion.
- 12 **(b) Time to File a Motion, ~~Response, and Reply.~~** These
13 ~~times apply to~~ Unless a different time is set by local
14 rule or the court orders otherwise, ~~in the case:~~ ~~(1)~~ a
15 party may file a motion for summary judgment at any
16 time until 30 days after the close of all discovery.†

17 ~~(2) a party opposing the motion must file a~~
18 ~~response within 21 days after the motion is~~
19 ~~served or that party's responsive pleading is~~
20 ~~due, whichever is later, and~~

21 ~~(3) any reply by the movant must be filed within~~
22 ~~14 days after the response is served.~~

23 **(c) Procedures.**

24 **(1) *Supporting Factual Positions.*** An assertion
25 party asserting that a fact cannot be or is
26 genuinely disputed ~~or is genuinely disputed~~
27 must be supported the assertion by:

28 **(A) *Supporting Fact Positions*** citation
29 citing to particular parts of materials
30 in the record, including depositions,
31 documents, electronically stored
32 information, affidavits or declarations,
33 stipulations (including those made for

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34 purposes of the motion only),
35 admissions, interrogatory answers, or
36 other materials; or

37 **(B)** a showing that the materials cited do
38 not establish the absence or presence
39 of a genuine dispute, or that an
40 adverse party cannot produce
41 admissible evidence to support the
42 fact.

43 **(2)** *Asserting That a Fact Is Not Supported by*
44 *Admissible Evidence.* A response or reply to
45 ~~a statement of fact may state~~ party may assert
46 that the material cited to support or dispute ~~the~~
47 a fact is not cannot be presented in a form that
48 would be admissible in evidence.

49 **(3)** *Materials Not Cited.* The court need consider
50 only the cited materials ~~called to its attention~~

51 ~~under Rule 56(c)(1)(A), but it may consider~~
52 other materials in the record.†

53 ~~(A) to establish a genuine dispute of fact;~~

54 ~~or~~

55 ~~(B) to grant summary judgment if it gives~~
56 notice under Rule 56(f).

57 ~~(4) *Accept or Dispute Generally or for Purposes*~~
58 ~~*of Motion Only.* A party may accept or~~
59 ~~dispute a fact either generally or for purposes~~
60 ~~of the motion only.~~

61 (4) *Affidavits or Declarations.* An affidavit or
62 declaration used to support or oppose a
63 motion, response, or reply must be made on
64 personal knowledge, set out facts that would
65 be admissible in evidence, and show that the
66 affiant or declarant is competent to testify on
67 the matters stated.

68 **(d) When Facts Are Unavailable to the Nonmovant.** If
69 a nonmovant shows by affidavit or declaration that,
70 for specified reasons, it cannot present facts essential
71 to justify its opposition, the court may:

- 72 (1) defer considering the motion or deny it;
73 (2) allow time to obtain affidavits or declarations or
74 to take discovery; or
75 (3) issue any other appropriate order.

76 **(e) Failing to Properly Support or Address a Facture**
77 **to Respond or Properly Respond.** If a response or
78 ~~reply does not comply with Rule 56(c) — or if there~~
79 ~~is no response or reply —~~ party fails to properly
80 support an assertion of fact or fails to properly
81 address another party’s assertion of fact as required
82 by rule 56(c), the court may:

- 83 (1) ~~afford~~ give an opportunity to properly ~~respond~~
84 ~~or reply~~ support or address the fact;

- 85 (2) consider a the fact undisputed for purposes of
86 the motion;
- 87 (3) grant summary judgment if the motion and
88 supporting materials — including the facts
89 considered undisputed — show that the
90 movant is entitled to it; or
- 91 (4) issue any other appropriate order.

92 (f) **Judgment Independent of the Motion.**

93 After giving notice and a reasonable time to
94 respond, the court may:

- 95 (1) grant summary judgment for a nonmovant;
- 96 (2) grant ~~or deny~~ the motion on grounds not
97 raised by a party ~~the motion, response, or~~
98 reply; or
- 99 (3) consider summary judgment on its own after
100 identifying for the parties material facts that
101 may not be genuinely in dispute.

- 102 (g) **Failing to Grant All the Requested Relief Partial**
103 **Grant of the Motion.** If the court does not grant all
104 the relief requested by the motion, it may enter an
105 order stating any material fact — including an item of
106 damages or other relief — that is not genuinely in
107 dispute and treating the fact as established in the case.
- 108 (h) **Affidavit or Declaration Submitted in Bad Faith.**
109 If satisfied that an affidavit or declaration under this
110 rule is submitted in bad faith or solely for delay, the
111 court — after notice and a reasonable time to respond
112 — may order the submitting party to pay the other
113 party the reasonable expenses, including attorney’s
114 fees, it incurred as a result. An offending party or
115 attorney may also be held in contempt or subjected to
116 other appropriate sanctions.

COMMITTEE NOTE

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine “issue” becomes genuine “dispute.” “Dispute” better reflects the focus of a summary-judgment determination. As explained below, “shall” also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase “partial summary judgment” to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

“Shall” is restored to express the direction to grant summary judgment. The word “shall” in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace “shall” with “should” as part of the Style Project, acting under a convention that prohibited any use of “shall.” Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions

— “must” or “should” — is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948)),” with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”). Eliminating “shall” created an unacceptable risk of changing the summary-judgment standard. Restoring “shall” avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court’s discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for

summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Direction to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may assert that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) —

show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once

that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007).* In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Changes Made After Publication and Comment

Subdivision (a): “[S]hould grant” was changed to “shall grant.”

If “the movant shows that” was added.

Language about identifying the claim or defense was moved up from subdivision (c)(1) as published.

Subdivision (b): The specifications of times to respond and to reply were deleted.

Words referring to an order “in the case” were deleted.

Subdivision (c): The detailed “point-counterpoint” provisions published as subdivision (c)(1) and (2) were deleted.

The requirement that the court give notice before granting summary judgment on the basis of record materials not cited by the parties was deleted.

The provision that a party may accept or dispute a fact for purposes of the motion only was deleted.

Subdivision (e): The language was revised to reflect elimination of the point-counterpoint procedure from subdivision (c). The new language reaches failure to properly support an assertion of fact in a motion.

Subdivision (f): The provision requiring notice before denying summary judgment on grounds not raised by a party was deleted.

Subdivision (h): Recognition of the authority to impose other appropriate sanctions was added.

Other changes: Many style changes were made to express more clearly the intended meaning of the published proposal.

SUMMARY OF COMMENTS: 2008 RULE 56 PROPOSAL*General*

08-CV-004, Benjamin J. Butts, Esq.: Supports the proposed Civil Rules amendments.

08-CV-008, Kenneth A. Lazarus, Esq., for American Medical Assn. and other medical associations: “In general, our group strongly supports” the revision.

08-CV-028, Hon. H. Russel Holland: The focus is on proposed Rule 56(c), but there is a general comment that “the proposed amendments to Rule 56” are not compatible with the purposes stated in Rule 1.

08-CV-037, Professor Adam Steinman: It is wise to refrain from attempting to change the summary-judgment standard or the assignment of burdens. But Rule 56(c) should be redrafted to protect against inadvertent misinterpretations that could change the standard or the burdens.

08-CV-039, Professor Alan B. Morrison: “[T]he changes will improve the operation of the Rule and bring the practice in line with the better practices in a number of districts.” But the references to local rules at pp. 85, 99-100 in the publication booklet should be reconsidered. “If these amendments are adopted, as I hope they will be, that should be the end of local rules in this area.”

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: “Summary judgment today is widely inappropriately used and the proposal before you is apt to exacerbate that problem.” It began as a device to enforce plaintiffs’ debt-collection and like claims, overcoming sham defenses. It became generalized; now it is not a plaintiff’s device, and indeed has become a dilatory tactic. It has grown to reach questions of negligence, intent, and the like that are unsuited to summary disposition. It deters settlement, increases aggregate legal expenditures, and biases results against plaintiffs in civil rights cases. “[T]he less conscientiously it is used as a tool to weed out purely legal disputes, the more intense the doubts that it comports with the Seventh Amendment’s jury trial guarantee.”

08-CV-049, Professor Elizabeth M. Schneider: The discussion of the point-counterpoint procedure in proposed subdivision (c) is set against a background of concern for the overall impact of summary judgment on civil rights and employment cases. The detailed statement and response procedure may aggravate an already unsatisfactory situation. The FJC study demonstrates the facts that summary judgment is sought more often in employment discrimination and other civil rights cases, is more often granted, and more often terminates the litigation. Other empirical research reaches similar conclusions, and also demonstrates that the differences are not due to the “weak” nature of many of these cases or to poor lawyer selection of what cases to bring.

08-CV-055, Gregory P. Joseph, Esq.: “I do not support the amendments to Rule 56. * * * I * * * concede at the outset that it reads much better than the existing text.” (The chief concern addresses the point-counterpoint procedure, as summarized with Rule 56(c) below.)

08-CV-061, Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform: Supports the proposal, but with two changes. “Should” grant ought be changed to “must grant”; sanctions should be provided for moving, responding, replying, or submitting an affidavit or declaration “without reasonable justification.”

08-CV-098, E.D.N.Y. Committee on Civil Litigation: The Committee should “reconsider amending the rule.” It “has generated a large body of interpretation over years of practice, judicial construction, and academic study. Altering a rule with such an extensive interpretive history may lead to unintended adverse consequences that neither the Advisory Committee nor this committee can predict.”

08-CV-100, L. Steven Platt, Esq.: “[I]n practice the courts are treating the plaintiff as still having the burden of proof in opposing summary judgment motions and the courts improperly take the inferences in favor of the moving party * * *.” “[T]he Committee should move in the direction of limiting the one-sidedness (i.e., favoring the moving party) of the current rule. A considerable body of research shows that summary judgment and other procedural devices disproportionately limit the access to justice by plaintiffs in civil rights cases. * * * The rule should discourage the current, overly aggressive use of summary-judgment practice, and especially should discourage judges from granting this motion[] improperly because they have such crowded dockets.” One means “would be a rule providing that summary judgment should be denied if any of the movant’s ‘material facts not in dispute’ are, in fact, disputed or otherwise * * * not a legitimate basis to rely on * * *.”

08-CV-109, Ellen J. Messing, Esq., for Seven Massachusetts Lawyers: “[T]he Committee should move in a different direction [from point-counterpoint procedure]. It should take appropriate steps to limit the abuse of summary judgment motions in civil rights and other cases where the parties are disproportionate in resources.” One means would be to provide that summary judgment “will be denied if any of the movant’s ‘material facts not in dispute’ are, in fact, disputed or otherwise * * * not a legitimate basis to rely on for summary judgment purposes.”

08-CV-116, Keith B. O’Connell, Esq., for Texas Assn. of Defense Counsel: Apart from urging adoption of “must,” the Association “generally supports the adoption of the other proposed amendments to Rule 56 * * *.”

08-CV-127, Michael R. Nelson, Esq.: “The Committee’s goals of establishing a clear, consistent national standard governing summary judgment and developing an improved summary judgment procedure without changing the standard for the entry of summary judgment are laudable.”

08-CV-133, Sharon J. Arkin, Esq.: Although the conclusion of this section states that it would be a mistake to substitute “must” for “should,” the underlying theme is a more general suggestion that summary judgment should not be further encouraged. “[T]he proposed changes to Rule 56 are not only unnecessary but actually destructive to the fundamental purpose of the civil justice system: Fair and just resolution of disputes.” “I am a strong supporter of the jury system.” “The ever-growing prevalence of summary judgment motions is having a very negative impact on the justice system. One of the most significant impacts is on the public’s perception of justice itself.” A party who loses

after jury trial is likely to believe that at least there was a day in court with a fair process; a party who loses after a judge decides on paperwork submitted by the lawyers is “confused and appalled,” feeling “cheated and angry.” Defendants make summary judgment motions for many reasons — to flush out the plaintiff’s theories or experts; to increase billings before settling; to take advantage of a judge’s desire to clear the docket, or the plaintiff’s inability to respond adequately; or to exploit the possibility of a mistaken grant. Summary judgment is appropriate in cases where undisputed facts require resolution of a particular question of law. But it is often granted in complex cases that involve issues of credibility, intent, and reasonable inferences.

08-CV-145, Professor Stephen B. Burbank: This long comment focuses on the point-counterpoint procedure of subdivision (c). But it includes general observations as well. Rule 56 “is very differently interpreted in different circuits and in different types of cases.” “Another problem is suggested by evidence that some courts are granting summary judgment by resort to techniques of factual and legal carving that threaten the right to jury trial and the integrity of the substantive law. Still another is that — apart from the problem of delay — summary judgment motions may be used by one party to inflict expense on the opponent.” The threat to jury trial is augmented by the risk of “cognitive illiberalism.” A judge may not be aware of the personal experiences that shape understanding of the world and fail to recognize the different experiences that may lead jurors to different understandings. Employment discrimination cases are a particularly troubling example of summary judgments granted when a jury including members sharing the life experiences of the plaintiff may have a different understanding of probable discrimination.

08-CV-150, Elizabeth J. Cabraser, Esq., for Public Justice: “Strategies of attrition, resistance, and delay have, to our clients’ detriment, all too often exploited loopholes and unintended opportunities in procedures that were designed to serve and balance the interests of both sides. * * * Procedural innovations, including time limits, bifurcation, and aids to juror comprehension, are and should be increasingly used to decrease cost, while increasing effectiveness, and preserving the jury’s irreplaceable fact-finding function.” Rather than rush to summary judgment, courts should explore summary jury trials, which “provide useful information on how [witnesses, advocates, and experts] play, in the real world.” Summary judgments beget appeals; summary jury trials beget settlements.

08-CV-160, Professor Stephen N. Subrin: “The amendments would continue the trend of replacing oral advocacy and trial in open court with disposition by documents.” Summary judgment, further, “often inherently calls for subjective determination of what is a sufficiency of evidence and what inferences to draw from evidence. Judges, like all humans, cannot be perfectly neutral, try as they may.” As Cardozo expressed it, there is an “inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.”

08-CV-167, Cynthia L. Pollick, Esq.: Attaches a letter sent by a client to the judge who granted summary judgment for the defendant, expressing concern that the justice system failed her by denying a jury trial. The comment urges that the present system is hard enough; the proposed

amendments would make it harder for everyday citizens, leaving unfortunate long-lasting impressions about the federal justice system.

08-CV-175, Hon. Marcia S. Krieger: The Rule 56 title should be “Summary Judgment or Summary Determination.” The ruling may not be a judgment, but only a determination. “This confusion is particularly significant when the rule is used for determination of ‘part of’ a claim or defense.”

08-CV-177, Paul R. Harris, Esq.: “[T]he summary judgment device truly is broke and in great need of fixing.” Adding point-counterpoint will only make it worse. “[I]n the employment law context, summary judgment practice needs to be restricted, not enhanced.”

08-CV-183, Professor Eric Schnapper: This comment includes a long paper on the development of Rule 56 into a device that was not — and could not have been — foreseen when it was created in 1938. The core theme is that present procedure does not provide the nonmovant a fair opportunity to respond when the motion addresses the sufficiency of the evidence. Changes should be made to provide an opportunity that comes closer to the setting in which judgment as a matter of law arises at trial. The paper is fascinating reading, but cannot be adequately summarized. Particular points are noted below.

Thomas Gottschalk, Esq., for the Institute of Legal Reform, Nov. 17, 89, 91: “[P]laintiffs don’t like summary judgment very much and defendants would like to have more of it.”

Hon. Royal Ferguson, Jan. 14 hearing, 7-10: In opposing point-counterpoint, begins: “Summary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the cost and risk to plaintiffs in the pretrial phases of litigation, while diminishing both for defendants. * * * [S]ummary judgment, as we have it today, has created an unlevel playing field.” The procedure should not be further complicated by adding point-counterpoint.

Michele Smith, Jan. 14, 32, at 39-40: Summary judgment should be made meaningful because it is an important part of practice. Point-counterpoint will help by forcing careful attention in deciding whether to make a motion, and in deciding how to respond. “I do not file motions out of just habit or routine. * * * [I]t really affects your credibility before the judges before whom you practice. * * * [M]y clients aren’t the type of clients that like to pay for summary judgments that don’t have a prayer of being granted.”

Hon. Robert S. Lasnik, Feb. 2, 11, 18: “[T]here are problems with summary judgment,” that “may have to do with lawyers who are churning cases inappropriately, lack of training and education among the lawyers.”

Hon. Claudia Wilken, Feb. 2, 46, 47: “I agree that Rule 56 very much does need to be revised.” (But point-counterpoint is not the way to do it.)

Jeffrey J. Greenbaum, Esq., Feb. 2, 221, 223-224: (This testimony reflects the views of officers and members of the council of the ABA Litigation Section, but is not ABA policy.) Because we really

do not have a uniform national rule now, “summary judgment is governed by a patchwork of local rules. I believe it is broken at present. The variations in rules are traps for the unwary who don’t know local practice. They foster confusion and non-compliance.” What, for example, is the consequence of not properly responding to a fact? It varies from district to district. “With something as important as summary judgment we believe there should be a uniform practice.” Uniformity will ensure less confusion and better compliance. “[N]o change, continuing our current practice, or optional procedure should not be a choice * * *.”

Rule 56(a)

PARTIAL SUMMARY JUDGMENT

08-CV-008, Kenneth A. Lazarus, Esq., for American Medical Assn. and other medical associations: It is good to adopt the common phrase “partial summary judgment.” Recognizing motions that address a claim, defense, or part of a claim or defense “will serve to promote greater utilization of the summary judgment process.”

08-CV-161, Federal Magistrate Judges Assn.: It is good to add “partial summary judgment” to the title.

08-CV-180, U.S. Department of Justice: Recognizing partial summary judgment “will be a valuable clarification and recognition” of this practice.

GENUINE DISPUTE

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Does not object to change from “issue” to “dispute,” as a change adopted for clarity without changing the standard.

ORAL ARGUMENT

08-CV-048, Stephen Z. Chertkof, Esq.: The rule should provide that courts should hear oral argument before granting a motion, and must hear oral argument before granting a “Celotex no-evidence” motion. It is difficult to fully understand the facts and issues solely on a paper record.

08-CV-117, Malinda Gaul, Esq.: Summary judgment motions are made in every employment dispute. They are granted far more often than denied. Many grants are reversed on appeal, but many employees cannot afford to appeal. “Therefore, I encourage the addition of a requirement for the Courts to conduct oral arguments on all motions.”

Prof. Elizabeth Schneider, Nov. 17, 62 at 76-77: “[Y]ou really want oral argument often in summary judgment cases because it’s everything. That’s it.” It is like going back to equity trial on the papers.

Malinda Gaul, Esq., Jan. 14, 23 at 25-26: Opportunity should be provided for oral argument. There is only a short time to respond. An oral argument would provide an opportunity to address the facts.

Brian Sanford, Esq., Jan. 14, 27 at 31-32: “[O]ral argument would be a nice thing, which is not the practice” in the Northern District of Texas.

Margaret Harris, Esq., Jan. 14, 44 at 49-50: Oral argument should be provided. It makes a difference when a judge misunderstands the record. Telling the parties what the judge thinks is called for and giving an opportunity to respond can be important.

“SHOULD,” “SHALL,” “MUST”

08-CV-008, Kenneth A. Lazarus, Esq., for American Medical Assn. and other medical associations: When there is no genuine dispute, “there appears to be agreement all around that imposition of summary judgment should be mandatory.” “[A]ccuracy should trump style here and * * * it would be preferable to substitute the word ‘shall’ for ‘should.’”

08-CV-011, Robert B. Anderson, Esq.: Although it speaks of retaining “the present language,” it seems clear that this comment favors “shall,” not “should.” The concern is that “should” will be seized by the trial judges and appellate courts that disfavor summary judgment to deny motions “even when undisputed facts and settled law would otherwise mandate summary judgment.” There is a risk that summary judgment will become “totally discretionary under all circumstances,” particularly as state courts and legislatures pick up on the federal model.

08-CV-016, Joseph D. Garrison, Esq.: In frequent appearances at the annual NYU employment-law seminar, he asks judges to raise their hands if they have “encountered situations where testimony at trial differed from that presented in summary judgment affidavits. It was the rare judge who did not raise his or her hand. This is why I believe judges should preserve their discretion to deny summary judgment in those circumstances where, for whatever reason, the judge is unwilling to credit a material affidavit.”

08-CV-039, Professor Alan B. Morrison: “Should” is the proper choice. It may be easier to have a short trial, particularly in a nonjury case, make Rule 52 findings, and send the case up to the court of appeals once. And “there are rare exceptions with no disputed material facts in which a denial is still appropriate.” “[A]ll the incentives for the judge are to grant summary judgment”; there is little likelihood that judges will abuse whatever discretion they have to deny.

08-CV-040, Theodore B. Van Itallie, Jr., Esq.: Writing as Associate General Counsel of Johnson & Johnson, responsible for global litigation. “I believe it critical that the mandatory ‘must’ replace the precatory ‘shall’,” making it clear that summary judgment is a matter of right. “Summary judgment rulings applying legal principles to undisputed facts create the guidance that unquestionably the business community seeks and which benefits the process of making reasonable choices in a complex world. The uncertainty engendered by delegating to juries that application of law to fact contributes to the litigation-fearing culture that is so prevalent in this country.”

08-CV-044, Claudia D. McCarron, Esq.: If “shall” was ambiguous, it should be replaced by “must.” “Should” will mean an increase in the number of cases in which discretion is exercised to deny summary judgment; facing the cost of moving, “fewer meritorious motions will be filed.” The concern that trial may produce a different record is misplaced — “trial will always change the record.” Rule 56 embodies the judgment that summary judgment is an appropriate juncture at which to terminate a case. And it is the responsibility of lawyers to ensure that pretrial circumstances do not fail to afford a fully reliable record for summary judgment.

08-CV-045, Debra Tedeschi Herron, Esq.: Summary judgment too often is deferred, ultimately leading to denial. “When properly supported, summary judgment must be granted as it lessens the exorbitant costs of litigation and restores faith in the juridical system.” A discretionary standard compromises the importance of summary judgment “and is a waste of time and resources.”

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: It would be wrong to adopt “must.” “[R]educing trial judge discretion to deny summary judgment from little to zero in any circumstance would be a profound and dangerous mistake.” “Trial judges need, and should be encouraged to use, the discretion to deny summary judgment simply because the procedure does not promise to streamline litigation.” [This view is stated as one conclusion that flows from a lengthy statement of challenges to the point-counterpoint procedure in proposed Rule 56(c). That procedure can be misused by stating an overwhelming number of facts, most of them not material. More importantly, breaking the case down into discrete facts loses the power of narrative, of story, distorting the process of deciding on the evidence as a whole.]

08-CV-047, Professor Edward Brunet: “Must” should be restored. Discretion has considerable costs. Fewer motions will be granted, leading to trials in cases that do not present fact issues. Arguments addressed to the court’s discretion will be different, and more difficult for the court. The price of settlement likely will increase because the transaction costs of litigation will increase. The cost of making a summary-judgment motion also will increase by making the process discretionary and thus more complex; some parties may be deterred from making any motion. It must be recognized that courts already possess some degree of discretion, as reflected in statements of reluctance to grant summary judgment in some types of cases, including antitrust, civil rights, and negligence claims. This kind of discretion in turn threatens the transsubstantive nature of the Civil Rules, a value vigorously championed by Judge Clark. It is not too late to undo the choice made in the Style Project.

08-CV-049, Professor Elizabeth M. Schneider: Keep “should.” “[T]here are some cases where there are no disputed issues of material fact where summary judgment should still be denied.”

08-CV-050, Stephen G. Morrison, Esq.: The “unbounded discretion” conferred by “should” “could result in parts of the case, or the entire case, being tried to a jury when it never should have made it that far.” “Must” will promote the most efficient and inexpensive manner of providing justice.

08-CV-051, Latha Raghavan, Esq.: It has long been understood that “shall” is a mandate to grant summary judgment. It has meant “must.” “[T]o preserve the intent and purpose of summary judgment, it is preferable to” adopt “must.”

08-CV-056, Hon. Frank H. Easterbrook: “Must” is the proper word. Some judges prefer to deny, despite the absence of genuine dispute as to any material fact, because at least one party will be satisfied by the jury’s verdict, both parties will appreciate being heard, and trial spares the need to decide the motion. But the party who shows there is no genuine dispute should not have to bear the costs of trial, nor should other parties in the trial queue have to wait longer. Beyond that, recognizing discretion to deny the motion will lead to arguments on appeal in this form: To be sure, there was no genuine dispute. But it was an abuse of discretion to grant the motion because better evidence might have appeared at the time of trial and trial would have been short. “That is not an argument that appellate litigants should be allowed to make, or appellate courts to address.”

08-CV-057, R. Matthew Cairns: The 2007 Style amendment should be unwound by substituting “must,” “though in my opinion ‘shall’ was just fine.” Recognizing discretion to deny will be a disincentive to moving for summary judgment. The Committee believes that summary judgment may properly be denied if the record is not fully developed or if it is difficult to ascertain credibility from the paper record. But it is the responsibility of nonmovant’s counsel to develop the record to show there is a genuine dispute, or to use cross-examination or other evidence to create a credibility dispute. “The court should not substitute itself for counsel * * *, or bail out the party or counsel who fails in his obligations under the rules and good practice, just as it wouldn’t at trial.”

08-CV-060, Federal Civil Rules Committee, American College of Trial Lawyers: With only 3 members of the 36-member committee dissenting, favors “must” “[i]f Rule 56 is to mean anything.” The laudable purpose of summary judgment is to render judgment short of trial when there are no disputed facts. This purpose should not be undermined by non-mandatory language. “Many College Fellows also are troubled by the current practice of some courts to use their discretionary power to force settlement.”

08-CV-061, Lawyers for Civil Justice, U.S. Chamber Institute for Legal Reform: Summary judgment “remains an underutilized and ineffective tool.” Motions are too often deferred until trial or denied without explanation. Adhering to “should,” as added by the Style Project, undermines the purpose and utility of summary judgment. “Should” will lead courts to an increasingly expansive view of the “negative discretion” to deny well-founded summary judgment motions. The Supreme Court has said that Rule 56 “mandates” summary judgment when there is no genuine dispute. That was the plain-language meaning of “shall.” The decision in *Kennedy v. Silas Mason Co.*, cited in the 2007 Committee Note, turned on finding disputed facts; it does not support discretion to deny a properly supported Rule 56 motion. Nor is there persuasive support in lower-court decisions for finding such discretion. It would be a mistake to distinguish between summary judgment on an entire action and “partial” summary judgment, recognizing discretion to deny partial summary judgment despite the absence of a genuine dispute as to some part of the action — summary judgment is needed to narrow the issues for trial.

08-CV-066, Richard L. Seymour, Esq.: “Should” is the proper word. If “must” is substituted, the result will be an increase in improper grants of summary judgment in close cases. The risk is shown by a computer search for grants of summary judgment in employment-discrimination cases between September 1, 2008, and November 16, 2008. 145 cases were found. 122 involved grants “solely to employers.” In these 122, 98 were affirmed, 9 were reversed or vacated, and 15 were affirmed in part and reversed in part. “When nearly a fifth of summary judgment decisions are reversed at least in part, it is difficult to conclude that summary judgment is not being granted in close cases.” An improper grant delays the case even when reversed, and adds a great deal of expense. Many parties cannot afford the expense of appeal.

Decisions in the First, Second, and Third Circuits “have criticized the tendency of district courts to use summary judgment as a device to clear their dockets rather than to identify and dispose of hopelessly unmeritorious cases.” This tendency too will be exacerbated by “must.”

(The comment and testimony explore two cases — one leading to reversal on appeal, the other to affirmance — that are described as “highly improper grants of summary judgment.” Adopting “must” will mean “that the existing rate of miscarriages of justice, whatever its number, will be increased.”)

Finally, it is urged that in the employment discrimination field courts have “fairly routinely” accepted concepts offered as rules of thumb that might properly be used as jury arguments but instead become “hardened * * * into ‘no reasonable jury could disagree’ rules of law. The rule of thumb concepts are then relied upon to destroy countless close cases until the Supreme Court disapproves them.” Numerous examples follow.

In the end, it is argued that frequent use of summary judgment decreases respect for the courts, while trials increase respect.

08-CV-110, G. Edward Pickle, Esq.: “In changing ‘shall’ to ‘should,’ the scriveners of the 2007 changes exceeded the scope of their stylistic charge and wrought a material, substantive change in Rule 56.” “There is no room or viable reason for discretion.” The argument for discretion when it is a matter of partial summary judgment at most ignores the reality that few cases are tried. “Narrowing issues as early as reasonably practicable lessens the scope of discovery, trial preparation, and other costs.” Carrying unnecessary issues into trial may confuse or prejudice the jury — granting partial judgment as a matter of law after the verdict does not unring the bell, much less show “whether its clanging drowned out other evidence.” “The grant or denial of a partial summary judgment motion generally has a palpable effect on the settlement value of a case.”

08-CV-111, Carlos Rincon, Esq.: Those who favor “should” seem to be attacking summary judgment practice as a whole as unfair to plaintiffs, who must rely on jury assessments of credibility and of matters “that are inherently grey, such as motive or intent.” But trial is appropriate only when there are material issues of fact. “Should” “opens the door to discretion even in cases that as a matter of law require dismissal,” leaving undeserving cases to increase litigation expenses and unfairly drive up the costs of settlement.

08-CV-113, John H. Martin, Esq.: Strongly supports “must,” for the reasons advanced by so many others. “Granting total, or even partial, summary judgment in proper cases can result in enormous savings of unnecessary litigation costs.”

08-CV-116, Keith B. O’Connell, Esq., for Texas Assn. of Defense Counsel: “Must” ought to replace “should.” “‘Should’ has never meant ‘shall,’” and “will render the rule both under-utilized and ineffective. “[T]he need for clear guidance, more certainty and more clarity is palpable.” The need is illustrated by the denial of summary judgment in a recent case, followed by great expense for expert witnesses and attorneys and then settlement in an amount reflecting plaintiff’s estimate that the case had little merit. Jury trial is vanishing, but not because summary judgment is granted too often. It is the increased costs of litigation and loss of confidence in the jury system that are “forcing parties to move outside of our civil justice system.”

08-CV-117, Cary E. Hiltgen, Esq.: “[S]hould takes away any requirement judges had to sustain meritorious motions and all advancements made by the requirements relating to the statement of facts become inconsequential. Moreover, the force behind the filing of a summary judgment motion would dissipate.” “Should” “creates confusion in the burden required by the moving party.” A court could decide for jury trial even when there is no genuine dispute of material fact. Many state courts recognize greater discretion than the federal rule has recognized, and for that reason “summary judgment motions filed in state court do not seem to have the same effect as those filed in federal courts.” Eliminating claims without factual support is critical in promoting inexpensive and speedy trial. Taking the strength out of the motion also decreases the possibilities for settlement. “The fear placed on the opposing party that a well-written summary judgment could prevail is an important strategic tool.” Denial of partial summary judgment will make trials longer and will create greater jury confusion.

08-CV-119, Thomas J. Crane, Esq.: “I am strongly opposed to making the grant of summary judgment mandatory in certain cases. * * * Since 1992, I have seen summary judgment more and more become a docket clearing device.” “In ADA cases, today, 92-97% of reported ADA Title I cases are dismissed by summary judgment or judgment as a matter of law.” “Summary judgment is already granted frequently and even routinely. In my experience, deserving cases are too often dismissed through summary judgment.”

08-CV-121, Phil R. Richards, Esq.: (It is unclear whether this comment is submitted for the American College of Trial Lawyers.) “[T]he rule should provide that a court ‘should’ grant summary judgment for either party” if entitled, “either globally or on any specific issue, regardless of whether they are the movant or the respondent.” (This seems an implicit endorsement of “should,” but there is no elaboration.)

08-CV-124, Wayne B. Mason, Esq., for Federation of Defense & Corporate Counsel: “Must” will avoid any ambiguity. Summary judgment too often is not granted, even when both sides move and agree that the case should be determined by ruling on the motions. Clients should be spared the expense of preparing and trying a case that should have been disposed of on summary judgment.

08-CV-127, Michael R. Nelson, Esq.: Changing “shall * * * forthwith” to “should” “will result in the creation of a more discretionary standard.” Defense litigators regard the change as drastic. Summary judgment is not disfavored; it is necessary to avoid “long and expensive litigation productive of nothing.” “Furthermore, summary judgment ‘serves as an instrument of discovery in its recognized use to call forth quickly the disclosure on the merits of either claim or defense on pain of loss of the case for failure to do so.’” In *Celotex*, the Court says that Rule 56 mandates summary judgment when the standard is satisfied. Professor Shannon has it right in his article submitted as 08-CV-134. Adopting “should” would be akin to expressing a speed limit as a matter of the driver’s discretion. To be sure, there is discretion to deny summary judgment “as long as there is a genuine dispute as to a material fact.”

Mr. Nelson also expresses doubts about recognizing discretion to deny partial summary judgment, but concludes: “[S]o long as any amendment to Rule 56(a) indicates that complete summary judgment ‘must’ be granted, the discretionary standard of ‘should’ would be acceptable for rulings on partial summary judgment.”

08-CV-131, Gregory K. Arenson, Esq., for New York State Bar Assn. Commercial & Federal Litigation Section: “Should” “is better, adequately preserves the competing interests involved and is most consistent with the law described in the 2007 Advisory Committee Note describing the stylistic change. “To the extent that ‘shall’ in the original Rule 56(c) was meant to be mandatory, that is not how courts applied the rule * * *. If experience taught the courts to ignore a mandatory rule in practice, it would be expected that the same good reasons * * * would cause them to ignore a similar mandatory rule in the future. Rather than cause courts to discreetly break the rule, it is better to honestly acknowledge that there may be circumstances where a savvy court would not grant summary judgment * * *.” Concerns of case management, the timing of settlement discussions or trial, or the eventual admissibility of evidence at trial may be reason to deny. “[T]he slight additional discretion” in “should” as compared to “must” “is not likely to result in judges failing to dispose of cases on summary judgment that deserve such disposition. Courts’ self-interest in disposing of cases on their dockets should not be discounted.” Nor should courts be discouraged from attempting to settle cases immediately after summary judgment motions have been briefed. Nor is the word “must,” without a specific deadline, “likely to do anything to actually speed those recalcitrant or overworked jurists who are unable or unwilling to make a decision.” Nor does it make sense to distinguish between granting summary judgment on an entire case and partial summary judgment — the standards should be the same.

08-CV-133, Sharon J. Arkin, Esq.: Prefers “should,” out of the general distrust of summary judgment summarized with the general comments at the beginning.

08-CV-134, Prof. Bradley Scott Shannon: Adopt “must,” for the reasons set out in the article submitted with the comment, *Should Summary Judgment be Granted?* 58 Am.U.L.Rev. 85 (2008).

08-CV-135, Marc E. Williams, Esq., for DRI: The practical effect of adopting “should” “has been to grant Courts wide discretion in their ability to deny a party summary judgment when there is no disputed issue of material fact. *Celotex* says that Rule 56 mandates summary judgment. “Meritless

cases that were once ripe for summary judgment are now subject to the threat of an extended, expensive litigation process.” And there is a risk that “should” will be interpreted inconsistently by different judges. “Must grant” is better.

08-CV-136, Andrew B. Downs, Esq.: “Should” is wrong. “If the facts and the law support entry of summary judgment, a refusal to do so provides fuel for those who perceive result-oriented actions by courts or the use of calculated uncertainty to pressure parties to settle.”

08-CV-137, Mary Massaron Ross, Esq.: “Should” “changed the standard in fundamental ways.” The language of Rule 56 before the Style Project shows that it mandated summary judgment. The 1986 cases show that the right to summary judgment is a legal entitlement. The utility of Rule 56 “is severely hampered when the rule permits unbridled discretion to deny summary judgment.” This will undermine the confidence of litigants in the civil justice system. It is vitally important that baseless suits be dismissed as soon as possible to reduce the costs imposed by unfounded litigation — “civil rights suits are regularly filed without factual or legal support.” Summary judgment also plays an important role in simplifying the cases that do proceed to trial, providing a better focus for the jury. Summary-judgment benefits both plaintiffs and defendants by making the federal courts an efficient, just, and speedy dispute resolution mechanism.

08-CV-138, Jeffrey W. Jackson, Esq.: Experience as General Counsel of State Farm Insurance Companies shows that “summary judgments are rarely granted.” Over the last three years, approximately 3.5% of actions against the company were fully resolved by summary judgment (the cases were 18% in federal court and 82% in state court). “Should” will lead to still fewer grants. Except for Pennsylvania, all state summary-judgment rules now say “shall”; it is likely that states will gradually follow any federal lead to “should,” adding congestion to the dockets of all courts. Summary judgment, moreover, is for cases “at the margin”; they devour litigants’ resources and court time. These costs are factored into insurance rates. And courts are “judicious in granting summary judgment motions” — of 20 cases taken on appeal from summary judgments for State Farm, 17 were affirmed. “Shall” “does not deny deserving litigants their day in court.”

08-CV-139, Kimberly D. Baker, Esq.: In 24 years of defending litigation, effective use of summary judgment has been seen to reduce the costs of litigation, and the motions prompt settlement negotiations or mediation. Many commentators expect a large increase in employment litigation in the current economic environment, including claims that have no sufficient legal basis. “Businesses and employers should be certain that when an employee has not met the legal standards to prevail, the lawsuit will be dismissed, eliminating the need to present a defense to a jury that may be comprised of citizens who are angry about the economic downturn and seeking an avenue to strike back.” Employment actions, moreover, “commonly seek relief under many statutes”; discovery commonly shows that many of the claims have no legal or factual basis. Summary judgment should be used to focus the case. “Shall,” not “should,” is the appropriate word.

08-CV-140, Donald F. Zimmer, Jr., Esq.: “Must,” or “at a minimum ‘shall.’” “The word ‘should’ is vague and provides little comfort to moving parties seeking certainty if they are able to meet their burden of proof.”

08-CV-142, Hon. David F. Hamilton: (1) “Must” is too strong; it should be used only when there are consequences, such as review by appeal or mandamus for denials of summary judgment. “I doubt the Committee intends to go in that direction.” (2) “Should” is strong enough. Judges are not going out of the way to look for work by trying cases that clearly should be decided on summary judgment. “[T]he summary judgment standard often requires the appellate court to consider a highly artificial and even hypothetical set of facts, or even two or more sets of hypothetical facts when there are cross-motions. In those close cases, I think it’s helpful to have the option of a trial, where shaky testimony can be knocked down, rather than to force the appellate courts to develop the law based on improbable testimony.”

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.: “Should” is proper. The judge should not be forced to rule on all aspects of a motion. There is no outcry that federal judges have been denying summary judgment in employment cases that deserve summary judgment. The empirical evidence is to the contrary. “If the language is rewritten as ‘must,’ will there be a genuine appellate issue that a court refused to grant summary judgment, perhaps for legitimate reasons of docket control, when ‘the record demanded it’”?

08-CV-144, Ralph A. Zappala, Esq.: “Must” is better. “[A] pending summary judgment motion provides an incentive for resolving cases. Seeing an adversary’s case presented in orderly fashion, with evidence, is beneficial to the litigants.” “Must” will provide an incentive for litigants to focus on the claims and defenses and related facts.”

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): “Must” is needed to avoid the practice before 1986, when “courts routinely denied motions for summary judgment and treated them as disfavored motions.” “Should” “will, as a practical matter, return summary judgment to that disfavored status * * *.”

08-CV-156, Brian P. Sanford, Esq.: A court should not be required to state reasons for denying summary judgment. “[T]he court has discretion to deny for reasons of credibility or fairness. A denial results in a trial.”

08-CV-158, Professor Suja A. Thomas: “Should” is appropriate “because courts should be given discretion in tough cases. * * * Indeed, judges in the same case often disagree on what the evidence shows and thus whether summary judgment should be granted.”

08-CV-161, Federal Magistrate Judges Assn.: “Should” “reflects the current law.” And “must grant” “might suggest that the court ‘must’ entertain motions that address the case in a piecemeal fashion.”

08-CV-161, Federal Practice Comm., Dayton Bar Assn.: “[S]hould’ does not lend itself to clarity. * * * ‘Must’ also is not inconsistent with the pre-2007 version of the rule, whose use of the word ‘shall’ adequately conveyed the concept * * *.”

08-CV-167, Michael T. Lucey for Federation of Defense & Corporate Counsel: “Must” is important. It is not uncommon to have a court deny cross-motions for summary judgment even though the parties agree that the case should be determined by the court. Failure to grant a motion sometimes appears to be used as a settlement tool. There should be a clear, unambiguous direction to grant meritorious motions.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: “While there is room for debate, we believe that, on the whole, giving the district court discretion to deny summary judgment, if used in limited circumstances, is salutary, and thus the ‘should grant’ language is preferable to the alternative ‘must grant.’”

08-CV-176, State Bar of California, Committee on Administration of Justice: Supports retaining “should” “for the reasons given by the Advisory Committee, and because ‘should’ allows for the limited discretion recognized by the case law.”

08-CV-180, U.S. Department of Justice: Celotex says that Rule 56 mandates entry of summary judgment. Mandatory language — either “must” or “shall” should be used. The rare instances in which discretion to deny summary judgment can be exercised can be accommodated without using discretionary words in Rule 56. “[I]n those cases, the district judge should be under a specific obligation to state on the record why summary judgment is not being granted.”

08-CV-181, Lawyers for Civil Justice, etc.: This comment supplements earlier comments, 08-CV-061. “Must” best represents modern usage under the Celotex trilogy. “We would, however, reluctantly support restoring ‘shall be granted’ on the basis that it is a ‘sacred phrase’ that retains the standard applied over seventy years of summary judgment jurisprudence.” “[R]ules must be rules, not suggestions, or they serve little purpose to guide those who comply with them.” As Judge Easterbrook notes, 08-CV-056, “should” “introduces additional appellate issues regarding judicial discretion.” “Should” will return summary judgment to the disfavored status it had before Celotex and its companion decision made it a pillar of the civil justice system. “The filing of a well-written summary judgment motion can provide the catalyst for settlement negotiations, making it an important strategic tool.” “AN ineffective summary judgment procedure will continue to make trial preparation more expensive and time consuming, increase the number of cases on court trial dockets, and result in longer trials.” “Judicial discretion is inherent in the standard that requires a judge to determine the facts in dispute and the law applicable to those facts.” “If American business is to remain competitive in the world marketplace, the cost and inefficiency of our civil justice system must not continue to put our businesses at a competitive disadvantage.”

08-CV-183, Professor Eric Schnapper: “Should” is correct. “It is entirely common for the evidence and contentions of the parties to be somewhat different at trial than they were at summary judgment. * * * [T]hese differences would at times lead the district judge to conclude that the nature of the future trial record is insufficiently clear to warrant summary judgment. In addition, a judge considering a summary judgment motion may reasonably conclude that he or she does not understand the factual issues as well as he or she would at the end of a trial.” Rule 50, for that

matter, does not require that a motion made during trial be granted even when the judge believes that the evidence up to that point is insufficient to support a verdict.

Claudia McCarron, Esq., Nov. 17, 5, 9-15: Advocates have long believed that they are entitled to summary judgment on showing no genuine issue of material fact. “The interjection of a discretion to deny an otherwise meritorious motion suggests a kind of arbitrariness that I believe will breed distrust.” The cases that seem to recognize discretion to deny might as well have denied by finding a material issue of fact. *Kennedy v. Silas Mason* was decided in 1948; whatever it means, to the extent that its flavor reflects distrust of summary judgment the 1986 decisions reflect a different view. The cases decided since December 1, 2007, do not seem to reflect that “should” has made an difference, but that is because the change has not sunk into professional consciousness. Discretion was no an issue in any of the cases reviewed for this period. But people who dislike summary judgment will pick up on the change and the Committee Note. The view that it may be simpler to try a case than to wade through mountains of motion papers to determine whether there is a genuine issue of material fact does not justify denial; “the bar will view a denial, a discretionary denial, and litigants even more than the bar, as something that is arbitrary and unpredictable.” And there are opportunities for partial summary judgment in these circumstances.

Richard T. Seymour, Esq., Nov. 17, 15, 26: The primary argument is that in employment cases courts too often grant summary judgment because they fail to consider the inferences that might be drawn in favor of the nonmovant. Then urges that “should” is the right word. “[C]hanging it to ‘must’ has got to produce a stomp on the accelerator pedal in the grant of summary judgment * * *.”

Leigh Schachter, Esq., Nov. 17, 26, 31-36: The substitution of “should” for “shall” in the Style Project simply did not catch the attention it should have drawn. It is unfair to put to trial a party who has demonstrated that there is no genuine dispute of material fact. The place where discretion is needed is reflected in present Rule 56(d), which reflects the need to allow adequate opportunity for discovery. After the process has been gone through, there is no need for discretion. Partial summary judgment may seem different, at least when there is a relationship between an issue ripe for summary judgment and other issues that will go to trial, although even then it is better to grant summary judgment. The lack of any standard to limit discretion, further, “really does run the risk of providing an opening for a situation where courts don’t want to grant summary judgment, and unfortunately there are some * * *.”

Steve Cherkof, Esq., Nov. 17, 34: “One of the things I’ve noticed in the testimony, whether you believe in ‘must’ or ‘should’ seems to depend on whether you think you’re bringing the motions or responding to the motions.”

Prof. Edward J. Brunet, Nov. 17, 52: “[S]ummary judgment mechanics need to be as firm and nondiscretionary as possible in order for Rule 56 to work its magic. * * * The word ‘entitled’ in this discussion needs to be given some meaning.” Summary judgment will become flabby and ambiguous. Adoption of “should” a year ago has not yet tilted the practice, but long-term use will result in additional judge-made exceptions. Movant and nonmovant will come to argue in difficult-

to-decide discretionary terms. Fewer motions will be granted; the number of trials will increase. “Now, there is discretion in summary judgment. It comes from appellate courts. So in three types of cases, including antitrust, civil rights, and negligence, we see great reluctance to grant summary judgment * * *.” And “interesting things will happen” if summary judgment is “should” but no corresponding change is made for directed verdict. De novo review is a substantial safeguard; review for abuse of discretion will lead to arguments that a grant was an abuse of discretion. But there is a need for some discretion when the choice is between partial summary judgment, sending the case to trial on closely related issues, or instead trying all issues. As to language, it is better to avoid must, should, or substitutes such as required or appropriate. It should be: “Summary judgment is granted if * * *.”

John Vail, Esq., Center for Constitutional Litigation, Nov. 17, 79, 88: The view that there is an “entitlement” to summary judgment raises a serious Seventh Amendment question. Summary judgment is denied; the movant loses the jury verdict on evidence that properly defeats a motion for judgment as a matter of law; on appeal from judgment on the properly supported verdict the movant argues that it is entitled to judgment on the summary-judgment record. Reversal of judgment on the jury verdict appears to be reexamination of a fact found by a jury contrary to the Seventh Amendment.

Thomas Gottschalk, Esq., for the Institute of Legal Reform, Nov. 17, 89, 91-97: The American legal system is preeminent in the world. “The only negatives are the issues of high cost and intrusiveness * * *.” Summary judgment is an important safeguard against the costs of discovery on issues that can be disputed when the case can be resolved as a matter of law on other issues. There is no justice in a system that does not grant summary judgment to a litigant who is entitled to it. Current subdivision (f), to become (d), provides adequate protection by ensuring adequate opportunity for investigation and discovery before summary judgment is granted. To add “an undisciplined, unrestrained, if you will, undefined, notion of discretion,” without any idea of what “should” means, will present a serious issue of meritorious motions being denied. “Shall” was interpreted by the Supreme Court in *Celotex* as mandating summary judgment. Even under “shall” there was some language — not holdings — suggesting some sort of implicit discretion to deny. “That occurred under ‘shall.’ We know what’s going to happen using the word ‘should.’” There is no need to worry that with “must” a meritorious jury verdict after trial will be upset because the verdict loser shows that judgment ought to have been granted on the summary-judgment papers. (In response to a question, avoiding the issue by saying “summary judgment is to be granted” “is as strong as must.”)

Theodore Van Itallie, Esq., Nov. 17, 105-111: The simple style change from “shall” to “should” might not have caused a problem. But the present proposal has drawn comments and testimony, creating a legislative history that makes it much more consequential to persist with “should.” Retaining “should” may suggest that the Committee embraces the discretion that some courts feel they have. An attempted finesse, such as “is to be granted,” is not effective. There is an inertia against summary judgment. Courts are obliged to grant summary judgment when the facts are undisputed. This is important to provide pronouncements of law that will guide others. The lack of opinions providing clear guidance on the law feeds into undesirable risk-averse behavior.

“[T]here’s a benefit in getting rules articulated, and this is the perfect vehicle.” Because of settlement, from the perspective of providing legal guidance too few cases will get to trial in any event. To be sure, it is proper to deny summary judgment when there are competing reasonable inferences. But it is not proper to deny because there are important public issues — resolution of the law by a clear summary judgment ruling is all the more important. Nor is it proper to deny summary judgment simply because it is less work for the judge to send the case to trial.

Stephen G. Morrison, Esq., Nov. 17, 120, 121-126: It is rare that either plaintiff or defendant is able to dispose of an entire action on summary judgment. Instead summary judgment focuses the case on the matters that truly are in issue. It provides three opportunities for speedy, just, and inexpensive resolution — and all are enhanced by “must.” First, the motion itself often brings the parties to the table and leads to serious discussions. Second, they come together during oral argument and each may concede some points — again, if they know the judge faces a true “shall” or “must” decision, they will consider matters more seriously. Third, after the judge rules they have another chance to resolve the case by settling. “Should” or “may” is inappropriate even for partial summary judgment. It is not fair for a judge to punt merely because it is too hard or too time-consuming to rule on the motion. Nor is it proper to deny the motion because the case involves the public interest — juries do not have to give reasons, while the reasons given by a judge for summary judgment better serve the public interest. Avoiding the problem by deliberately writing an ambiguous “if/then” rule will lead to different standards in all of the circuits, and eventually a resolution by the Supreme Court. It is better to achieve clarity now by adopting clear rule language.

Bruce R. Parker, Esq., for International Assn. of Defense Counsel, Nov. 17, 129, 139-141: Summary judgment is rarely granted in personal injury actions. But it had never occurred to me that “shall” admitted of any discretion. If the facts are truly undisputed and the law is in our favor, summary judgment must be granted. Trying to explain denial to a client is difficult. Denial “breeds a certain disrespect for our litigation process.”

Debra Tedeschi Herron, Esq., Nov. 17, 141-143: Favors “must.” It will avoid lengthy trials.

Latha Raghavan, Esq., Nov. 17, 143-146: “Thou shalt not kill” is a command. “Shall” means “must.” Celotex establishes a mandatory standard. The point-counterpoint procedure forces the attorneys to do the work. Further protection is provided by the rule that the judge need not search the record.

Alfred W. Cortese, Jr., for Lawyers for Civil Justice, Nov. 17, 153, 154-161, 163: “[W]e did not focus on” the change from “shall” to “should” in the Style Project “because we were content with the committee’s assertion that they were not changing the substance of any of the rules.” Celotex established a mandatory interpretation of “shall.” That was the intent of the original rule. It should be restored. “[W]e’ve heard a lot today about how plaintiffs’ lawyers and liberal academics don’t like slicing and dicing. I would assume they would prefer shake and bake, that you just shake it all up and throw it against the wall and hope that it hits.” “Should” does not fit with “entitled” to summary judgment. It is a suggestion, not a rule. It is wishy-washy. “[S]ummary judgment should be utilized as a tool by the judge to focus on the facts and law in the cases and to give the litigants

a clear decision one way or the other.” “Should” gives “yet another opportunity basically not to enter — not to enter an order that should be required under the original rule and under the law as set out in the Celotex trilogy.” “I would leave you with the thought that we do want commandments, not suggestions. [Q] Because they’ve been so effective? [A] They haven’t been effective enough. I wouldn’t dilute them.”

Hon. G. Patrick Murphy, Jan. 14, 12-13, 19-20, 43-44: “I agree with that “must.” If there’s no disputed issue of fact, surely you must grant the motion.” Why would you want to have a trial if there’s nothing to try? But does that mean that disappointed movants will be petitioning for mandamus? “I’m not sure what that means.” (Responding to questions Judge Wood put to another witness, Judge Murphy later expressed concern that “must” might mean that a busy judge might have to drop everything else to make a prompt ruling on a summary-judgment motion, or face mandamus, but offered no firm conclusion.)

Brian Sanford, Esq., Jan. 14, 27 at 31: Because it is a “should standard,” the judge should have absolute discretion to deny summary judgment and not have to explain it.

Michele Smith, Esq., Jan. 14 at 32, 34-37, 40-43: “Must” is important to offer direction on the obligation to grant summary judgment. “Clear and unequivocal guidance is imperative * * * [because] most judges * * * do not like granting summary judgment.” Some judges believe summary judgment is just not appropriate, that all cases should get to a jury. Others worry about reversal. The reality of practice is that it is much easier to get summary judgment in a case with small stakes than in a case with large stakes, even though the cases are indistinguishable under the summary-judgment standard. Judgment often is denied with the suggestion that the parties mediate, leaving the defendant in the unenviable position of determining whether they would prefer to pay some money to get out of the case and avoid “the uncertainty of a trial in jurisdictions that may not be favorable.” Partial summary judgment, further, saves resources for all parties, and for the court. And “must” is better than “shall.” Judge Wood asked whether reality is better expressed by “should,” because there will be cases in which the judge just is not ready to rule, and also whether the standard should be the same when granting partial summary judgment would leave part of the case for trial. Ms. Smith responded that the standard should be “must” both for full and for partial summary judgment. She also recounted her own experience with having to tell a client that there is no effective way to make sure the judge will decide a summary-judgment motion before trial

Margaret Harris, Esq., Jan. 14, 44 at 49: “Shall. I kind of like that. * * * [I]f I were a District Court Judge, I might take a little offense if the rules were telling me I must do something. I would think that I’m intelligent enough to exercise my own discretion * * *.”

Wayne Mason, Esq., for Federation of Defense & Corporate Counsel, Jan. 14, 60 at 61-63, 66-70, 71-75: Clients are frustrated when counsel has to explain that the motion is right on the undisputed facts and on the law but it is not granted. Sometimes there is no ruling at all. Sometimes there is a denial without any explanation. “[I]t should not be discretionary.” “[I]t is important * * * for people to be able to trust the fact that it will be ruled on.” It costs a lot to prepare for trial — in many cases it is not a 3-day trial, but a 3-week trial or even potentially a 3-month trial. Even when

trial is likely to be brief, partial summary judgment can narrow the issues and has an effect on settlement. The most important issue in the rule is “must” rather than “should.” “Shall” was understood to be mandatory. Nonetheless petitions for mandamus to compel a ruling were rare. They will remain rare if the rule says “must”; no one wants to seek mandamus on a question like this. “I’m not naive enough to * * * believe that there are times when summary judgment would still be denied under the ‘must’ standard.” But the message should be that it is nondiscretionary; if “should” remains, state courts are likely to follow this lead and the situation in state courts is already bad enough.

John H. Martin, Esq., Jan. 14, 82, at 91, 93-96: “Must” is appropriate. In one recent experience a motion for summary judgment on a narrow ground in an otherwise complex case languished without any decision until a new judge was appointed to the case and promptly granted summary judgment, which was affirmed on appeal. “I don’t have a good answer to how you make a judge rule on any motion.” But softening the command to “should” “might send a message to some judges that they’ve got a lot more discretion on summary judgments than they think they do.”

G. Edward Pickle, Esq., Jan. 14, 104, 107-111, 113-115: For 70 years “shall” has made summary judgment mandatory when there is no genuine issue. Our civil justice system is too costly; it is not competitive with other democratic developed nations. Summary judgment is one of the most effective tools for managing costs. Legions of cases establish the mandatory meaning of “shall.” If we stick with “should,” judges who have some antipathy toward summary judgment — either as a matter of overwork or as just disliking it — “can drive a truck through it.” The discretionary option will be a “total way out.” Most lawyers have not yet caught up with the 2007 Style change, but the risk is there. And uniformity is crucial on this point — the standard for summary judgment cannot vary from one court to another. Nor should the standard be relaxed for partial summary judgment. No smart lawyer will risk provoking a partial summary judgment that will be reversed after trial and appeal, forcing another trial. In managing outside counsel I would never approve such a motion. When there is a solid basis, however, partial summary judgment is important. It narrows the issues for trial, and gives the parties a better foundation for settlement. One of the biggest problems practitioners have is the judge who simply will not rule on a motion. When the ruling is deferred to the start of trial, most often it is a simple and unexplained denial. But there may be a partial grant — that simplifies trial, but an earlier ruling would have spared the parties the costs of preparing to try those issues.

Cary E. Hiltgen, Esq., Jan. 14, 121-128: His own practice is not to file a summary-judgment motion in every case. For one client, he has tried 100 cases to completion. He made summary-judgment motions in 26 of those cases — 12 were in federal court, 14 in state court. He kept the motions simple. His clients are interested in cost — they do not want to pay the cost of a losing motion, but they do want to save trial costs by successful motions. Partial summary judgment works. If summary judgment is made discretionary, “you are asking to exacerbate the amount of time and money involved.” There is no room for discretion. The party has “the absolute right” to get rid of claims that lose on the undisputed facts. “Must” is the proper word.

Keith B. O’Connell, Esq., for Texas Assn. of Defense Counsel, Jan. 14, 129-140: It should be “must.” As an anecdote, offers a case in which summary judgment was not granted despite a compelling showing, leading to prolonged proceedings, and settlement at a low value that avoided the cost of trial but probably left the plaintiff with very little in relation to a serious loss. Faith in the system is diminished if people believe courts act arbitrarily. That includes denial of warranted summary judgments. There are lots of cases that seem to recognize discretion to deny. But they did not involve motions that satisfied all of these conditions: “the motion is not premature; there has been adequate time for discovery; an adequate record to support the judgment has been made; the motion has been filed in accordance with a schedule order — you know, the deadline, it’s not filed on the eve of trial; proper notice has been given to the other side; the other side has had a reasonable opportunity to respond; the movant has — the movant has shown, based on an adequate record, that there is no genuine issue of material fact; the movant has shown, based on an adequate record, that the movant is entitled to judgment as a matter of law.” When all of those things do not occur, it is proper to deny summary judgment, whether the rule says “shall” as it has or instead says “must.” Nor will it help to attempt to avoid the issue by rewriting the rule to say only that a party may move, without stating any standard to guide the court’s action. There is too much history, too much risk of changing the standard.

Stephen Pate, Esq., Jan. 14, 140, 141-144: Has had motions for summary judgment denied both as defendant and as plaintiff in insurance contract cases. “[J]udges are reluctant to rule on summary judgment motions, even though it’s a situation involving a contract which involves matters of law.” Cross-motions are both denied even when you expect one side or the other is right on the law. Adopting “must” does not threaten a wave of petitions for mandamus — “I don’t think a case has ever been strong enough for it,” and lawyers are reluctant to mandamus a judge. “Must” also will protect against judges who use summary-judgment as a settlement tool. An example is provided by a case in which a judge waited seven months and then granted partial summary judgment a week before trial — “I think he thought he was a mediator and not a judge * * *.”

Carlos Rincon, Esq., Jan. 14, 147, 148-152: “Must” is right. For all the talk that summary-judgment motions are filed in every case, “we are very cautious.” The data on employment cases reflect the fact that changes in other areas of the law are drawing more lawyers to employment cases, leading to more employment cases. Nor is the wish for actual jury trial and confrontation all that it may seem. Litigants are increasingly anxious for “an opportunity to vent, to tell their story. And that certainly happens.” They are more concerned with solutions, including ADR as a means of achieving solutions.

Tom Crane, Esq., Jan. 14, 156, 156-157: Summary judgment is overused. There is no need to increase its use by changing to “must.”

Michael R. Nelson, Esq., Feb. 2, 58, 60-64, 66-70: Anderson v. Liberty Lobby is cited both for and against discretion to deny. “[T]hen we need a rule.” A court never says that a party is entitled to summary judgment, but that judgment is denied as a matter of discretion. “They find some issue that needs to be tried,” and can do that even with “must.” But at least “must” gives a clear standard. Since the Style change to “should,” and since publication of the present proposal, we are seeing

comments supporting negative discretion to deny summary judgment even though the standard is satisfied. Denial cannot be supported simply because the judge would rather see the testimony at trial; nor for fear of the costs of appeal, reversal, and remand for trial; nor because a trial remains necessary on other issues — it is expensive to bring cases to trial, and summary judgment can narrow the issues to be tried. Trial should be avoided even if it is a simple half-day event with two local witnesses. The same thing should hold on Rule 12 motions to dismiss for failure to state a claim. Rule 12 has never directed that the court “shall” grant the motion, but it too should be a matter of right. “I think ‘shall’ [sic for should?] is just going to create more and more mental leeway with the judge.”

Jeffrey W. Jackson, Esq., Feb. 2, 71-80: As general counsel for State Farm Mutual Automobile Insurance Company surveyed all the first-party lawsuits against the company and its affiliates from November 20, 2005 through November 20, 2008. There were about 6,500 suits in that period. Summary judgment totally disposed of 224 of them, or 3.5%. Voluntary dismissals and other dismissals disposed of 25%. Settlement accounted for 70%. Fewer than 2% went to trial. Most of these cases — 82% — were in state courts, only 18% in federal courts, but all of the states save Pennsylvania have “shall” in their summary judgment rules. We have not yet counted the number of cases in which we moved for summary judgment, nor the number of partial grants. But with grants so low, what is the need to reduce it from “shall” to “should,” rather than “must”? Trial costs five times as much. Nor do we always move for summary judgment — some cases do not support the motion. But if it is supported, we may make it despite the chance of denial and wasted cost — some cases involve questions of law, such as coverage, that we cannot resolve by settling to save the costs of summary-judgment practice. Finally, we have some 120,000 third-party cases against our insureds. The costs of defending them go into our insurance rates. Efficient procedure is important. “Shall” might do the job. And it would go part-way to say that the court must grant summary judgment “unless for good cause stated on the record.”

Kevin J. Dunne, Esq., Feb. 2, 80-83, 86-87: “I’m a defense lawyer. * * * I want summary judgments granted and I think in many instances they should be granted and I don’t think they’re granted enough.” Denials may be by failure to rule, or by outright denial. Some judges deny because they love the right to jury trial — “I think their philosophy should be moderated.” “[J]udges who don’t like to work as hard as other judges don’t like to grant summary judgments.” They should not be able to hide behind “should.” “[T]heir idea is ‘If I deny this, it will settle. If I deny this, it will have to go to a jury.’” I want a more certain system, so I can give a client a better idea of what will happen if we move for summary judgment. Grant or denial is “a huge swing in money.” I often attempt to get permission for interlocutory appeal under § 1292(b) after a denial, and sometimes a judge will grant permission. If we have “shall” or “must” it will be easier to get reversal on appeal. And it may support review by mandamus.

Mary Massaron Ross, Esq., Feb. 2, 87-92: “Shall” was always understood to be mandatory. “Should” “conveys discretion, a hope, an expectation, but not an obligation.” It is difficult to explain denial to a client when there are not genuine fact disputes. And it is costly — not only in money, but in emotion. Partial summary judgment also is important because it can pare a case down, and by doing so reduce the aberrant results that can flow from “a sort of generalized

presentation to the jury.” As an appellate lawyer, I spend a lot of time explaining to trial lawyers and clients why an appeal is not a good thing. Mandamus is not a risk if the rule says “must.” It is an extraordinary writ and the courts of appeals are not likely to grant it. “It’s expensive. It gets the trial judge mad at you if you lose.”

Sharon J. Arkin, Esq., Feb. 2, 94, 98-101: Summary judgment is often granted where it should not be. As a plaintiff’s lawyer in complex litigation I have opposed hundreds of summary-judgment motions, “and most of them are not granted, but I have reversed on appeal dozens which were granted.” “Should” is appropriate. The judge who has a gut feeling there is something in the case should be able to send it to trial even if the plaintiff has not been able to identify specific fact disputes. This goes back to the inference issue. “Shall” has some flexibility. So does “should.” “Must” does not. “[T]he case law has evolved such that flexibility is available.”

Elizabeth J. Cabraser, Esq., Feb. 2, 107, 117: “Must” and “shall” are appropriate for rules directed to lawyers. “Should” is the proper word for a rule directed to judges. The determination to leave the standard unchanged makes “should” the appropriate word. (In addressing point-counterpoint, she also notes, p 112, that when summary judgment is denied “facts that may be quite material come into evidence in the course of that [trial] time that were not enumerated or argued or submitted to the court in the summary judgment stage.”)

Stefano G. Moscato, Esq., for National Employment Lawyers Assn., Feb. 2, 117, 133-135: “Should” is better. In employment discrimination cases “there is no outcry that federal courts are denying summary judgment motions in cases where they should be granted. Quite the opposite is true.” Yes, it would be difficult if a judge ruled that although an employment plaintiff had showed there was no genuine dispute and was entitled to judgment as a matter of law, the motion would be denied. But that does not happen. It is not proper to argue that discretion can be exercised in favor of a plaintiff but never against.

Peter O. Glaessner, Esq., Feb. 2, 137, 140-145: “Shall” or “must” should be adopted. Rule 12 is not the same — it rests on notice pleading, and is invoked before the parties are heavily invested in the litigation. By the time of summary judgment the case already has become quite expensive. Denial will lead to an expensive trial. Individual employment trials in my experience involve five to eight claims and last three to five weeks, even as single-party cases. Summary judgment is an important tool to narrow the case, shaping the duration of the trial and what evidence might be admissible. My clients are primarily public entities and non-profits, not Fortune 500 corporations. A \$50,000 to \$100,000 trial is very expensive for them. Rule 56 practice has historically been geared to “shall.” It has been a mandatory directive. A change to “should” will be seen by some as a change.

Ralph A. Zappala, Esq., Feb. 2, 151-153: “Must” provides a very strong incentive in commercial litigation. Often an adversary cannot stipulate, but will be able to resolve the case when the case is laid out on summary judgment. Or summary judgment gets rid of many things that come in with notice pleading, things that do not matter. “[S]ummary judgments trim away the dead wood and leave a healthy tree for the judicial process * * *.”

Marc E. Williams, Esq., Defense Research Institute, Feb. 2, 157, 163-173: Shifting to “must” will not lead to frequent applications for mandamus to review a denial. “It is something that almost never comes up in terms of mandamus simply because it is so disfavored and the risks are so high.”

Practitioners already are arguing that “should” means the court should let the case go to trial even though there is no genuinely disputed material fact. A similar argument has been made in a pending appeal, although it is framed as an argument that reasonable inferences favoring the nonmovant should have defeated summary judgment.

Any risk that “must” might seem to come too close to denying the right to jury trial can be addressed in the Committee Note. The Note can explain that the change from “should” to “must” is not intended to change the standard, “but to clarify the fact that the change from ‘shall’ to ‘should’ was nothing more than a stylistic change * * *.” The right to jury trial ends at the point where the fact-finder has no facts to find.

As for the case in which there is a novel issue of law that might be illuminated by a full fact record, “[r]egardless of the judge’s individual belief that the record might be better developed at trial, which one could make the argument that any record is better developed at trial — I don’t know if that’s necessarily the case. I think oftentimes the record is more muddled at trial.” When there are no material issues of fact, the question becomes one of law and the court should decide it.

Daniel J. Herling, Esq., Feb. 2, 175-177: Already lawyers are arguing that “should” gives discretion to deny the motion. “I’m not saying judges are buying the argument, but they are continuing to see it.”

Andrew B. Downs, Esq., Feb. 2, 190, 191-195: The change to “should” is generating arguments for discretion to deny. But what discretion can there be if the record shows no genuine dispute as to any material fact, all favorable inferences are recognized for the nonmovant, and the law entitles the movant to win? Subjective denials will lessen respect for the judiciary. But it would be a mistake to attempt to write a rule that compels the judge to decide the motion within a specified deadline.

Michael T. Lucey, Esq., for Federation of Defense & Corporate Counsel, Feb. 2, 202, 203-207: “‘Shall’ is ‘must.’ ‘Shall’ is ‘will.’” Already in mediations, adversaries have asserted that the change to “should” means my case is no longer a summary-judgment case. Courts have not yet come to say this, but the argument is being advanced. And the cost-benefit analysis offered to support discretion is wrong. If the clients want to spend more money on summary judgment than on trial, that’s their right. The view that the court should not devote eight days to summary judgment in a case that will take two days to try is wrong.

Kimberly D. Baker, Esq., Feb. 2, 209-220: The need to abandon “should” is illustrated by a case in which the judge put the parties through prolonged pretrial proceedings and trial preparation without ruling on a summary-judgment motion based on the statute of limitations. The motion was granted on the eve of trial. Both parties would have wanted the “shall” or “must” standard. Nor is it suitable ground to deny the motion because the nonmovant or the court would prefer to have a jury decide.

Both movant and nonmovant need to be confident that a uniform standard is applied. I would go back to “shall.” Must may be a little stronger than shall, but it is much closer to shall than is should. Adopting “must” will not eliminate all discretion. “I think discretion of some kind is always going to be there.” The alternative of saying “must, unless for good cause” will not work. It would take years of appellate wrangling to determine what “good cause” might mean.

Jeffrey J. Greenbaum, Esq., Feb. 2, 221, 235-238: (This testimony reflects the views of officers and members of the council of the ABA Litigation Section, but is not ABA policy.) “Should” changes the standard. “Shall” means “must.” Summary judgment is no longer a disfavored device — Celotex established that. Should will take it back to a disfavored device. Nor should “must” be qualified by “except for reasons stated on the record.” That would open a real Pandora’s box. “[T]he style change has snuck in as a style change.” If the judge thinks the case should go to trial, the judge is going to find a fact dispute on the issue that is really troubling.

Donald F. Zimmer, Esq., Feb. 2, 248, 249-250: A party is entitled to certainty and consistency — if the motion shows there is no genuine dispute, the party is entitled to summary judgment. Almost all state rules use “shall.” “‘Must,’ of course, would be preferable from a defense standpoint, but I see the nuance in between those terms.” Should “is decidedly more voluntary and much closer to ‘may.’”

STATE REASONS

08-CV-056, Hon. Frank H. Easterbrook: The rule should say “must,” requiring a statement of reasons both for grants and for denials. A grant usually is the terminating order. Even for a partial grant, the reasons will help counsel plan the rest of the case. Reasons are essential for a denial when it may be appealable, as with official immunity. The invitation for comment suggests nothing would be gained by requiring the court to state the obvious, “but when the reasons are obvious a sentence or two will do. The problem with using the word ‘should’ in the rule is that it authorizes the judge to keep silent even when the reasons are not obvious.”

08-CV-071, Hon. Paul J. Kelly, Jr.: The Committee Note generates inappropriate pressure to state the reasons for denying summary judgment by stating that the court need not address every available reason. The Note “should make it clear that courts are not required to state on the record the reasons for denying a motion for summary judgment, but rather retain discretion to deny a motion summarily.”

08-CV-134, Prof. Bradley Scott Shannon: There is no reason to distinguish between granting and denying summary judgment. A statement of reasons should be required for either action.

08-CV-156, Brian P. Sanford, Esq.: A court should not be required to state reasons for denying summary judgment. “[T]he court has discretion to deny for reasons of credibility or fairness. A denial results in a trial.”

08-CV-161, Federal Magistrate Judges Assn.: Agrees with requiring the court to state the reasons for granting or denying the motion.

08-CV-180, U.S. Department of Justice: “It is critical that parties understand the basis for the court’s ruling, whether the motion is being granted or denied.” The Department supports this provision.

08-CV-183, Professor Eric Schnapper: It is important to have an explanation for grant or denial of a question-of-law motion; denial of a motion based on the statute of limitations, for example, will often be the last time the issue is addressed in the district court and it is important to have an explanation for purposes of any later appeal. Explanation also is important to permit review when the court grants an evidence-sufficiency motion. But an explanation of denial of an evidence-sufficiency motion is not always helpful. If the judge thinks an explanation will help the parties prepare for trial, the judge can explain. But explanation of a denial usually is meaningless after trial — the sufficiency of the evidence will be measured by the trial record, which usually is different from the summary-judgment record.

Brian Sanford, Esq., Jan. 14, 27 at 31: Findings should be required on granting summary judgment, but there is no need on denial. “[A] judge should have absolute * * * discretion to deny summary judgment and not have to explain it. They still get a trial.”

STANDARD: INFERENCES

08-CV-048, Stephen Z. Chertkof, Esq.: Provide that “a moving party must support its motion by undisputed facts without inferences, while the nonmoving party may rely on both undisputed and disputed factual assertions as well as inferences drawn from such evidence.”

08-CV-066, Richard T. Seymour, Esq.: Rule 56 should require the movant to show that its position does not rely on disputable inferences in its favor, “and that no reasonable inference from the record could be drawn to support the nonmoving party with respect to the contention at issue.” And the nonmoving party should be required to address the question of inferences. Without these requirements, “the court does not have a developed perspective as to the possible inferences in the case, and can result in the court’s inadvertent drawing of inferences in favor of the moving party.” Courts can easily slip into this error.

08-CV-075, Mark Hammons, Esq.: Summary judgment must be denied when different inferences can be drawn from undisputed facts. “Because a change in intent might be inferred from [(c)(2)], the language should be altered to read: “There is no genuine issue as to any material fact or material factual inference.”

08-CV-118, Malinda Gaul, Esq.: The rule should provide that a motion can be supported only by undisputed material facts, “without inferences.” The nonmovant “may support its response by undisputed and disputed facts, as well as any inferences drawn from the evidence.”

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.: The point-counterpoint procedure “does not work well for those cases where the plaintiff relies heavily on inferences to be drawn from undisputed facts, and which depend on placing those facts in a broader context of other facts.” “[T]he complex narratives typical to [sic] our members’ cases cannot be effectively told in a list of undisputed facts.” The nonmovant should be expressly permitted to articulate the reasonable inferences that might be drawn from the listed facts, and to point to other facts in the record that support the inferences.

08-CV-157, Margaret A. Harris, Esq.: “But what about inferences”? They should be added to the rule text: “should grant summary judgment if, after resolving all factual disputes and drawing all inferences in favor of the non-movant, there is no genuine dispute * * *.” In the employment law field, the case law is not clear as to what facts are “material.” The Supreme Court has recognized in *Ash v. Tyson Foods*, 126 S.Ct. 1195 (2006), that “meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.”

08-CV-171, Sue Allen, Esq.: “I am a plaintiff’s employment lawyer and am frustrated by the failure of judges to give my clients the benefit of inferences in their favor.” The proposed Rule 56 changes “will add to the considerable burden that employment law claimants bear * * *.”

Richard T. Seymour, Nov. 17, 15-26: Studying innumerable appellate opinions in employment discrimination cases shows too often summary judgment is granted “by a judge taking a rule of thumb, transmitting it into no reasonable juror could disagree with this principle of law,” and winning appellate affirmance. Jury arguments become rules of law. Of 122 appellate opinions suitable for analysis rendered since this September 1, almost one-fifth reversed summary judgments. Some of the opinions comment on a rush to judgment that uses summary judgment as a docket-clearing device. The problem is structural. Inferences are left out of the equation. The motion is made without ever identifying the range of inferences that can be drawn in favor of the nonmovant, without showing the inferences that must be drawn in the movant’s favor to support summary judgment. “[T]here is no developed argument that enables the judge to take a look at what both sides have to say about the range of permissible inferences.” Inference problems are easily demonstrated by the many cases that require a showing of intent without any open statement of intent by the defendant. The rule text should be changed to require that “inferences be addressed by the parties in an orderly fashion.” (Then describes several sequences of cases in which rules of thumb adopted by lower courts to grant summary judgment against employment plaintiffs have been ultimately rejected by the Supreme Court.)

Prof. Edward J. Brunet, Nov. 17, 52 at 59-60: The suggestion that a reference to inferences should be written into the rule text is unwise. The text “can’t cover every issue, and I think inference is just an asking for liability to go there.”

Margaret Harris, Esq., Jan. 14, 44 at 46-48, 51: Employment discrimination cases are very complex. “Hardly ever do we have direct evidence.” What facts are “material” can be difficult to define when the case depends on complex circumstantial evidence. The Supreme Court recently reversed lower courts that failed to consider the inference of discrimination that may flow from addressing an

African-American employee as “boy.” “[T]he word ‘inferences’ needs to be in the language of the rule. That is the law.” “[T]hink about Hamlet. How do you reduce that to a point/counterpoint? Is the guy crazy or is he not? How do you decide was revenge appropriate or wasn’t it? I mean, all those are inferences that you draw.” “[O]ur cases are proved more like we’re the hounds barking at night. Little tiny — little tiny things.”

Steve Chertkof, Esq., Nov. 17, 34-52: This testimony is summarized with the point-counterpoint procedure. Argues at length that when intent is at issue decision commonly turns on inferences from facts that, standing alone, do not seem “material.” The rule text should make clear that a nonmovant can respond by pointing to reasonable inferences that defeat a motion that seems to show there is no genuine dispute as to material facts.

Hon. Claudia Wilken, Feb. 2, 46, 55-56: Inferences present a problem for point-counterpoint procedure. It may be argued that an inference is not a fact, and cannot be included in the statement or response. “And yet in order to understand the narrative, in order to understand what’s really happening, you need to point out the inferences.”

Rule 56(b)

08-CV-039, Professor Alan B. Morrison: (1) The proposal allows times to be varied by local rule [at the end, he suggests this is a mistake]. Why not allow the parties to stipulate to different times, unless there is a scheduling order? (2) “[A]dditional time should be allowed either side if the other moves for summary judgment at or near the end of the time allowed,” again with an exception for cases governed by a scheduling order. (3) It sounds unduly directory to establish the time limits for response and reply by stating that the opposing party “must” file a response, and the movant “must” file a reply. These should be reduced to “may.”

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: (1) allowing a defendant to move at any time “likely will force many nonmoving plaintiffs to respond to summary judgment motions before they can conduct enough discovery to obtain the support they need for the responses that proposed subsection (c) requires.” [It is not clear just what drafting change is recommended.] (2) The movant — the defendant — can take months to prepare a motion, billing by the hour; 21 days is not sufficient time to respond, “even if the defendant’s statements of undisputed facts are clear and correct.” Plaintiffs’ lawyers typically work for a contingent share of the recovery; imposing the duty of responding to extensive statements of undisputed facts impairs efficiency. Plaintiffs should be allowed to challenge the number of fact statements in the motion, or to challenge the materiality of the facts, before a full response is required.

08-CV-133, Sharon J. Arkin, Esq.: “[A] defendant should not be permitted to file a motion for at least 60 days after its answer has been filed, in order to permit the plaintiff a reasonable opportunity to conduct necessary discovery.” Close judicial supervision will remain necessary to make sure that a recalcitrant defendant does not make discovery so difficult as to impede opposition to the motion. (California has expanded to 75 days the time to oppose, Code Civil Procedure § 437c.)

08-CV-134, Prof. Bradley Scott Shannon: The reference to “local rules” should be deleted in favor of a uniform national standard. Exceptional cases can be dealt with by court order. And authority for a court order can be found in Rule 16. In addition, the rule should not say that an opposing party must file a response; the consequences for not filing are severe, but there is no obligation to respond.

08-CV-156, Brian P. Sanford, Esq.: The time limit should be 30 days before the close of discovery. Motions often present declarations or witnesses not deposed or documents not emphasized. Discovery should be available to respond to the motion.

08-CV-179, Robert J. Wiley, Esq.: Discovery usually ends before the motion is made. “This encourages defendants to hide the ball and litigate by surprise.” It is important to allow the nonmovant to depose the witness after a Rule 56 affidavit is filed. Summary-judgment motions should be due not less than 45 days before the close of discovery, with a corresponding 45-day response deadline.

08-CV-180, U.S. Department of Justice: Supports the timing provision, including the response provision recognizing that under Rule 12(a)(2) the United States may have 60 days to plead, and that the 21-day response period should be measured from the time the responsive pleading is due.

08-CV-183, Professor Eric Schnapper: The movant controls the time of moving, and often relies on material — most notably affidavits — unknown to the nonmovant. The nonmovant’s dilemma is aggravated by the inadequacy of present Rule 56(f) (to become 56(d)), which virtually forces a simultaneous response to the motion and request for greater time for discovery. The rule should require that the movant disclose any affidavits and documents it intends to rely on at least 90 days before making the motion and before the close of discovery.

Brian Sanford, Esq., Jan. 14, 27 at 29-30: The motion should be filed before discovery is ended. I cannot cross-examine a declaration. If the motion is made before the discovery deadline, “I can notice that person up for a quick deposition, I can send out another set of discovery requests.” I should not have to make a special motion for added discovery time. Some judges let me have more time, but some do not.

Sharon J. Arkin, Esq., Feb. 2, 94, 105-106: There should be more time to respond. The plaintiff should have at least 60 days to conduct discovery after the motion is served.

Rule 56(c)

POINT-COUNTERPOINT

08-CV-003, Leslie R. Weatherhead, Esq.: “Enthusiastically” supports proposed Rule 56. Sets out E.D.Wash. Rule 56.1, a point-counterpoint rule that permits the court to assume the facts claimed by the moving party are admitted without controversy except to the extent they are controverted by the nonmovant’s “counterpoint” statement. “This procedure forces the disorganized lawyer to think clearly about the evidence in his or her case before bringing a motion for summary judgment, and

forbids the wily practitioner from manufacturing a spurious ‘genuine issue of material fact’ by raising a confusing welter of facts in opposition * * *.” [The local rule allows the nonmovant to dispute or “clarify” a fact. “Clarify” is a word that may deserve consideration.]

08-CV-006, Hon. Avern Cohn: Suggests adding a requirement that the movant and nonmovant integrate the statement, response, and supporting citations in a single document. Each fact would be set out separately, in a form that includes statement, response, supporting citations, and response citations. In like fashion, a single document (apparently a separate single document) would be used to merge any additional facts stated by the nonmovant and the movant’s reply.

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: By requiring additional specificity of proponents and opponents, the rule “will ultimately serve to refine and further enhance the summary judgment process.”

08-CV-009, Hon. G. Patrick Murphy: Seems to be addressed to subdivision (c), recounting that “this procedure was tried in our court by local rule and it proved to be a waste of time * * *. An entire motion practice developed around what is an ‘undisputed fact.’” The practice adds to the tremendous advantage larger firms have over smaller firms. The amendment will be a disaster; “don’t do it.”

08-CV-010, Hon. Scott Kreider: “[C]ases where parties have submitted their statements of fact in enumerated paragraph format often lead to more litigation over what is and is not disputed * * *.” If a separate statement of facts is to be required, it would be better to have a joint statement that sets out the opposing party’s responses with each alleged fact. And it might work better to require citations to the record in the argument section of the summary judgment memorandum; many lawyers simply refer in the argument to the statement of material facts, a practice that “is often annoying and time consuming.”

08-CV-014, Hon. Ortrie D. Smith: Joins Judge Sedwick’s opposition, 08-CV-017. “This may be one of those instances where making work does not equate to making better.”

08-CV-016, Joseph D. Garrison, Esq.: The problem with detailed statements is that some lawyers defending individual employment cases make abusive submissions detailing hundreds of facts, imposing inappropriate burdens on the small firms that often represent plaintiffs. The remedy should be a motion to strike an abusive submission; there is no need for other sanctions. This proposal is summarized at greater length with Rule 56(e) on defective motions.

08-CV-017, Hon. John W. Sedwick: Judge Sedwick compares practice in the District of Alaska, his own court, with practice in the District of Arizona, where he has been assigned more than 1,200 cases over the last ten years. Arizona Local Rule 56.1 “is in substance identical to” proposed Rule 56(c). Experience shows it is a mistake that increases costs for clients, imposes greater burdens on the court, threatens to force busy district judges to transfer still greater parts of civil litigation to magistrate judges, will yield little or no benefit in better dispositions, and will differentiate federal practice from state-court practice. These consequences flow from the greater length of motions

under this practice, and are augmented by a corresponding increase in motions to strike. “Summary judgment papers in Arizona can be truly gargantuan”; in one recent case, the motion listed 322 facts, and appended 524 pages of exhibits. “A list of 20 to 30 statements of fact with 75 to 100 pages of exhibits is probably typical.” It takes “up to twice as much time” to decide these motions. “One might speculate that the elaborate statements of fact required by the Arizona rule improve the quality of the court’s decision. That has not been my observation.” Even if there is some benefit, it likely “would be small, for summary judgments are not often reversed due to a factual error by the trial court.” Without this rule, a motion that simply asserts there are no material facts in dispute may be met by a response that agrees and argues only the law, or by a response that points to two or three issues of disputed fact. It is rare to encounter a response that provides a long list of allegedly material and disputed facts. Under proposed subdivision (c), “[b]ecause counsel for the moving party cannot know what facts the opposing party might contend are material, he or she is very likely to create a longer list than is actually necessary. * * * Lawyers who have even a tiny doubt about whether a fact should be listed will usually resolve that doubt in favor of adding the fact to the list.” And responding parties may be led into “substantial effort to show that facts which actually do not make any difference are in dispute.” Once started down this track, the responding party also may be tempted to include additional facts that will then be attacked by the reply.

08-CV-020, Hon. Joseph M. Hood: Joins Judge Sedwick’s comments, 08-CV-017, noted above. “This may be one of those instances where making work does not equate to making better.”

08-CV-028, Hon. H. Russel Holland: Judge Holland joins Judge Sedwick. Like Judge Sedwick, Judge Holland has “assisted with Arizona civil cases for the last ten years.” As compared to Alaska, the Arizona local Rule 56 practice is “not compatible with” the purposes of Rule 1. The separate statement of facts requirement “causes summary judgment motion practice to be more complex and convoluted.” The Arizona rule “actually encourages counsel to claim the existence of fact disputes that either do not exist or are not material to the case.” And it generates subsidiary motion practice “in somewhere between one-third and one-half of the cases where summary judgment motions are made” — “squabbles over whether a party has or has not met all of the technical requirements of the Arizona rule and/or efforts to strike portions of a party’s separate statement of facts. We rarely see that kind of subsidiary motion practice in Alaska * * *.” (Judge Holland offered similar points in his summary, 08-CV-149: Counsel generally do a responsible job of setting forth in a memorandum of points and authorities the material facts that are claimed to be undisputed.)

08-CV-030, Hon. Graham C. Mullen: Also joins Judge Sedwick’s comments. There has been little difficulty with summary-judgment motions in the Western District of North Carolina. “The lawyers have all but uniformly cited to appropriate parts of the records in their briefs.” The occasionally sloppy motion can be dealt with by a simple direction to refile. Rather than fix a problem, proposed Rule 56(c) will add cost, delay, burden on the courts, and unnecessary wheel spinning.

08-CV-033, Hon. Inge Johnson: Separate paragraphs may be workable, but it will not work to require separate numbered paragraphs for undisputed facts. “I have had experience with such a rule and you would be surprised how many attorneys cannot count. * * * It is easier to read just an essay about what the undisputed facts state and the reference to the record.”

08-CV-037, Professor Adam Steinman: There is a minor flaw in (c)(2)(B)(ii), which can be fixed: “(ii) may in the response concisely identify in separately numbered paragraphs additional material facts — as to which there is at least a genuine dispute — that preclude summary judgment.” It should be clear that the nonmovant need not rely on facts established beyond genuine dispute; it suffices that the fact is material and subject to dispute.

08-CV-039, Professor Alan B. Morrison: (1) Offers a number of drafting suggestions that carry through the suggestion made for subdivision (b), reducing “must” to “may” in many applications. (2) Would add two words in (c)(4)(A): “(A) A statement that a fact cannot be genuinely disputed or that is genuinely disputed must be supported by * * *.” (3) It is unclear how a party “shows” that an adverse party cannot produce admissible evidence to support a fact. It does not work simply to cite to parts of the record that do not show admissible evidence; explanation is needed. Should the explanation be in the statement of facts, or in the brief? If in the statement, the statement will be made longer and more argumentative than a statement of undisputed facts usually is. If in the brief, page limits may be effectively reduced. (4) It is not clear how to relate the (c)(5) statement that cited materials are not admissible in evidence to the (c)(6) requirement that an affidavit must set out facts admissible in evidence. The confusion can be eliminated by revising (c)(6): “An affidavit or declaration may be used to support a motion, response, or reply ~~must be~~ if it is made on personal knowledge, sets out forth facts * * *, and shows * * *.”

08-CV-042, Hon. Robert G. Doumar: Proposed subdivision (c) “is unnecessary and approaches changes for the benefits of billable hours of large law firms.” Continuing amendments of the Civil Rules have raised the cost of litigation so high that “small businesses of the United States cannot afford to ever be in federal court.” Most lawyers in the Eastern District of Virginia refuse to come to federal court because of the complexity of litigation under the Rules. This proposal “promotes less benefit than it costs.”

08-CV-043, Hon. David C. Norton: Proposed (c) “would make our jobs [as district judges] more difficult, not less difficult. Also, it would raise, not lower, the cost of litigation.” Discarding (c) will require revising (e), which refers to (c), and also “jettison[ing] Proposed Rule 56(g) in its entirety, for it would be inoperable without Rule 56(c).”

08-CV-044, Claudia D. McCarron, Esq.: In her early years in practice, summary-judgment motions commonly stated “for reasons stated in the attached memorandum of law”; the memorandum provided a narrative. Then some districts adopted local rules, or individual judges adopted individual practices, requiring a statement of material facts and a response. “[R]equiring such a statement is useful and rarely unduly burdensome.” It “allows the moving party to impose clarity on a case * * *. This is particularly valuable in federal cases where notice pleading permits suits to be initiated without specificity * * *.” “Opposing parties who have a clear understanding of their respective theories also benefit from being required to state the material facts and respond to them.” Cross-motions are often filed in insurance disputes. Left to narratives, each party clings to its own reality and “the parties produce motions papers that seem nearly unrelated. * * * Advocates will benefit from the discipline imposed on them by requiring statement of fact and responses thereto.” The process “ensures that the parties reach some shared reality regarding their agreements and

disagreements.” There is a risk that the procedure will generate motions “that arrive in boxes and overwhelm a smaller firm. However, in these cases, discovery materials and trial exhibits will be no less burdensome.”

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: Offers several points.

(1) Conceptually, the party who bears the trial burdens should have the same freedom as at trial to present the facts as a persuasive whole, not rent “into individual threads of fact, each of which the court must consider in isolation.” The facts are found by listening to a narrative, through a process of making sense of information by creating a meaningful summary. Analytical abilities are radically insufficient for full competence in telling and understanding stories. The point-counterpoint process distorts the factfinding chore.

(2) The rule is rigid, trapping the nonmovant into a response pointing to admissible evidence or explaining why none is available.

(3) The (c)(4)(B) provision that the court need not consider materials not called to its attention creates an incentive for better-funded parties to load their fact statements so heavily as to increase the chance that a poorer adversary will miss something. In districts with local rules that resemble the point-counterpoint process, movants “pile up fact averments to an absurd degree * * * in an attempt to obtain or exploit a tactical advantage over a less well-resourced opponent.”

(4) There is no procedure for ruling on the admissibility of the materials relied upon: what is the test of relevance or materiality at the Rule 56 stage? Does a balancing test apply? What of the ability to “link up” one piece of evidence to another, or evidence whose admissibility depends on other evidence?

(5) There is no provision for responding to a listed fact “by pointing out that the fact does not allow the inference the movant wants to draw, or that the fact is divorced or disaggregated from a context that puts it in a different light and would allow other inferences against the movant * * *.” Some judges in districts with local rules similar to proposed Rule 56(c) are reported to reject such filings “because they do not fit into a specific provision of the rule.”

08-CV-047, Professor Edward Brunet: There will be complaints that the point-counterpoint procedure will increase costs both for movants and nonmovants. Some lawyers already prefer state courts because of the perceived brevity, simplicity, and lower costs of their procedure. But the point-counterpoint procedure is desirable. Stating the facts will focus the judge’s attention. Providing record citations “requests work already done by careful counsel,” and will save the court’s time in searching the record. The nonmovant “should see the summary judgment issues with greater clarity following efforts to cite to record, a vision that greatly facilitates case evaluation and settlement promotion.” The Committee Note, p. 38, line 76, emphasizes the need to avoid over-long motions; the Note as a whole should be revised to better reflect the importance of this concern.

08-CV-048, Stephen Z. Chertkof, Esq.: “To discourage unnecessarily lengthy lists of proposed disputed facts * * *, the proposed rule should define ‘material facts’ as those ‘that might affect the outcome of the suit under the governing law’ * * *.” The rule text also should provide that summary judgment must be denied if the nonmovant shows a genuine dispute as to any single fact designated as material by the movant. Facts that are not designated as material may not be included in the statement of facts, but may be included in the brief when that helps full understanding.

08-CV-049, Professor Elizabeth M. Schneider: Expresses concern that the proposed point-counterpoint procedure will have a particularly adverse impact on employment discrimination and other civil rights actions. The testimony of judges who have experience both in districts with this procedure and districts without this procedure is telling. The procedure adds additional and unnecessary work for parties and the court without offsetting benefit. The effect of breaking the case down into too many discrete parts is to detract from the often necessary holistic appraisal of different aspects of the evidence in the context of the legal claims. “Slice-and-dice” atomization is a mistake. There is no real reason to do this — only 20 districts have adopted local rules analogous to the full point-counterpoint procedure proposed now.

08-CV-053, Hon. Benson Everett Legg: The judges of the District of Maryland completely agree with Judge Sedwick, Comment 08-CV-017 above, and unanimously urge that proposed Rule 56(c) not be adopted.

08-CV-055, Gregory P. Joseph, Esq.: Offers both criticisms and drafting suggestions.

“In my practice, statements of indisputable fact (“SIF”) are expensive and pointless.” Consider the mammoth statement needed in a big corporate fraud case. The response to each paragraph of the statement would “meticulously analyz[e] each verb, adjective, adverb and noun in every statement. Even those statements with which there is no substantive disagreement will largely be restated to make sure that the phrasing is acceptable and that nothing is being snuck by.”

A movant cannot trust that the nonmovant will agree to anything, so every statement must be restated in an affidavit or declaration.

If there are simultaneous motions, “as is common,” there will be competing SIFs.

How does Rule 56(c) apply when a motion under Rule 12(b)(6) or 12(c) is converted to summary judgment by considering materials outside the pleadings?

The Rule 56(c)(3) provision that a party may accept or dispute a fact either generally or for purposes of the motion only should have a default provision — and it should be that if the nonmovant does not specify, an acceptance or denial is for purposes of the motion only. “A point that a party may be willing to concede or is forced to fight in one constellation of claims, to make one argument * * * on summary judgment, may be prejudicial before a jury or otherwise harmful under the post-summary judgment array of claims and relevant facts.”

So too, the movant's statement of indisputable facts should be for purposes of the motion only. An example is a motion based on a limitations defense, in which the defendant recites the notoriety of its misconduct. No matter how careful the defendant may be to hedge the statement so it is not an admission of "mis"conduct, there may be slips.

08-CV-057, R. Matthew Cairns, Esq.: For years the District of New Hampshire has required a separate statement of material facts and a response that specifically lays out the facts that are disputed. This practice "has forced movants and opponents to focus on that which is truly material * * *, rather than simply asserting a long litany of facts * * * or throwing numerous facts against the wall * * *. It has also focused the court's attention and permitted it the luxury of not having to decipher what a party thinks is material or in dispute. This latter point is particularly important in cases where there are pro se litigants * * *."

08-CV-060, Federal Civil Rules Committee, American College of Trial Lawyers: "[T]he adoption of the 'three-document' approach to motions and oppositions that already is used in the vast majority of district courts should provide uniformity of practice across all federal courts."

08-CV-062, Hon. Roger L. Hunt: Joins Chief Judge Sedwick's comment, 08-CV-017, "strongly urging against" proposed Rule 56(c). It would only serve to increase the cost of litigation and the burden on the Courts, with no appreciable benefit."

08-CV-064, Hon. James C. Fox: Also joins Judge Sedwick's views, 08-CV-017, urging rejection of proposed Rule 56(c).

08-CV-072, "Practitioners' Comment": Seventy lawyers — one of them Gregory P. Joseph, author of 08-CV-055 — succinctly "urge the Committee not to mandate the use of statements of undisputed fact ("SUF") as the default rule in connection with all summary judgment motions but, rather, to make the default rule that no SUF is required, permitting the judge, in any particular case, to require an SUF if he or she deems it appropriate."

08-CV-090, Hon. Claudia Wilken: Judge Wilken writes on behalf of the Northern District of California. "From at least 1988 until 2002" the court's local rules required "a statement of material facts not in dispute." [Apparently there was no express requirement of a counterpoint response.] The rule was abandoned in 2002. "Since this rule change, we have found the summary judgment motion practice to be much improved." This improvement is described as "our experience with judicial efficiency and understanding." Comments by lawyers will "express the inefficiencies and expense that proposed Rule 56(c) would cause them and their clients."

Under the local rule, memoranda supporting the motion commonly also stated the undisputed facts; the separate statements "were supernumerary, lengthy and formalistic." "Opposing parties frequently filed objections * * *, and sometimes their own statements of purportedly undisputed facts," again duplicating the fact statements in the memoranda. (08-CV-155 adds that the statements often sounded "almost like fact pleading or requests for admissions." The fact statements in movants' briefs were repetitive but more understandable. Nonmovants often offered objections and

opposing facts that “really raise[d] only semantic disputes over the way the facts were phrased.” And matters became really complicated with cross-motions, where the same party is both a nonmovant, whose facts must be accepted as true, and also a movant who must accept the truth of the other party’s facts. “[T]he statement of undisputed material facts is a format that particularly lends itself to abuse by the game-playing attorneys and by the less competent attorneys.”)

“A complex narrative cannot be effectively told in a list of undisputed facts. There may be facts that are disputed, where the disputes are not dispositive but are necessary to an understanding of events.” The nonmovant cannot effectively communicate its version if it must do so by responding in the order of the movant’s statement, “again, without the context of disputed but important facts.” Then the nonmovant must set out its own set of undisputed facts outside the chronological order established by the movant’s statement.

“Further, a case whose disposition relied on inference cannot be well explained in formal lists of facts. * * * Even the nomenclature of undisputed facts is counter-intuitive; often the ultimate facts are legitimately disputed, due to competing reasonable inferences * * *.” “The complex circumstances of a case can best be expressed in a narrative statement which addresses the uncontestable facts, in the context of all of the facts necessary to explain the events, in a meaningful chronology.”

(08-CV-155 adds that since abandoning point-counterpoint in 2002, fact statements are submitted in narrative form as part of the briefs and within brief page limits. The practice is much improved. Narrative statements address “incontestable facts and reasonable inferences from them, in the context of all the facts necessary to explain the events, in a meaningful chronology.” The opposing party can provide its own narrative, unrestricted by the chronology chosen by the movant. Objections to admissibility are made in a motion to strike, or — better — in the brief. This procedure works better than a procedure that would require a separate statement of undisputed facts as part of the brief; the separate statement either would require duplicating the facts, or attempting to use the statement as the narrative.)

08-CV-098, E.D.N.Y. Committee on Civil Litigation: An earlier Local Rule 56.1 required a statement of material facts about which the moving party contends there is no genuine issue, with a specific record citation. The opposing party is required to file a response. The Rule was similar to proposed Rule 56(c). “Many attorneys in our district expressed confusion about the meaning and operation of the predecessor Local Rule 56.1 * * *.” It was revised.

08-CV-100, L. Steven Platt, Esq., writing “As a past President of the National Employment Lawyers Association”: The point-counterpoint system used in the Illinois district where Mr. Platt practices “doesn’t work and unfairly favors the defendants.”

Statements of facts allegedly not in dispute are too long. In one recent case the statement recited 250 facts. Responding entails “an enormous waste of time and extreme burden”; the burden is particularly severe for employment plaintiffs’ lawyers who typically do not charge on an hourly basis.

The point-counterpoint system is, for many reasons, “biased against plaintiffs and their lawyers in civil rights cases.” (1) The rule recognizes only one mode of response — advancing facts that contradict the asserted facts. (2) There must be a way to respond to facts that “may be accurate, but that are misleadingly [sic] or are stated disingenuously. It may be true that the employer has a written policy prohibiting discrimination; but it also may be true that it is not enforced — yet the nonmovant could be sanctioned for providing the context. (3) The fact may be correct but irrelevant. (4) The fact may be correct, but the inference the movant claims is unwarranted. An employee violates company policy and is fired, but the full facts show that all employees violate the policy and this employee was instructed by his supervisor to violate the policy. (5) The asserted fact may depend on the credibility of a witness the jury is not required to believe. (6) The asserted fact is based on inadmissible evidence. Under the proposed rule the nonmovant cannot rely confidently on its inadmissibility argument, and thus must undertake the additional work of responding fully. (7) An accurate fact may have “a different significance if considered in conjunction with other facts that are not listed.” An employee may admit that her supervisor never openly propositioned her, but have a great deal of other evidence of quid-pro-quo harassment. The facts cannot be treated in atomized fashion.

It is unfair to allow the movant to reply but not to provide a sur-reply. “That is especially true in light of the growing practice on the part of some movants of saving major points for reply briefs to which non-movants are not permitted to respond.”

08-CV-104, Hon. Robert L. Miller, Jr.: Chief Judge Miller writes for all the District and Magistrate Judges of the Northern District of Indiana. The Southern District of Indiana once adopted a local rule that was much like the proposed point-counterpoint procedure. The Northern District studied the procedure in the hope that state-wide uniformity could be achieved by adopting a parallel local rule, but decided that the rule was “likely to lead to inefficiency.” The Southern District eventually abandoned its rule because it “led to too much satellite briefing, such as motions to strike for non-compliance with the requirement.” Rule 56 leaves crevices in practice that, for the most part, have been admirably filled by local rules or individual orders. Uniformity is not an end in itself, but should be pursued only when it serves the goals expressed in Rule 1.

08-CV-109, Ellen J. Messing, Esq., for Seven Massachusetts Lawyers: The District of Massachusetts has a point-counterpoint practice. “From our perspective as plaintiffs’ civil rights lawyers, this system is an unmitigated disaster.” (1) “[T]he sheer length of the lists of assertedly not-in-dispute material facts encouraged by the system tends to overwhelm plaintiffs and their lawyers.” In a recent case the statement, including exhibits, exceeded 600 pages. The labor required to show that all of them are unsupported, irrelevant, or misleading is an enormous burden. (2) The methods allowed to respond are too narrow; the rule “is profoundly biased against plaintiffs and their lawyers in civil rights cases.” The asserted fact may be accurate, but misleadingly stated, disingenuously utilized, irrelevant, or offered to support an unwarranted inference. The fact may turn on the credibility of witnesses the jury is entitled not to believe — “As such, it cannot be meaningfully disputed.” The fact may be inadmissible, but the nonmovant must respond fully because the admissibility issue is seldom certain. The significance of the fact may turn on other facts that are not listed. (3) It is “profoundly one-sided” to stop the exchanges with the movant’s reply. “In

practice, movants' reply briefs virtually always raise central points that require a response * * *." There is "a growing practice on the part of some movants of saving major points for reply briefs to which non-movants are not permitted to respond."

08-CV-110, G. Edward Pickle, Esq.: Point-counterpoint "facilitates resolution of summary judgment motions. Non-responsive arguments and obfuscation are rendered more obvious."

08-CV-111, Carlos Rincon, Esq.: The proposed procedure "would preserve and establish a more efficient summary judgment practice." Litigants and counsel will remain focused. "[B]y highlighting what truly is at issue based on the case record, the parties are on notice of what truly is critical in a case and it affords the parties a sense of transparency in understanding what the Court construes as being more significant * * *."

08-CV-113, John H. Martin, Esq.: Strongly favors point-counterpoint. He has practiced in districts that do it, and in those that do not. The procedure "requires the parties to specify clearly what facts they contend are, or are not, truly in dispute." Although a party may list facts that are not material, the nonmovant has ample opportunity to demonstrate which dispositive facts they contend are disputed. The result usually is a very small number of potentially disputed issues.

08-CV-114, Gregory S. Fisher, for Alaska Chapter, Federal Bar Assn.: Point-counterpoint "will needlessly increase fees and costs as it will take more time to draft, review, and file motion papers. It will also take more time to analyze responses * * *. Current practice provides for a streamlined filing that incorporates argument with relevant facts in one filing." The experience of courts and judges that have worked with this procedure and rejected it is telling. A district that likes the procedure can adopt it by local rule.

08-CV-117, Cary E. Hiltgen, Esq.: "[T]he requirement of undisputed facts will bring consistency nationwide, promote good motion practice and will allow Courts the ability to easily and properly adjudicate claims * * *."

08-CV-118, Malinda Gaul, Esq.: Supports the proposed (c) procedures, but the requirement that the movant present only material facts that cannot be genuinely disputed should be enforced by providing that the court must deny the motion if the nonmovant shows a dispute as to any fact the movant claims is material. (And the movant may not advance inferences, while the nonmovant may respond with undisputed facts, disputed facts, and inferences.)

08-CV-120, Hon. John W. Sedwick: Judge Sedwick writes for all the District Judges of Alaska (he wrote for himself, 08-CV-017, summarized above). The judges unanimously oppose (c). "[I]t is particularly discouraging to see a committee of the Judicial Conference pursuing a concept that will make a significant aspect of our work more burdensome."

08-CV-121, Phil R. Richards, Esq.: (It is unclear whether this comment is on behalf of the American College of Trial Lawyers.) "[A]n explicit disclosure of the undisputed facts or any statement of

evidence disputing the opponent's facts is necessary," but it is better included in the brief rather than a separate statement. A separate filing only increases the paper required.

08-CV-123, Hon. Barbara B. Crabb: W.D. Wis. uses a procedure very much like proposed (c), "and I find it very helpful * * *. Yes, the process can be daunting, particularly in patent cases and class actions, but it does seem to cut through the chaff." But it should not be written into Rule 56. Other courts find that different procedures work better for them. "So long as each court makes it clear to the litigants what its expectations are, I'm not convinced that litigants are affected adversely by not having a consistent federal rule on the subject."

08-CV-132, Hon. Timothy J. Savage: "Having used the same procedure that is proposed * * * for several years, I support the proposed new rule. Using the procedure requiring the parties to specifically identify disputed and undisputed facts with citations to the record has been invaluable. * * * The procedure eliminates the wasteful and needless searching of the record with which the attorneys are familiar and the court is not." Sufficient flexibility is preserved by allowing the court to depart by order in the case.

08-CV-133, Sharon J. Arkin, Esq.: Point-counterpoint "is * * * very disturbing * * *. because it encourages defendants to set forth excessive, unnecessary facts that must be addressed by the plaintiff in a painstaking, piecemeal way." California has a similar procedure; defendants often propose more than 100 facts. "Responding to these individual facts is daunting, tedious, time-consuming and resource-intensive." "I am convinced that defendants deliberately utilize this process in the hope that plaintiff's counsel will simply be overwhelmed and unable to adequately respond * * *." The effect is exacerbated by "the very common circumstance that trial court judges — probably because of workload issues — simply do not consider the effect of reasonable inferences from the facts set forth in the point-counterpoint." Even if the fact is true, that does not mean there are no contrary inferences. "But I have found it common that judges ignore the reasonable inferences and simply grant summary judgment if the plaintiff cannot cite to directly contrary evidence."

08-CV-135, Marc E. Williams, Esq., for DRI: Point-counterpoint will identify the facts and legal issues at an early juncture. The court will be focused solely on the material issues. Some commentators fear that this procedure "will leverage the advantage that 'larger firms' have over 'smaller firms,'" but "any additional work associated with the litigation of the statement of undisputed facts will likely be more than offset by a process that is streamlined to focus the subsequent litigation solely on issues that are relevant to a swift resolution."

08-CV-136, Andrew B. Downs, Esq.: This procedure is similar to the procedure adopted by California in 1984. It works, and proposed Rule 56 improves on California practice. Allowing the court to go beyond the motion under proposed 56(f) protects against abuse by not restricting the court to the formulations used by the parties. There are lengthy motions under this procedure, but other motions will be more narrow or will not be filed at all because of this procedure. But some judges have standing orders that require the parties to provide a joint statement of undisputed facts. That procedure can work when all lawyers are intellectually honest and fully candid with the court

— and have clients that will authorize unfavorable admissions — but it often precludes meritorious motions or generates ancillary motion practice. The Committee Note should disapprove court orders for a joint statement.

08-CV-140, Donald F. Zimmer, Jr., Esq.: Point-counterpoint, the practice in California state courts, “is neither wasteful nor cumbersome, * * * but actually helps focus the parties on the material facts at issue.” Practitioners will attest that “shorter is often better.” Courts will not be fooled by extraneous disputes over non-material facts, and “can discern whether papers have been lodged in an attempt to obfuscate the real issues at hand.”

08-CV-142, Hon. David F. Hamilton: From 1998 to 2002 S.D.Ind. required separate “point-counterpoint” documents, as the proposal would do. But this “provided a new arena for unnecessary controversy.” Hundreds of facts were asserted, and “became the focus of lengthy debates over relevance and admissibility.” Lawyers made sterile objections and trivial arguments over admissibility and relevance “that would never be made in a trial.” “[W]hat happened was an exponential increase in motions to strike.” But the procedure brought a clarity we were reluctant to abandon. The revised local rule requires that the movant include a statement of material facts not in dispute in the brief; the nonmovant is required to include in brief a statement of material facts in dispute. Both are required to support their positions by citations to the record. This works because the page limits on briefs curtail overlong statements.

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.: “The efficiency and cost of opposing motions for summary judgment” is important to NELA members, who mostly are sole practitioners or work in offices with no more than 3 attorneys and generally no paralegals. In point-counterpoint districts NELA members find that the procedure allows “(and even encourage[s]) motions which contain unrestricted statements of supposedly undisputed material facts.” The statements are “very lengthy, overly burdensome, abusive * * *.” “[T]he real merits get lost in the shuffle.” The defendant can begin preparing the motion long in advance. “The small-office plaintiff’s counsel, receiving a statement with more than 100 statements, supposedly all material, has no way of responding effectively * * *.” Admitting facts solely for purposes of the motion is too risky because a lawyer cannot predict what facts the judge will agree are immaterial. The nonmovant should be allowed to strike an entire statement that is not concise. (But point-counterpoint might work if there is an effective way to ensure that statements of fact are concise, to allow express arguments for inferences from both undisputed and disputed facts, and to allow a sur-reply.)

08-CV-144, Ralph A. Zappala, Esq.: Point-counterpoint can lead to efficient disposition by pushing the parties to recognize “what evidence exists and what evidence really matters to the case at hand.” “[I]n commercial litigation, too often general pleadings lead to expensive discovery based upon causes of action that will not stand the test of scrutiny.” Summary judgment can remove parts of the case, saving “large sums of money otherwise spent on discovery.” The procedure also can lead to better evaluation of the merits and thus settlement — in an action to collect on a contract claim, for example, a counterclaim for breach of the plaintiff’s obligations can have this effect.

08-CV-145, Professor Stephen B. Burbank: This comment, focused entirely on subdivision (c), cannot be adequately summarized — it fits into 13 pages as much content as a law review article of considerably greater length. The conclusion is that point-counterpoint procedure is too risky to adopt. Rule 56 has been put to uses never contemplated by its makers, but of itself that is not bad — Rule 56 operates in a litigation environment never contemplated by its makers. There is, to be sure, great disuniformity in practice now. But why impose a practice adopted by a minority of courts — and abandoned after experience by a few — on the much larger majority that have not adopted it? Good things may come from adopting good local rules into the national rules, but bad things also may happen — the 6-person jury is a classic example. Many of the comments show the costs of this procedure; 08-CV-72 is from “some seventy of the most prominent plaintiffs’ and defense lawyers in the country.” FJC data show that point-counterpoint procedure is associated with substantial delay in deciding — the risk of uncertainty about causal connections should be borne by those promoting this format. This procedure has a potential for abuse by strategic motion practice designed to extract favorable settlements from plaintiffs; at a minimum, the Committee should seek empirical data about the costs of preparing motions and responding under this procedure. The increased rate of dispositions shown by the FJC study, further, is offset not so much by fewer trials as by fewer settlements. And the FJC data show that the impact may not be neutral, but instead tends to more terminations by summary judgment, particularly in employment discrimination cases. For example, the FJC data show that within point-counterpoint districts, the “no disposition” rate is much lower in employment discrimination cases than in other types of cases. The high rate of disposition may result not from deserved differences but from the incentive this procedure furnishes “to take a partial and incomplete view of the relevant facts and/or to distort legal doctrine by subdividing it specifically for the purpose of enabling summary adjudication.” Summary judgment in employment discrimination cases, further, runs the risk of cognitive biases, of “cognitive illiberalism” blinding a judge to the view of the facts that would be taken by jurors whose life experiences better reflect the plaintiff’s experiences. In all, “the risks of uncertainty that proposed Rule 56(c) presents are far too serious to warrant proceeding with its adoption at this time.”

08-CV-146, March Buchanan, Esq.: Experience in employment discrimination law shows that the point-counterpoint procedure “would be nothing more than abusive, in that it allows the defendant to select the theme of the motion, and prevents the plaintiff * * * from submitting reasonable inferences from the facts.” How does a plaintiff point out that the weight of harassment accumulated over time? — is this fact, or inference? The plaintiff’s testimony of her experience would be challenged as inference, not fact, by a motion to strike; the procedure will spawn motions that seek to remake the law of evidence.

08-CV-147, Gene Graham, Esq.: The proposed changes put the movant in a very favorable position. “Plaintiffs in employment cases already have to overcome a very negative attitude toward civil rights cases in the 8th Circuit.” Plaintiffs should not be put in a straight jacket in responding to the motion.

08-CV-148, Thomas A. Packer, Esq.: A similar practice in California state courts has generally positive support from counsel and judges. “The reality faced by the courts and litigants is that undisputed material facts must be set forth in some fashion in any event. Having them set forth in

an orderly, clear manner benefits all. * * * [O]ne bringing a motion for summary judgment tends to err on the side of a smaller, rather than larger, list so that there are fewer facts for the opposition to contest.”

08-CV-149, Hon. H. Russel Holland: This summary is noted with Judge Holland’s first comment, 08-CV-028.

08-CV-150, Elizabeth J. Cabraser, Esq., for Public Justice: Point-counterpoint forces a binary approach — yes-no, on-off — to a factfinding process that is essentially analog. “The whole truth * * * is often greater than the sum of its parts.” “Erecting a haystack of [statements of uncontested facts] frustrates and obscures the search for that ultimate rarity: the truly material and genuinely undisputed fact on which a purely legal question turns.” The binary approach places a deep discount on “the central adjudicatory concepts of inference, credibility, and context.” It will add cost in time and dollars. Summary judgment can work well in the rare case “when the pertinent facts are well-defined and incontestable.” But that is not true of the complex disputes that are the province of the federal courts. The point-counterpoint procedure can work well in some cases, and can be required on a case-specific basis by invoking Rule 16 — but most often, its value cannot be determined until the moving papers, and perhaps the responses, have been filed.

08-CV-151, Joan Herrington, Esq.: In a pending case the separate statements in Rule 56 motions by plaintiff and defendant contain 457 material facts. “And this is a comparatively simple [employment] case in that Plaintiff is relying on direct evidence of retaliatory motive. * * * The proposed amendments * * * requiring point-counterpoint separate statements will exacerbate these problems.” The idea that summary judgment should be available to avoid discovery in supposedly unmeritorious cases is wrong. Summary judgment is fundamentally unfair if a party is denied access to potential evidence; “[t]his position is particularly egregious in employment rights litigation where the defendant employer holds almost all the evidence and the plaintiff employee must file motion to compel after motion to compel to gain access to it.”

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): When properly used, point-counterpoint statements “may facilitate the identification of key issues and significantly advance the resolution of an action.” But in many instances they are misunderstood or are misused “to overburden the other side with the need to respond to * * * far too numerous, detailed and complex fact statements * * *. Similarly, careful lawyers seeking to avoid any admission frequently try to deny facts that are genuinely not in dispute, as by challenging an adjective used or the phrasing of the statement.” Often the statement is prepared as a mechanical task after the brief is completed. This procedure can be salvaged by imposing a defined limit, such as no more than 20 facts per claim or cause of action; a movant or respondent should be allowed to seek relief from the limit, or from the point-counterpoint procedure as such.

08-CV-157, Margaret A. Harris, Esq.: “The proposed rule is unwieldy and would result in an inordinate increase in the amount of time spent by counsel * * * and, more importantly, result in the district court receiving, at minimum, four additional (and lengthy) documents that must be checked

and cross-checked against one another.” There is no such rule in S.D.Tex., and the lack has no adverse impact. But if there is to be a point-counterpoint procedure, it should stress the importance of limiting the statement to material facts by adding a (c)(1)(A)(iv): “If the non-movant establishes that any one or more of the identified material facts is disputed, the motion may not be granted as to that claim.” Inferences also should be brought in to the rule text: in (ii), the statement of facts “may not contain any inferences from any fact, and must be supported, wherever possible and in large part, by reference to the non-movant’s testimony or admissions.” So for the response: (B)(i): “* * * or, as appropriate, state inferences from the facts that preclude summary judgment.” And (B)(ii) “may in the response concisely identify * * * additional material facts or inferences from the facts that preclude summary judgment.” And for the reply, (C)(i): “a reply to any additional facts or inferences stated by the non-movant and show that no jury could reach the stated inference and rule in favor of the non-movant.”

08-CV-158, Professor Suja A. Thomas: Point-counterpoint procedure is not merely a matter of procedure; it will change the standard. The FJC study shows a higher rate of granting summary judgment in point-counterpoint courts; before adopting the procedure, there should be further study to show that this procedure is not the cause for the higher rate. This is particularly important as to the findings in several studies that the rate is higher still in civil rights cases, “some of the most factually intensive cases in the court system.” The point-counterpoint procedure also will add to the burden on courts, as shown by the greater time to disposition found by the FJC study — the effort to show there may not be a causal link shows only that there should be further study to ensure there is no time increase or that any increases are otherwise justifiable. The increased cost of this procedure also may lead to more pre-discovery motions to dismiss, and more grants. Finally, if this procedure is adopted the rule text should specify that pro se plaintiffs are exempt.

08-CV-160, Professor Stephen N. Subrin: “I concur with Professor Burbank’s opposition [08-CV-145] in every respect.” In addition, this proposal is of a piece with amendments that “continue to add steps to the process. * * * Each of these steps has the realistic potential of increasing time and expense.” There is no empirical support for adding another set of documents to the Rule 56 process.

08-CV-161, Federal Magistrate Judges Assn.: There should be national debate about forcing the point-counterpoint procedure as a uniform rule, but these comments assume it will be adopted. The provision that allows departure by order in the case will impose a burden on judges who decide to depart, and in the absence of a local rule will create greater uncertainties about procedures within a single district. The rule should permit districts and judges to *supplement* the procedures in Rule 56(c) by local rule or standing order.

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Point-counterpoint should not be forced on districts that, as the Southern District of Ohio, do not have it. “We endorse the well-written and compelling views of Judge Sedwick and Judge Wilken.” But if it is adopted, the rule should state that a nonmovant’s failure to address a fact stated by the movant “shall or should” be construed by the court as acceptance of that fact for purposes of the motion only.”

08-CV-163, 20 lawyers at Perkins Coie, endorsing letter by Hon. Robert S. Lasnik signed by all judges in W.D.Wash.: Point-counterpoint will substantially increase burden and expense without meaningful or identifiable benefit. Fully agrees with the letter from all the district and magistrate judges in W.D.Washington. The letter begins by observing that a typical motion begins with reciting the truly undisputed facts without citations because they are indeed undisputed. “The handful of facts that are truly contested becomes clear through the exchange of coherent narratives and a few well-chosen pieces of evidence.” The proposed point-counterpoint procedure will require far more. Each fact must be stated, “and evidence supporting each contention must be provided even if the contention is undisputed. The cold enumeration makes it very difficult for a party to present its narrative in context or to argue for reasonable inferences. The opposing party is even more disadvantaged * * *.” The nonmovant will feel the need to address every fact, for fear of waiver later in the proceedings. The lists of facts will become an issue, generating collateral fights. “A number of judges in this district have presided over cases utilizing the point-counterpoint procedure. Our experience with this cumbersome form of motion practice has been consistently unsatisfactory * * *. Over the years, we have revised our local rules to avoid” the duplication and waste entailed by point-counterpoint. A single moving paper is required, with strict page limits and pinpoint citations.

08-CV-164, Hon. Janice Stewart: D.Ore. has had a point-counterpoint local rule since well before 1993. “I now always waive the filing.” The practice has generated widespread dissatisfaction; the local rules committee is considering deletion of this rule unless national Rule 56(c) requires it. The statements do not assist the court. They do not seem to help the parties. “Because the moving party cannot know in advance what facts the opposing party will dispute, it is likely to create a longer statement of facts than is absolutely necessary.” The response disputes and adds more facts. “These competing fact statements become duplicative, time-consuming, confusing, disputes over semantics, and counterproductive to an understanding of the issues. This is especially true in employment disputes (a large source of summary judgment motions) where the parties rely primarily on reasonable inferences from a synthesis of facts.” The local rule sets a five-page limit for the statements, but parties routinely move to expand the limit. The separate statements usually duplicate the fact section of the legal memoranda — the narratives of the memoranda are much more useful. The memoranda, however, cite not to the record but to the citations in the statement, complicating the court’s task. And there is no point at all in having these statements in proceedings for review on an administrative record.

08-CV-165, Scott Jerger, Esq., with three more lawyers: Expresses complete agreement with Magistrate Judge Stewart’s comments about experience in D.Ore., 08-CV-164. The concise statement of facts required by the local rule “fails to context the dispute.” The fact section of the memoranda works much better. The concise statements frequently recite non-material facts and facts not needed to decide the motion. Proposed Rule 56(c) does not impose a page limit, making it possible to state hundreds of facts; the nonmovant must respond to each, for fear of having the fact considered not disputed; this “could lead to attorney gamesmanship.” If the rule goes forward, a five-page limit should be imposed.

08-CV-166, Hon. Sue L. Robinson, for D.Del. Judges: “Even if we assumed * * * that proposed Rule 56(c) had some merit, the Federal Rules of Civil Procedure were never meant to be a ‘best practices manual.’” Judges “should be credited with the wisdom, through experience, of using the procedures best suited to their cases, consistent with the culture of their court.”

08-CV-170, Karen K. Fitzgerald, Esq.: “In an employment discrimination case, much often turns on subtleties.” Defendants state facts in terms designed to be persuasive. “[T]he point-counterpoint system makes it even more difficult for the plaintiff to adequately correct some of the subtle misconceptions because the plaintiff is forced to respond within the confines of the defendant’s stated version of the story.” The plaintiff should be allowed to tell the story in a persuasive way.

08-CV-172, David L. Wiley, Esq.: “I’m against the point-counterpoint amendment for the same reasons cited by NELA * * *. [T]his process makes more burdensome a procedure that is already burdensome enough.”

08-CV-173, Committee on Federal Courts, New York City Bar, by Wendy H. Schwartz, Esq.: The Southern and Eastern Districts of New York have had point-counterpoint since at least the early 1960s. The Second Circuit has blessed it as a means of streamlining summary judgment, freeing judges from the need to hunt without guidance through voluminous records. The Advisory Committee aspires to an exchange of documents that concisely focuses the parties and the court on the important facts. “But this is often not how it works in practice, and there is no mechanism set forth in the proposed rule to force attorneys to use the procedures in this way.” Instead, the statement generally repeats the facts set forth in the memoranda of law or affidavits; the nonmovant often feels compelled to respond in terms more complicated than a simple “admit” or “deny,” so the response also duplicates the memoranda. “The end result is a parallel track set of duplicative summary judgment papers that is unnecessarily burdensome * * *.” Nor does the proposed rule include a mechanism to force the desired attorney behavior. The local rules in New York provide that facts are deemed admitted for purposes of the motion unless specifically controverted; proposed Rule 56(e) leaves it to the judge to decide whether to consider a fact undisputed. Finally, there is no need for a uniform national rule on this issue. Many courts have different practices, and the proposed rule allows wide variation by order in the case. There is no national consensus.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: Point-counterpoint “requires a high level of preparation, but we agree that a summary judgment motion should not be made — or resisted — without that preparation.”

08-CV-175, Hon. Marcia S. Krieger: “[I]t is difficult/inconvenient for counsel to decide what facts are truly material to a given issue. They want to tell the ‘whole story,’ that is why they prefer the narrative statement of the facts.” Judge Krieger attaches her Practice Standards, and urges a similar procedure for Rule 56: “1) the movant be required to identify the claim/defense on which a summary determination is sought, what party has the burden of proof, what the standard of proof is and what the elements are, and 2) the listing of material facts should be limited to those that are material to the claim/defense, or part thereof, which is the subject of the motion.”

08-CV-176, State Bar of California, Committee on Administration of Justice: Separate statements are beneficial for the reasons given by the Advisory Committee, and there is appropriate allowance for opting out. But a minority of the Committee believe that the choice of this procedure should be left to local rules or to individual judges.

08-CV-177, Paul R. Harris, Esq.: Joins the NELA comments. “[F]or certain the summary judgment device truly is broke and in great need of fixing, but adding this additional hurdle doesn’t fix anything. Far from streamlining the process, it just adds another layer of complexity and time. And it forces non-movants (overwhelmingly plaintiffs) to make a point by point response to any piece of information the movant decides to throw in there. This kind of requirement only adds to the disputes, the papers, and the contentiousness between the parties.”

08-CV-178, Alice W. Ballard, Esq.: Joins the NELA comments. “[I]n some motions, the listing of purportedly uncontested facts is quite persuasive, in and of itself. The facts in the listing look dry and neutral, but when you read them, they have theme, context, and a narrative structure that tells the defendant’s story well.” The plaintiff is forced to respond within the confines of the defendant’s story. “This gives the moving defendant not only primacy, but also remote control over the context and narrative structure of the story.” Judges know the jury will hear the plaintiff’s story first, but on some level “the extra persuasive edge * * * will inequitably color the judge’s view of how a reasonable juror will respond to the evidence.”

08-CV-179, Robert J. Wiley, Esq.: A tit-for-tat comparison works well for direct evidence. But with indirect, circumstantial evidence, four or five facts taken together may raise an inference that contradicts another fact. Most non-FLSA employment cases turn on circumstantial evidence. “In such cases, the effect of the proposed rule will be to prevent the court from seeing the forest for the trees.” The vast and overwhelming majority of courts, although free to adopt this procedure on their own, have chosen not to. It should not be imposed on them.

08-CV-180, U.S. Department of Justice: The Department generally supports this procedure, “already used in a number of districts, [as it] should bring clarity to resolving these motions.” But point-counterpoint is not appropriate when summary judgment is used as the vehicle to review an administrative decision on the administrative record. An exception should be written into the rule — for example, “The procedures for filing statements of material fact and responses to statements of material facts do not apply to cases involving challenges to agency action where judicial review is based on an administrative record.”

08-CV-181, Lawyers for Civil Justice, etc.: This comment supplements earlier comments, 08-CV-061. Point-counterpoint “ensures that the parties reach some shared reality regarding the merits of the case.” It can be made acceptable to most by placing numerical or page limits on the required statements, or by combining the statement and the brief or motion in one document. Or courts could be permitted to opt out by local rule.

08-CV-182, Amy Gibson, Esq.: The response to a summary-judgment motion in a First Amendment employment retaliation case ran 87 pages. “As a non-movant on a dispositive motion, I felt the need

to respond to any ground, even a no-evidence ground slipped into a footnote or some not expressly stated, yet vaguely argued, ground for the motion.”

08-CV-183, Professor Eric Schnapper: Point-counterpoint procedure is useful, if at all, only for “question-of-law summary judgment.” Such motions are truly controlled by a few simple facts that no one disputes — what was the date of the event that measures the limitations period is an example. But when the question goes to the sufficiency of the evidence of some fact — such as “negligence” — the motion typically “does not turn on ‘a small number of truly dispositive facts.’ There usually are no ‘dispositive facts’ favoring the party seeking judgment as a matter of law. The statements and responses offered with regard to an evidence-sufficiency summary judgment motion are lengthy because the parties are (quite properly) seeking to summarize the often lengthy evidence that would occur at a trial of a week, or far more; the documents are ‘unwieldy volumes’ because a dispute about the sufficiency of the evidence of the non-moving party calls upon both sides to present essentially the documentary evidence they would offer at trial. No sensible judge would propose that a Rule 50 motion refer only to ‘a small number of truly dispositive facts,’ or suggest that the court intends to ignore the ‘unwieldy volumes of materials’ in evidence at trial.”

08-CV-186, Allen D. Black, Esq.: Point-counterpoint “imposes an enormous amount of unproductive busywork on both the parties and the Court.” In complex cases the statements “almost universally list hundreds of facts * * *, many of which have only tangential impact on the core dispute. The non-moving party is then compelled to contest or at least re-cast hundreds of peripheral facts * * *.” In a recent antitrust case, the movant listed 156 undisputed facts, the nonmovant responded with 144 single-spaced pages contesting them; the total of these submissions was 556 separately numbered paragraphs and 228 single-spaced pages. A better procedure would be to require a conference with the judge before filing any summary judgment motion; plenty of experience with Rules 16 and 26 show that such conferences work. Alternatively, the number of facts could be limited, perhaps to 10, with provision for expansion by court order. The procedure, as it is, prompts the courts and parties “to look at each fact individually rather than looking at the case as a whole. This could have substantive impact in some cases, notably employment and antitrust.”

08-CV-187, Hon. Rebecca Beach Smith: Joins Judge Payne’s request, 08-CV-190, that point-counterpoint be deleted and left for regulation by local rule and individual judges.

08-CV-188, Hon. Leonie M. Brinkema: Joins Judge Smith, 08-CA-187, and Judge Payne, 08-CV-190, opposing point-counterpoint. “Setting clear limits on the length of submissions by counsel conserves limited judicial resources and actually improves the quality of the pleadings * * *.”

08-CV-189, Stuart R. Dunwoody, Esq., for Federal Bar Assn., W.D.Wash.: Point-counterpoint “will add burden and expense,” make Rule 56 practice “more complicated and expensive,” and “generate disputes concerning the admissibility of the evidence cited.” W.D.Wash. has no such requirement, and “summary judgment motions are typically resolved efficiently without separate fact statements.” The Ninth Circuit Representatives to the Western District of Washington also oppose point-

counterpoint. If this procedure is retained in Rule 56, districts should be allowed to opt out by local rule.

08-CV-190, Hon. Robert E. Payne: The local rule in E.D.Va. requires that the movant's brief "include a listing of undisputed facts with citations * * *. The responsive brief then must include a specifically captioned section listing all material facts contended to be in genuine dispute with citations * * *." The rule "helps focus the briefing." It works in conjunction with another local rule that limits opening and response briefs to 30 pages, and rebuttal briefs to 20 pages. Experience shows that if lawyers are allowed to file separate statements of fact with citations, they exercise no restraint. But the page limits on briefing accomplish the objectives sought in proposed Rule 56(c). Without these limits, proposed (c) "will make the job of judges much more difficult and indeed presents the very real risk that the process of dealing with summary judgments will overwhelm judicial dockets."

08-CV-191, James C. Sturdevant for National Assn. of Consumer Advocates: Rule 56, which cuts off the right to trial, "should not be amended in a way to create traps for the unwary." Statements of undisputed facts will "add enormous cost both in time and dollars to the litigation process," and "decrease the emphasis on the established concepts of credibility and inference." Some cases might benefit from this procedure, but "this would be the clear exception." Attorneys who have the advantage of hourly billing will have an incentive to use this procedure, adding burdens that do not crystalize issues or serve to identify material issues of fact in dispute or undisputed. "There are plenty of other ways, and motions, to weed out non-meritorious cases prior to trial." And the plaintiff should always have the last word.

08-CV- , Hon. Robert J. Faris, for Conference of Chief Bankruptcy Judges of Ninth Circuit: Some of the judges think that point-counterpoint forces counsel to think carefully and tends to improve presentation of summary-judgment motions. Others find the system "less than useful." Attorneys often do not do a good job of preparing statements and counterstatements, the procedure is hard to enforce, and the cost to the parties outweighs the benefits. Disagreeing about the merits of the technique, "we do agree that it should not be imposed as a uniform national practice." Courts that want to use it should be free to do so. Others should be free to adopt procedures that suit their local legal culture, the preferences of the judges, and the demands of their caseloads. Bankruptcy courts would face particular problems because they have a large number of small cases and only a small number of large cases. If point-counterpoint is adopted in Rule 56, the bankruptcy rules should be amended to allow bankruptcy courts discretion to opt out of the procedure, or modify it, "in some or all adversary proceedings and contested matters."

Claudia McCarron, Esq., Nov. 17, 5, 6-9: Has extensive experience both with point-counterpoint and with other submission practices, much of it in insurance coverage disputes. Often the lawyers for both sides agree that the case is suitable for decision on cross motions, and yet, without point-counterpoint, "I find that the advocate in each lawyer makes it nearly impossible to file a brief that really clarifies the points of agreement and disagreement, but when that procedure is in place for a statement of material fact by each party, real clarity can be achieved." It is protested that the motions "arrive in boxes. I get complaints that arrive in boxes." But the work is worth it. And "my

experience is, as a practical matter, those motions have not arrived in boxes * * *. [A]s an advocate you lose the advantage of the statement if you burden it with subsidiary facts.”

Leigh Schachter, Esq., Nov. 17, 26, 27-31: As in-house practitioner at Verizon Wireless finds summary judgment very important. Many cases “are at heart not so much fact cases * * * but are really purely legal cases” that can be decided promptly. It is important to have a system in which summary judgment is actually considered. And it is important to have a uniform rule throughout the country — it is difficult and inefficient to have to encounter differences in practice. Point-counterpoint “is a very useful tool for trying to identify and narrow what are the issues in the case.” It shows whether there is a genuine dispute as to a fact and, if there is, whether it is material. Yes, the statements can become so long as to be burdensome; it is important that bench and bar work together to make sure the statement is concise and limited to facts that are important. But as a practical matter the movant wants to limit the statement to a small number of facts — the more facts you present the greater the prospect that there will be a genuine dispute as to at least one fact that you have characterized as material.

Steve Chertkof, Esq., Nov. 17, 34-52: This testimony addresses inferences of intent in employment discrimination and retaliation cases. Addressing the response part of the point-counterpoint procedure, it is urged that the nonmovant need not rely on “material” facts, but should be able to point to “additional facts or inferences that preclude summary judgment.” The problem is that intent and state of mind often depend on inferences facts, no one of which seems “material.” The running illustration is clear: an employee who has been highly valued for 20 years goes to the company Equal Opportunity Office and makes a discrimination complaint against her supervisor. Two days later she comes to work 10 minutes late and is fired for being tardy. The first undisputed material fact is that she was 10 minutes late. The second fact will be that both the EEO office and the supervisor deny that the EEO office told the supervisor about the complaint. But being 10 minutes late seems a trivial offense. The facts may show that many other employees frequently arrived much later. These facts may warrant an inference that the supervisor had learned of the complaint, and that tardiness was not the reason for firing the plaintiff. But they are not facts identified as “material” by the rules that govern the substantive claim.

So, while point-counterpoint may be effective in cases where the ultimate issue is one of objective fact, it is less often useful, and can work against clarification of the issues, “where subjective intent and motivation are at issue.” It is very hard to get at motivation through point-counterpoint. The danger that the movant will state too many facts should be addressed by a rule provision that the motion must be denied if there is a genuine dispute as to any one fact the movant says is material and beyond genuine dispute. Some relief might be provided by the provision that allows a nonmovant to accept a fact only for purposes of the motion, but an employment plaintiff’s attorney might be too fearful of this course, “for fear of never getting the second chance.”

Credibility presents problems similar to inference problems. Summary judgments are granted on the basis of the statements of witnesses that a jury would not have to believe. Most of the witnesses are interested; they are aligned with the employer or not. Many of these cases are

“basically a conflict among several witness’s testimony. Employers frequently have more witnesses.” The plaintiff should not lose simply because of the number of witnesses.

That summary judgments against employment plaintiffs are often affirmed does not mean the judgments are right. “[T]here are rules and inferences being drawn against plaintiffs in this context that seem different than in other contexts.” Summary judgment is not warranted simply because the EEO officer says he never told the supervisor about the complaint and the supervisor said he never heard of it. The circumstances of firing a valued 20-year employee for being 10 minutes late two days after filing the complaint warrant an inference of intent. As nonmovant, the plaintiff should be able to respond to the motion with facts that are not independently material but that do support favorable inferences. Simply arguing inferences in the brief is not enough. The real material fact is the supervisor’s intent, and that can be reached only by inference. “I’ve never had a perfect employee” as plaintiff. There always will be some shortcoming that can be assigned as the reason for adverse action.

Prof. Edward J. Brunet, Nov. 17, 52 at 60-62: Point-counterpoint has a cost, but is helpful. “A good lawyer cites to the record and focuses the claim.” There are four advantages. It saves judicial time searching the record. It focuses the issues. Opposing counsel see the issues with greater clarity by being forced to search the record, “a vision that greatly facilitates case law promotion and settlement promotion.” And it aids appellate review “by mandating a more tidy and transparency in the summary judgment record.” By focusing on the record, it also enables more precise rulings and thus is related to the choice between should, must, may, or is. The Committee Note admonition against stating too many undisputed facts is good, but it should be given still greater prominence.

Professor Elizabeth Schneider, Nov. 17, 62 at 63-79: Point-counterpoint aggravates the tendency to “slice and dice” the record, looking at individual facts in isolation and losing sight of the whole picture. Summary judgment has become the do-or-die place in federal civil litigation. It has had a huge impact in removing cases from public adjudication. The proposals create an extensive process in cases where it often would be easier just to go to trial. It may affect the choice of forum — already, there is an impression that federal courts are courts for defendants. Nor is the procedure going to compensate by making judicial decision-making more effective. To be sure, it may push the lawyers to more effective marshalling of the facts. Good lawyers already cite to the record. But there are particular risks for civil rights and employment cases in the “impermissible disaggregation of legal issues.” The “integration, interrelationship of fact and law,” is being segregated out. The opportunity to argue the whole picture in the brief is not enough to offset this tendency. Nor is there enough protection in the provision that the court can order a different procedure on a case-by-case basis — that will make the process still more cumbersome by adding arguments about what the procedure should be. It would be better to require specific citations to the record in the briefs. The judges do want and need direction through the record, but allowing for integration of fact and law in the brief is better.

John Vail, Esq., Center for Constitutional Litigation, Nov. 17, 79, 80-88: Summary judgment is most often a defendant’s tool. The plaintiff has the trial burden, and at trial carries the burden by telling a story. The point-counterpoint procedure enables the defendant to deflect the story by focusing on

small pieces and requiring a response by small pieces. “The sum of an evidentiary presentation may well be greater than its constituent parts * * *. [F]acts can get in the way of finding truth when you don’t get the whole story.” “[Y]ou’re dealing with a problem of cognition, a problem of how people perceive facts[,] of how we come to know things * * *.” The opportunity to provide the narrative in the brief is not always adequate — page limits impose constraints, and the constraints may be severe when the case also presents meaty legal issues.

Joseph Garrison, Esq., Nov. 17, 97, 98-106: Uses point-counterpoint, and as a plaintiffs’ employment lawyer supports it. But there are motions that abuse the procedure by stating too many undisputed facts, including “supposed material facts which are not at issue.” Many plaintiff-side employment firms are firms of one, two, or at most three lawyers, and do not have the resources to respond. Accepting a fact for purposes of the motion is not a remedy. Indeed it may be worse than not responding at all — with no response, the court will take at least some look at the record. “[N]ot responding or admitting for purposes of the motion carries the risk of guessing wrong on materiality, and if you guess wrong, you could lose * * *. You have to respond to these because you can’t take that chance of guessing wrong. The remedy for the over-long statement of undisputed facts is a motion to strike. The motion should not be in a form that specifies that of the 250 facts 50 are hearsay, another 20 are irrelevant, 30 are background, and so on. That form of motion is ugly collateral litigation. There have to be boundaries on the motion to strike, just as on the statement of undisputed facts. It should suffice to point out that the motion goes beyond a concise statement of material facts. It is a blunt tool, but it’s better than nothing.

R. Matthew Cairns, Esq., Nov. 17, 114, 119-120: Has not encountered the “250-fact” statement. Such statements are a mistake — “you are not focusing the court where you need to be focusing the court.” The same is true of replies that throw everything up against the wall.

Stephen G. Morrison, Esq., Nov. 17, 120, 122: A summary-judgment motion provides an opportunity for speedy, just, and inexpensive resolution. “[T]he point-counterpoint puts a fine focus on that.”

Debra Tedeschi Herron, Esq., Nov. 17, 141-143: Point-counterpoint supports the “must” standard for granting, because it gives greater confidence in the process of identifying facts that cannot be genuinely disputed. It enables the court to provide a better statement of reasons for granting or denying the motion. And changing subdivision (h) to provide a remedy for statements or responses that are not objectively reasonable will avoid the over-long statements that include peripheral facts.

Latha Raghavan, Esq., Nov. 17, 143, 144-145: Judges know how to control point-counterpoint, avoiding the 200-fact statements. The procedure forces the attorneys to do the work by citing to the record, both in supporting and opposing the motion. If any concern remains, it can be addressed by enhancing the sanctions provision.

Hon. G. Patrick Murphy, Jan. 14, 10-23: The Southern District of Illinois had point-counterpoint. When the local rules were reconsidered a canvass of the bar showed overwhelming support for abandoning the procedure. A cottage industry developed “around what is disputed and what isn’t

disputed.” The nonmovant would respond to statements of undisputed facts by disputing them, and the movant would say they cannot be disputed. There were motions to strike and other procedural problems. “[T]he small players are going to be disadvantaged.” The local rule was adopted with the hope of speeding up disposition of summary-judgment motions. “[I]t just didn’t work for us.” The rule was revised. “[S]implicity works. Keep it simple. Have a few rules. Apply them ruthlessly and it will work.” “We still grant summary judgments at the same rate. * * * It just takes less time and less money.” Rule 56 is not underutilized; “I have never had a civil case where I didn’t get a Rule 56 motion.” “And it’s usually a pretty big job. * * * A summary judgment motion, it’s not unusual for it to be * * * 9 inches to a foot thick. I don’t know how you avoid that.” Nor does it help to allow use of a different procedure by order in the case — “[T]here should be a presumption against rules where the exception eats the rule.”

Malinda Gaul, Esq., Jan. 14, 23-27: In the Western District of Texas “what we practice is the shotgun method. Basically you get big summary judgment motions, everything’s thrown at the wall and the defense hopes that something sticks.” Point-counterpoint is interesting, but it should focus on the material facts that affect decision. “Not every single fact should be lined up. It shouldn’t be 200 point/counterpoints.” We need a definition of “material,” because “what we’re seeing is statements of facts that go on for pages and pages and pages.” Once the nonmovant raises something to dispute the fact, “that’s it.” The case should not be tried on paper.

Michele Smith, Esq., Jan. 14, 32, 37-40: Talking with others who have more experience with the practice, has been advised that point-counterpoint “does require more work on the front end,” but makes it harder for either side to hide the issues. By forcing attention on the issues it may dissuade a movant from making the motion at all. It may force the nonmovant to take a hard look before the hearing. Because the motion may educate your adversary, requiring a detailed motion may discourage some motions entirely.

Margaret Harris, Esq., Jan. 14, 44, 45-46, 51-59: Has not practiced with point-counterpoint, but her partner has. The movant filed 109 statements of material fact; most of the statements were paragraphs. Responding to the statements added 6.5 hours to the time required to respond, and the effort added nothing to the response. We don’t get oral argument to buffer the risk entailed by responding to only a few of the stated facts, asserting that disputes as to them defeat the motion. This is not plaintiff-friendly in employment cases. We have to respond to the motion, and then duplicate the effort in responding to the statement. It would be OK if the movant were limited to 4 or 5 facts. “I don’t feel comfortable telling a District Court judge I disagree with these nine, and not even say anything about that other 100.” This adds work for the judge as well as for the nonmovant. If point-counterpoint survives, the tendency to state too many facts should be diminished by adding a provision that if a genuine dispute is shown as to even one of the stated facts, the motion is denied. That would not be a “sanction.” It’s something like an estoppel — the movant, having identified the fact as material, cannot then back off and assert that it is not material and summary judgment still can be granted.

Wayne Mason, Esq., for Federation of Defense & Corporate Counsel, Jan. 14, 60, 63-66, 67-68, 70-71: Point-counterpoint “does force you to focus on the issues of your case * * *.” At times in a

point-counterpoint jurisdiction looking at the case in light of the rule has persuaded me not to file the motion. Busy practitioners have lots of work to do; it is good exercise to be forced to look at the case this way. To be sure, ““motion lawyers’ do dumping whether it’s point/counterpoint or not, and whether it’s a 109-page brief, or whether it’s a 109 points * * *.” I understand that some judges will not like to be told they must adhere to this procedure. National uniformity is valuable, but as a national practitioner I understand that a court does not have to change its practice for me just because I happen to travel around the country; I have to learn the local rules. A numerical limit on the number of facts claimed to be established beyond genuine dispute might prove difficult in complex cases, even with express recognition of the right to seek permission to state more facts. Another way to deal with it would be to impose cost-shifting on a party who states too many facts.

John H. Martin, Esq., Jan. 14, 82, 91-93, 96-99: Has practiced in courts that have point-counterpoint and in courts that do not. Is about to use it in a court that does not have the practice. Point-counterpoint forces counsel to “get analytical about it”; that can dissuade from filing any motion at all. And “it makes lawyers do a better job in filing a motion.” It saves costs. But it is not possible to say whether the procedure affects the rate of appellate affirmance of summary judgments. In trying mass tort cases all around the country, particularly air crash cases, a “300 undisputed facts” motion has never appeared. “I cannot conceive of filing one. I cannot conceive of filing a summary judgment motion that has more than a handful of undisputed facts that were material in support of a motion.” The absence of a rule requiring this format does not prevent counsel from using it. But national uniformity is important — not only because it may be difficult to learn local practice, but also for the intrinsic advantages of uniformity. Parallel cases are not always consolidated; it is useful to be able to file the same motion in the same form in different courts.

G. Edward Pickle, Esq., Jan. 14, 104, 111-113: One system that should be put aside, although it is practiced in some courts, requires the parties to submit a joint statement of material facts. It simply does not work. Point-counterpoint, on the other hand, refines the issues down to clear specifics. “I can’t conceive how that does not make a judge’s job easier, as opposed to a throw-it-up-against-the-wall motion * * *. [Y]ou know, if you’re the opponent to a summary judgment motion, your whole job is to simply try to muddy the waters, to make things as complicated as you possibly can * * *.” There is a problem in managing “material,” which is a pretty broad term. It may help to focus on the elements of claim and defense. “It shouldn’t require a thousand-page litany of material facts to deal with the specific issues, especially if we’re talking about a partial summary judgment motion.”

Cary E. Hiltgen, Esq., Jan. 14, 121-128: Keeps motions “simple. Very few statements of material facts. Now, I get a lot of counter responses with lots of facts because they’re trying to develop a fact in issue to keep it from summary judgment being sustained.” “I have never had a motion for summary judgment where I did not have point/counterpoint. Again, my statement of facts go right down the elements. I want it simple. Those complicated ones, that just gives you * * * the ability to say, Oh, there’s a question of fact.”

Stephen Pate, Esq., Jan. 14, 140, 144-145: Point-counterpoint is good. It forces attorneys for both sides to marshal their evidence and analyze the case. And a motion in this form “really helps to educate the judges.” It would be extremely foolish for a defense attorney to overplay his hand by

offering long lists of undisputed facts. “[W]hen I do it, I keep it short and simple and succinct.” “You got to do it right.”

Carlos Rincon, Esq., Jan. 14, 147, 152-155: Point-counterpoint is effective. It forces lawyers to sit down and evaluate the case. It is a lot of work, but you have to understand your case; this process “ultimately does save time.” The concern that defendants will impose huge and unwarranted burdens on small plaintiffs’ firms is not accurate. Corporate clients are savvy about monitoring litigation. Filing for summary judgment must be approved by in-house counsel. Firms are required to produce litigation budgets. “And as expensive a summary judgment in practice is, jury trial, and the preptime for jury trial * * * still makes up at least 45 percent of the entire litigation cost of many of the cases that I handle.”

Tom Crane, Esq., Jan. 14, 156, 157-158: Has done it a couple of times. The “uncontested facts” were largely irrelevant. The statements were never referred to or really used. And it is difficult to encapsulate inferences in a one- or two-sentence format.

Hon. Robert S. Lasnik, Feb. 2, 11-22: Very good trial judges find point-counterpoint helpful. “[B]ut the naysayers are not just people who say no to change. They are people who have tried the method and found it to be wanting for their purposes.” The change will have an impact in a significant number of cases; judges who are using Rule 56 as it is are not clamoring for uniformity, nor do they begrudge the districts that have adopted other procedures. Lawyers want good judges handling their cases in an efficient manner more than they want uniformity. The opportunity to opt out on a case-by-case basis is not an answer; “to make us do a standing order in 99 percent of our cases to avoid a local rule and to pretend that we have uniformity” is not an honest way to deal with the situation. If point-counterpoint made sense for the vast majority of cases, it would be different. But we have districts that have tried point-counterpoint and “found it wanting or * * * too cumbersome and too expensive.” The bar in the Western District of Washington is satisfied with current procedure. The federal judiciary, moreover, is likely to face increasing financial constraints. “[J]udges really don’t want to take on a procedure that they see as more expensive for the lawyers, more time consuming and, therefore, more expensive for themselves and less efficient * * *.”

Hon. David F. Hamilton, Feb. 2, 22-37: The Southern District of Indiana adopted a local rule much like the proposed point-counterpoint rule, including a separate statement of facts and a separate response. The rule was amended in 2002 to address the problems that arose in practice. The separate documents “provided a new arena for unnecessary controversy. We began seeing huge, unwieldy and especially expensive presentations of many hundreds of factual assertions with paragraphs of debate about each one of those.” In one case with a routine motion “the defendant tried to dispute 582 of the plaintiff’s 675 assertions of undisputed material facts.” Lawyers were arguing every conceivable evidentiary objection, making arguments that never would be made in trial. And there was an exponential increase in motions to strike. The cure was to require that the statements and responses, with pinpoint citations to the record, be included as part of the briefs. Brief limits are 35, 35, and 20 pages. Attorneys are forced to use their pages wisely. There is some flexibility as to format. But it is clear that if a party does not respond to an assertion, it will be treated as undisputed. To be sure, some people try to fix problems with their cases with lengthy

affidavits, but the problem is not as severe as the problem of having unlimited point-counterpoint statements. Adopting a page limit on the statements is not likely to be as effective as forcing the statements into the briefs. This system can work in cases that depend on inference. The counterpoint to the motion is “going to have to be: ‘See my whole brief. It’s all my evidence. It’s circumstantial.’” We recognize that, “for example, in a discrimination case the plaintiff can develop what [the Seventh Circuit] calls a convincing mosaic of circumstantial evidence to put the case together.”

Experienced lawyers can use point-counterpoint to beat up on the less sophisticated. Extra friction was generated by the opportunities to criticize the opponent’s failure to comply strictly with the rule. So we introduced a provision that says the court can for good cause excuse failure to comply strictly. That has been very helpful in telling lawyers they should not bother the court with minor deviations. Pro se litigants are given signals, and treated flexibly — the main thing we want from them is a signed affidavit of what they’re telling the court.

If point-counterpoint is adopted in the national rule as proposed, courts should be allowed to opt out by local rule.

Hon. H. Russel Holland, Feb. 2, 37-46: He and Chief Judge Sedwick have been hearing cases in Arizona for about ten years, taking a cross-section of civil cases from the regular draw. Arizona has a local rule quite similar to the proposed point-counterpoint procedure. Alaska does not. The Arizona procedure “typically results in a lengthy chronological explanation of what the case is about” that does not comport with a sensible assembling of the facts. The procedure doubles the number of documents the lawyers must prepare and the court must consider. “In Arizona we spend much more time doing summary judgment motion practice.” It does not facilitate the court’s work. It “requires an artificial separation of the material facts from issues that have to be decided.” The page limits on briefs are very useful. The practice also “spawns separate motion practice.” Between a third and a half of the cases involve a motion to strike something, usually in a squabble over evidentiary support for a statement; such motions are less common in Alaska. The Arizona rule does not include the proposed (c)(2)(A)(ii) limit to “only those material facts that cannot be genuinely disputed”; it seems likely that this attempt to curtail over-long statements of fact will itself generate subsidiary motion practice arguing that a fact is not material. Rule 56 should be left undisturbed.

Hon. Claudia Wilken, Feb. 2, 46-58: The Northern District of California had a point-counterpoint local rule from 1988 to 2002. Lawyers did not much object but the judges led the move to abandon it. The real problem is duplication. The judge reads the same things twice. The separate statement of facts cannot suffice on its own because it “is not a good way of telling a story, particularly if you’re trying to include only material undisputed facts and you’re not including the background facts.” You need to know facts that are not material to understand what happened. “[T]he best way to say it is in the narrative.” Now we have the statements and pinpoint citations in the briefs. “[Y]ou can compare both stories side by side, but each is a narrative. Each is a story that’s understandable.” The procedure is hardest on the nonmovant, because the movant can list the facts it wants and in the order it wants; the nonmovant must respond in order, leaving its own facts “stuck at the end and they are sort of out of order.”

If the proposed national rule is adopted, I will excuse the point-counterpoint procedure in every case. National uniformity is important, but it is better to have a uniform simple procedure, allowing point-counterpoint to be adopted on a case-by-case basis where it seems suitable.

If a party does not provide the required citations to the record, oral argument commonly affords an opportunity to ask for the citations. If there is no oral argument, an opportunity to comply may be given if it seems a meritorious case, but perhaps not if it seems a weak and frivolous case. Our local rule does not specifically say that failure to respond is a default, but it works that way. So long as the statement is supported by a citation, failure to respond with a citation supports taking the statement as true “unless it were frivolous or something.”

Michael R. Nelson, Esq., Feb. 2, 58-60, 64-66: It is not clear what the problem is that the judges see with point-counterpoint. “In a motion for summary judgment there is a statement of facts offered by the movant and then those facts are agreed to or not That has to happen in the process.” The fear of over-long statements of fact comes down to case management; complex cases will require longer statements. Uniformity is important. “It’s form over substance * * *. There is the law, there is the argument, and then there’s the facts. * * * Ultimately this all plays out in the argument section of whatever document you’re calling it.”

Kevin J. Dunne, Esq., Feb. 2, 80, 83: If judges want point-counterpoint, I’m happy to do it. “[W]e were doing it like crazy and getting good at it and efficient at it.” If judges do not want it, I’m happy not to do it.

Mary Massaron Ross, Esq., Feb. 2, 87, 92-93: Point-counterpoint is a useful tool. “What you want * * * is that the litigants be disciplined and the court be disciplined to look at record facts.” The nonmovant should be required to come forward with admissible evidence.

Sharon J. Arkin, Esq., Feb. 2, 94-98, 101-104: California has point-counterpoint in the state courts. “Over the years it has become a much more elaborate, time-consuming, resource-intensive prospect.” It should be allowed by order for good cause in a particular case. But the uniform base line should be a simpler procedure. Defense firms have become much more elaborate in the motions in the number of facts and precise nature of each single fact. I litigate complex cases. But “I think the defense firms increase the complexity deliberately in order to make it more difficult to oppose and more likely that it will be granted because it’s just so much to get through.” And point-counterpoint does not allow the narrative, where the inferential facts come in. California procedure “doesn’t afford the opportunity to explain why, while that fact is true, there’s actually a good reason why summary judgment shouldn’t be granted.” It is not helpful to the nonmovant, despite the apparent opportunity to respond with a long litany of disputed facts. The problem is that “the resultant workload increase because of point-counterpoint has been astronomical for plaintiffs who can least afford to do it.”

Elizabeth J. Cabraser, Esq., Feb. 2, 107-117: Experience with many summary judgment motions under point-counterpoint, and many under other procedures, shows a vast difference in the number of hours and dollars imposed on the parties and in the time and effort judges must take sifting

through the statements. An example is shown by a case in which a point-counterpoint summary-judgment motion took hundreds of hours to brief, and took the court many, many hours to consider and deny; the same issue was presented at trial in an hour and forty-five minutes. The procedure also slights the role of inference. “It is in the nuances that many disputes live and that the truth is most often to be found.” “By such a deconstruction, some truth is lost. Facts are the bones, but it is the connective tissue, the inferences that create a living body.” Rather than a summary-judgment motion, it is better for the parties to educate the judge at a pretrial conference. It often happens that after summary judgment is denied the trial turns up evidence of facts that are quite material but that were not enumerated, argued, or submitted on the motion. If adopted, the procedure should include a surreply brief — but the very need for an additional brief suggests the procedure is not desirable. Sufficient uniformity is achieved by the standard established by the Supreme Court in 1986. “If disputes were all uniform, then we certainly could have a uniform summary judgment * * * procedure, but the federal courts entertain such a vast and diverse array of cases” that it is difficult to see the advantage in a uniform point-counterpoint procedure. Judges know about the procedure. They can adopt it in a particular case where it fits. There is no need to remind them of this option in the text of Rule 56 — and there is a danger that the reminder would become the default procedure. The danger would not be avoided by adopting a “good cause” requirement for adopting point-counterpoint.

But it is appropriate to adopt a “pinpoint citation” practice. When the parties have evidence, it forces them to bring it to the court’s attention. And it saves the court’s time.

Stefano G. Moscato, Esq., for National Employment Lawyers Assn., Feb. 2, 117-136: Employment plaintiffs’ lawyers typically are solo practitioners or work in offices of three or fewer attorneys. Point-counterpoint is incredibly burdensome for them. It adds an extra layer to the unavoidable costs of summary judgment. Responding to each of hundreds of stated facts takes time away from dealing with the real merits of the motion. Of course it is appropriate to require pinpoint citations to the record. But there should be permission to strike the entire motion if it is too long — because cases vary it is not possible to set a numeric limit on the number of undisputed facts, but judges are able to recognize an overlong statement.

One reason for preparing over-long statements of fact is that many judges are hostile to employment discrimination plaintiffs. If a plaintiff has to respond to 600 facts, and is able to manage a meaningful response to only 400, that provides an opportunity to “latch on.” “[T]o just let some of those slide where we are fairly confident they are not the kind of facts that really should be decided in a summary judgment motion is really putting a lot of trust in the judge to agree with us.”

Inferences also are at risk. Employment cases rely particularly on inferences. Suppose it is undisputed that the plaintiff was late for work on one occasion, and asserted that the employer has a clear rule against tardiness. There may be many other things that affect the determination whether the plaintiff was fired for being tardy. Was the rule well known? Was the employer lax in enforcing it — even, perhaps, generally ignored the rule? As others have said, the facts that shape the inference are like a mosaic. The tiles do not look the same when picked apart and stacked by shape

or color. Point-counterpoint focuses dispute on the particular fact of tardiness, when meaning can be found only in other facts, both disputed and undisputed. Adding those facts in a long list of facts in the counterpoint may lose them in the shuffle. Yes, the story is told in the brief. And yes, many judges read the briefs first, using the point-counterpoint statements as a reference. But time devoted to the statements is time taken away from attempting to discern the mosaic. The inferences cannot be argued through the point-counterpoint. “At a minimum the non-movant should be expressly permitted to articulate in its response the reasonable inferences that might be drawn from those facts that are listed and to point out to other facts in the record that support those inferences so that that mosaic is right there for the judge * * *.”

Peter O. Glaessner, Esq., Feb. 2, 137, 145-148: Defending employment cases, finds that this procedure, familiar from practice in California courts, “serves one very valuable function.” The separate statement tells the court and everyone what the facts are. It allows for clarity, for focusing. Suppose the plaintiff has testified to three acts of sexual harassment. It is important to make the record clear that there are three and only three. Stories of 500-fact statements suggest a counterproductive practice. “Less is more. The fewer facts you need to put before the court and claim are material facts that are not in dispute that are necessary for the defendant to win, the stronger the motion.” The mosaic can be described in the brief.

Ralph A. Zappala, Esq., Feb. 2, 151, 153-155: Point-counterpoint has been practiced in California state courts for more than twenty years. It works. An example is a product liability case in which it can be shown that the product was not made by the defendant. “[Y]ou can lay that out in a point-counterpoint fashion that makes it abundantly clear what the material fact is.” We need a uniform approach, not “maybe we’ll do it in this case, maybe we won’t in another case.”

Marc E. Williams, Esq., Defense Research Institute, Feb. 2, 157, 173-174: Limited experience with point-counterpoint in some districts shows it to be a helpful aid. In districts that do not use the procedure, this still is the way to develop a case to determine whether to make a motion for summary judgment and to determine what is the best way to posture the facts when opposing a motion filed by the other side. Any problems that exist can be resolved by appropriate restrictions, by page limits, or by some other local rules provision.

Daniel J. Herling, Esq., Feb. 2, 175, 177-179: Many years of California practice show point-counterpoint is not an uncaged beast but a tool to present your side of the story. “[I]t enables or ensures that counsel hone their arguments.” Trials turn on five to ten, maybe eight main facts. A motion that asserts 12 undisputed material facts is a loser. In federal court, even though we do not call it point-counterpoint, my colleagues and I keep it in mind when we write the briefs. This is just one piece; it is not the mosaic, the overall story.

Thomas A. Packer, Esq., Feb. 2, 182, 189-190: “[O]ne attorney’s mosaic * * * is another attorney’s house of cards.” Point-counterpoint allows the movant to focus the court on the issues of material fact “so that the attorney trying to paint the mosaic, if you will, perhaps can run around the central facts, but they can’t hide from them * * *.”

Andrew B. Downs, Esq., Feb. 2, 190, 195-202: Practices in Nevada without point-counterpoint and in California with it. Point-counterpoint is a disciplinary tool. It provides intellectual structure. If it cannot be written, the motion is not filed. If response is not possible, the nonmovant will seek to settle. Long statements should not be a problem; they are invitations to deny the motion. Two judges in the Northern District of California at times utilize the state procedure; when they do, they require a single undisputed statement, and have a standing order that states a fact is disputed if the parties cannot agree on it. That does not work. The client may be unwilling to agree, or be patently unreasonable — that should not be the basis for denying summary judgment. But writing point-counterpoint into the national rule as an opt-in procedure might create more chaos than it cured. Pinpoint citations are properly required, but the brief limits must be sufficient to support them. As for inferences, “that’s why we write briefs.”

Michael T. Lucey, Esq., for Federation of Defense & Corporate Counsel, Feb. 2, 202, 207-208: The hearing seems to create an impression that defense attorneys are behind point-counterpoint. In California it was the courts that imposed it, not at the request of defense attorneys. The courts were led to it by failures to identify the material facts. What counts at the end of the day is whether there is a genuine issue of material fact. “As long as we get there, I don’t really care of the form of the process. * * * It’s self-policing, I think. The more facts you create, the more chance you have to be denied on that basis.”

Jeffrey J. Greenbaum, Esq., Feb. 2, 221, 224-235, 239-242: (This testimony reflects the views of officers and members of the council of the ABA Litigation Section, but is not ABA policy.) The basic position is that point-counterpoint is a good idea, but only if some combination of rule text and Committee Note effectively conveys the lesson that the movant must limit the number of undisputed facts. Perhaps 10 or 20 per cause of action should be the limit. Although the 300-fact statements are bad lawyering, they happen often enough to require control. Courts need not fear endless motions to increase the limit — most often, as with page limits on briefs or the number of depositions, the parties will work it out. And if an additional fact turns up, the judge will have discretion to allow it in.

It would be a terrible idea to describe point-counterpoint in the national rule as an opt-in procedure. That would be worse than the present situation, where local rules often establish a known procedure in a given district. “If I have to explain to a client that the practice on something as important as summary judgment will depend on whose name comes up on a wheel, that’s kind of hard to explain to a client * * *.” As for districts that have no local rule, but often standing orders and different practices, it’s one thing to have 93 local rules, “but I would hate to see a situation where we have 600 or a thousand.”

It might work to have the statement as a section of the brief; that could avoid much of the duplication that now exists between the separate statement and the brief. It would retain the opportunity to tell the story — to describe the mosaic — in the brief. But “give me back my pages. I want my full 40 pages for the old brief.”

Donald F. Zimmer, Esq., Feb. 2, 248, 250-251: Defense lawyers did not ask for the California point-counterpoint rule. It is instructive and it limits the number of issues. The weight of the motion may defeat it. “So I have not seen people file extraordinarily long statements * * * with any success.” If judges are dissatisfied with the procedure, perhaps an opt-in or opt-out procedure would be appropriate.

Raoul D. Kennedy, Esq., Feb. 2, 252-269: It is telling that as a defense lawyer I disagree with Elizabeth Cabraser and Sharon Arkin about nearly everything, but we all agree that point-counterpoint is not a good idea. Twenty-five years of experience in California show its defects. I have never won or lost a summary-judgment motion and thought that the separate statement either helped me or hindered me. “[B]ut it carries an incredible amount of baggage and expense.” Three different intermediate appellate decisions in California establish three different approaches — anything not in the statement must be completely disregarded; the court has a duty to look at all the evidence in the record; there is something in between. And courts disagree whether the statement can be amended to include something left out. The idea that good lawyers will automatically provide brief statements is wrong. In a current case in the Central District of California, using this procedure, very good lawyers have produced a motion with 130 undisputed facts, another motion with 60 undisputed facts, and another motion with 80. If you tell these lawyers they can have only 20 or 25 facts, the motion will look much the same, “except facts 1 through 6 are now going to be fact number 1. And you can then do a whole new round of law and motion about who’s cheating on combining more than one fact into a single number.” Lawyers fearing that only facts in the statement will be considered will not take chances. They will produce the 80-fact statement. “There is caution on the part of the lawyer.” And “lawyers just don’t do a very good job of conceding” — the responses to the 130 facts will not be “undisputed, undisputed, undisputed.” The responses are evasive, or the movant thinks they are and files a reply, giving the court a three-column document to trace across. “[I]t’s almost the equivalent of a request for admissions in interrogatories. Lawyers aren’t going to belly up and candidly say what’s involved.” “[Y]ou’ve got an imprecise issue with an imprecise response with an imprecise rejoinder. It’s like doing discovery.”

A solution would be to have the nonmovant submit a proposed order with the response, laying out specifically what the contested facts are. The movant would have to file a response to the proposed form of order.

A brief with page limits provides another possible approach. “We’re very good at writing point-counterpoint briefs against one another, but the statement of undisputed facts presupposes a certain amount of collegiality and joint participation * * *. You’re asking lawyers to do something most of us are genetically incapable of doing and giving us unlimited numbers of pages in which to do it.”

Writing point-counterpoint into Rule 56 as an opt-in is not wise. There is a risk that it would become the automatic default. And the California experience shows it is a practice that should not be encouraged. It was adopted by the legislature at the behest of plaintiffs’ trial lawyers, and although it has boomeranged legislative change is not likely.

(C)(2): ADD SUR-REPLIES

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: “Of special help with motions filed early in a case would be explicitly to permit sur-replies where the reply supporting summary judgment contains any factual matter beyond the scope of the response.”

08-CV-048, Stephen Z. Chertkof, Esq.: “Provide a right of sur-reply for the non-moving party so that the party with the burden of proof at trial is fully heard, rather than giving the moving party the first and last word and a disproportionate ability to frame the issues.”

08-CV-075, Mark Hammons, Esq.: Present practice allows a nonmovant to respond to new fact materials or new legal argument offered in a movant’s reply. This opportunity is essential; compare present Rule 56(c), which allows a nonmovant to serve opposing affidavits before the hearing day. The rule should provide that the movant’s reply may not contain new evidentiary materials or new legal arguments, but also provide that if the reply violates this restriction the court must either exclude the new materials and arguments or allow the nonmovant to respond.

08-CV-109, Ellen J. Messing, Esq., for Seven Massachusetts Lawyers: As summarized with the point-counterpoint comments — movants commonly raise new and central points that require a sur-reply.

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.: Sur-replies should be permitted, but both reply and sur-reply should be confined to responding to materials in the opposing submission. “NELA members have complained that they have been ‘sandbagged’ by primary brief which had provided abbreviated or unclear statements of facts or arguments, tactically written to prevent cogent or complete responses, with the Reply Brief clarifying or even adding arguments and providing additional authorities in support of those arguments.”

08-CV-150, Elizabeth J. Cabraser, Esq., for Public Justice: The plaintiff has the burden at trial, but the proposed structure gives a moving defendant the first shot and last shot. “A surreply opportunity, at the least, should be permitted, in this duel of ‘facts,’ to give each side the same number of shots.”

08-CV-156, Brian P. Sanford, Esq.: “To more closely simulate the burden of proof at trial, the court should allow the party with the burden of proof a sur-reply to a motion for summary judgment.” Often the motion relies on cross-examination of the plaintiff at deposition. “The plaintiff is not allowed to present his or her direct testimony until after defendant’s selection of plaintiff’s cross-examination and the plaintiff is chastised if gaps are filled, and punished if there is any change in testimony.”

08-CV-157, Margaret A. Harris, Esq.: A sur-reply should be added as a new (b)(4).

08-CV-179, Robert J. Wiley, Esq.: Plaintiffs usually go first at trial. In employment cases usually the defendant goes first on summary judgment. Plaintiffs should be allowed to surreply.

08-CV-183, Professor Eric Schnapper: The comment is supported by a lengthy paper. The paper develops a theme heard in many comments: often the movant adduces its most important evidence in supporting the reply. The sequence is a motion that ignores some or all of the evidence the nonmovant will rely on; a response that adduces the nonmovant's evidence; and a reply that spells out the defects the movant relies on to undermine the probativeness of the nonmovant's evidence. The nonmovant must have an opportunity to reply — Rule 56(b) should be modified to allow a fourth filing.

Brian Sanford, Esq., Jan. 14, 27 at 30-31: A defendant's motion for summary judgment "turns trial practice on its head." The defendant frames the issues, the plaintiff gets one chance to respond, and then the defendant has the last word. The Eastern District of Texas local rules provide an automatic sur-reply. This should be generally available.

08-CV-191, James C. Sturdevant for National Assn. of Consumer Advocates: The point-counterpoint procedure gives the movant — usually the defendant — the first and last word. But the plaintiff has the burden of proof. "[T]he plaintiff should always have the last word as s/he does at trial."

Steve Chertkof, Esq., Nov. 17, 34, 51: There should be a right of sur-reply. And oral hearings.

Hon. David F. Hamilton, Feb. 2, 22, 36: The majority of the court in the Southern District of Indiana believe there should be a right to surreply. "[W]e see all the time * * * reply briefs from moving parties that either raise new evidence or object to admissibility for the first time of a non-moving party's efforts. And it just seems to me basic fairness the non-moving party has to have an opportunity to respond to those. We keep it short. We keep it limited with a short time frame." And this makes it easier to avoid arguments after a nonmovant who failed to surreply loses on the motion.

Elizabeth J. Cabraser, Esq., Feb. 2, 107, 114: If point-counterpoint is adopted, it should include a surreply brief "to make sure that there is no injustice and that evidence is not left out." But the need for yet another brief is a good sign that point-counterpoint is not a good idea.

Stefano G. Moscato, for National Employment Lawyers Assn., Feb. 2, 117, 132-133, 135-136: Employment plaintiffs are "over and over * * * sandbagged by briefs that are providing abbreviated and unclear statements * * * essentially tactically being written to prevent a cogent response and then waiting for a reply brief * * *." Our members complain that they are not allowed to surreply. It would work to limit the surreply to new evidence provided in a reply, any new material.

(C)(3): ACCEPT FOR MOTION ONLY

08-CV-048, Stephen Z. Chertkof, Esq.: Rule 56(g), permitting a court to establish a fact as not genuinely in dispute is in irreconcilable tension with proposed Rule 56(c)(3), permitting acceptance

of a fact for purposes of the motion only. No one will be willing to accept a fact for purposes of the motion only.

08-CV-071, Hon. Paul J. Kelly, Jr.: Allowing a party to accept a fact only for purposes of summary judgment may make the summary judgment process more efficient, but it will have two undesirable effects. Cautious counsel will accept only for purposes of the motion, while accepting facts generally would make trial more efficient. And accepting facts only for purposes of the motion will reduce the effectiveness of proposed Rule 56(g) — a general acceptance would enable the court to find a fact not genuinely in dispute, while an acceptance for purposes of the motion only defeats this prospect.

08-CV-161, Federal Magistrate Judges Assn.: Allowing a party to accept or dispute a fact either generally or for purposes of the motion only is beneficial.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: To protect against trapping a party who accepts for purposes of the motion only, Rule 56(g) should be revised to provide that the court may not “state” a fact if a party accepted it for purposes of the motion only.

08-CV-175: Hon. Marcia S. Krieger: Rule 56 should provide for a joint stipulation of facts and a joint request for a legal determination. “I often offer this when the dispute is limited to an application of the law — ERISA, declaratory judgment/insurance coverage, contract interpretation cases, agency appeals.” The parties simultaneously file opening briefs, and simultaneously file reply briefs.

08-CV-176, State Bar of California, Committee on Administration of Justice: The Committee Note states that acceptance for purposes of the motion only does not provide a basis for an order under Rule 56(g), but this relationship is not clear from the rule text. Rule 56(g) should be revised “to make it clear that a conditional acceptance under subdivision (c)(3) cannot provide the basis for an order under subdivision (g).”

Sharon J. Arkin, Esq., Feb. 2, 94, 104-105: At times I have said that a fact is not disputed for purposes of the summary-judgment motion, and then it has “been turned around and I’ve been attacked at trial saying I stipulated to the facts.” The rule should be that a fact is undisputed for purposes of the motion only unless the party otherwise indicates that it is accepted for general purposes.

(C)(4): SUPPORTING MOTION AND RESPONSE

08-CV-037, Professor Adam Steinman: Proposed (c)(4)(A)(ii) allows a movant to show “that an adverse party cannot produce admissible evidence to support the fact.” **(1)** This language can be misread in ways that, contrary to the Committee’s intent, will change the moving burden. A party who bears the trial burden of production should not be able to prevail simply by showing that the nonmovant does not have evidence; the movant must show that it can carry its trial burden to the point of shifting the trial burden of production to the nonmovant. This part of the proposal is

intended to apply only to a motion by a party who does not have the trial burden of production; it should say so expressly. (Proposed rule language is included.) (2) A second shortcoming is that the proposed language may imply that the movant need not cite to any materials in the record. The Celotex opinion is clear that the movant always has the initial responsibility of identifying the materials that show there is no genuine dispute. (Again, proposed corrective language is included.)

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: Even after stating that material is not admissible, the response or reply must refute the fact as if the supporting material were admissible, lest summary judgment be granted. In fairness, there should be a ruling on admissibility before having to respond on the merits. (And it is asked whether the challenge must be stated in the brief, impairing the best use of limited pages.)

08-CV-183, Professor Eric Schnapper: The paper supporting this comment includes a draft of Rule 56 provisions, including detailed provisions for Celotex no-evidence motions. The starting point is that “the moving party demonstrates that at trial the non-moving party [who has the burden of proof] will not have legally sufficient evidence on the basis of which a reasonable jury could find for the non-moving party.” The motion must “(a) state with particularity the fact or facts regarding which the moving party asserts that the non-moving party will lack sufficient evidence at trial, (b) set forth the discovery undertaken by the moving party to identify the evidence regarding such facts which the non-moving party would have at trial, (c) set forth why the non-moving party bears the burden of proof regarding the fact or facts in question, and (d) be accompanied by an affidavit and/or documents reflecting any information in the possession of the moving party with regard to those fact or facts, including information that might lead to the identification of relevant admissible evidence. If the moving party has no such information, it shall so state in a sworn affidavit.” (Note that (d) would go part way back to the “heartburn” aspect of the initial disclosure rule in force from 1993 to 2000.)

08-CV-161, Federal Magistrate Judges Assn.: Expresses confusion as to the intended meaning of (c)(4)(A)(ii), and recommends that it be revised to be clearer.

(C)(4)(B): MATERIALS NOT CITED

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): A one-way notice provision makes little sense. “Notice to the parties should be required if the court goes beyond the material cited, whether doing so to grant or to deny summary judgment.”

Jeffrey J. Greenbaum, Esq., Feb. 2, 221, 224-235, 239-242: (This testimony reflects the views of officers and members of the council of the ABA Litigation Section, but is not ABA policy.) Notice should be required when the judge relies on record materials not cited by the parties, whether the judge relies on them to grant or to deny the motion.

(C)(5): STATE CITED MATERIAL NOT ADMISSIBLE

08-CV-037, Professor Adam Steinman: Summary-judgment materials need not themselves be in a form admissible at trial — an affidavit or declaration ordinarily is inadmissible hearsay, but suffices. Courts now divide on the use of material that is not in a form admissible at trial, but that can be reduced to a form admissible at trial — an affidavit that recounts the hearsay statements of a different witness is surely relevant if the proponent “indicates an intent to call at trial the individual who made the out-of-court statement.” The cure is to eliminate (c)(5) “[b]ecause the use of trial admissibility standards at the summary judgment phase is an open question under the current version of Rule 56 * * *.”

08-CV-098, E.D.N.Y. Committee on Civil Litigation: The language should be changed to parallel subdivision (c)(6): “ * * * may state that the material cited to support or dispute the fact would not be admissible in evidence.” This would make it clear that evidentiary determinations at the Rule 56 stage would be made “in anticipation of whether a foundation for admissibility will be available for the evidence at trial.”

08-CV-131, Gregory K. Arenson, Esq., for New York State Bar Assn. Commercial & Federal Litigation Section: Most courts agree that material may be considered so long as it can be reduced to an admissible form at trial. (c)(5) should be amended to allow a statement that material “could not be reduced to a form admissible in evidence at trial.”

08-CV-134, Prof. Bradley Scott Shannon: The rule should say explicitly that the court must not consider inadmissible materials, assuming proper objection is made.

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): A clear mechanism to challenge admissibility is useful. But there should be meaningful notice of the basis for the challenge. The rule should include: “together with a concise citation to or identification of the basis for the challenge.”

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Approves allowing an objection to admissibility without filing a separate motion to strike.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: To parallel (c)(6), and to clarify that rulings on admissibility anticipate whether a foundation for admissibility will be available for the proffered evidence at trial, this should be revised: “A response or reply to a statement of fact may state that the material cited by the adverse party to support or dispute the fact would not be admissible in evidence.”

Rule 56(d)

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: When a party seeks time for additional discovery, “we believe that it would be helpful to require some specification of the material facts that the opposing party expects to discover.”

08-CV-055, Gregory P. Joseph, Esq.: “There is no convincing reason why 56(f) has to be renumbered 56(d).” Future computer searches will be more complicated.

08-CV-082, Robert S. Mantell, Esq.: Points to First Circuit cases said to refuse an alternative response that both asserts the nonmovant has sufficient evidence to defeat summary judgment and also requests an opportunity for further discovery. A nonmovant’s request for Rule 56(d) relief should not be taken as a tacit admission that the nonmovant cannot defeat summary judgment without the relief. Nor should a response on the merits waive the right to request Rule 56(d) relief. This sentence should be added: “A nonmovant may seek relief under this provision while arguing in the alternative that the nonmovant has produced sufficient evidence requiring denial of the motion.”

08-CV-134, Prof. Bradley Scott Shannon: The nonmovant should allowed to show its reasons by sworn testimony in open court, not merely affidavit or declaration. If the required showing is made, the court should not deny the motion — the only appropriate accommodation is to defer consideration. Nor is there any need to carry forward the provision for “any other appropriate order. Finally, the three paragraphs should be separated by “and,” since the court may take more than one of these measures.

08-CV-142, Hon. David F. Hamilton: Some comments suggest a nonmovant should be permitted to respond in the alternative — the motion should be denied, but if the court is inclined to grant it I would have more time for discovery. “[I]f an alternative response is a permissible response, * * * I expect it will become the standard response.” A decision to grant summary judgment will become an advisory opinion — more time is allowed for discovery, the parties brief the motion anew, and the court will issue a second and real decision. “Please — make clear that this is not a permissible response.”

08-CV-157, Margaret A. Harris, Esq.: This provision, as present Rule 56(f), presents the problem that a nonmovant does not have a clear mechanism to obtain a ruling on the motion for more time before having to file a response to the Rule 56 motion. “And when there is a response on file, lower courts often see that as sufficient and thus deny the 56(f) motion — leaving the non-movant with a less-than otherwise available record should summary judgment be granted.”

08-CV-183, Professor Eric Schnapper: Present practice is clearly unsatisfactory. Things work well if a sensible order is imposed by a scheduling order. Otherwise the movant controls timing. There is every incentive to move before potentially inculpatory evidence has been discovered — and often the movant is the one who knows this. “Summary judgment thus operates as sort of a retroactive discovery cutoff * * *. The filing of a summary judgment motion summarily ends the record building process.” With only a short time to respond, the nonmovant is usually unable to do more than summarize the information it has in hand. “[T]he key weapon for preventing the disclosure of adverse information is delay * * *. A moving party’s control over the timing of summary judgment can be outcome determinative if it is used to stop the clock before the process has run its course.” The nonmovant ordinarily must respond at the same time as it litigates its request for additional time. “Such a system would be inconceivable in the process of creating a trial record. No court would

permit a litigant to control the trial date and keep it secret from the opposing party until a few weeks before trial.” Even making a Rule 56(f) request is discouraged by the need to divert precious time from preparing a response to the motion. Some lawyers may be discouraged by the fear that even asking for more time is inconsistent with the position that the nonmovant does have sufficient evidence. A number of courts, moreover, address Rule 56(f) requests by asking whether the nonmovant has been sufficiently vigorous in pursuing discovery — that is inconsistent with the safeguards built into the procedures for imposing discovery sanctions. “At best the Rule 56(f) process confers on the district judge discretion to cut off the record-building process.” That is fundamentally different from the process at trial. And at worst, the system “creates significant institutional pressures on the judge to proceed to decide the summary judgment motion on the merits (at the time of the moving party’s choosing), as it would any other motion, rather than start the process over again.” (This is followed by a longer plea for scheduling orders that establish “a structure more similar to the predictable and equitable record building process that precedes a JML motion.”) The supporting paper includes a draft rule provision: “within 30 days after the filing of a motion for summary judgment, the non-moving party shall either file a response to that motion, or submit a request under Rule 56(f) or otherwise for additional time for investigation of discovery. If such a request is made, a response to the motion itself shall be filed within the period determined by the court.”

Rule 56(e)

DEFECTIVE MOTIONS

08-CV-016, Joseph D. Garrison, Esq.: Proposes the rule should include a motion to strike an abusive submission. The motion would toll the time to respond. The problem is one encountered in representing plaintiffs in individual employment actions. It is illustrated by cases in which defendants submitted far too many allegedly material facts — the numbers encountered in his own practice have ranged from 92 through 107, 237 (a case involving 8 individual plaintiffs), 246, and 292. References were made to the record for each fact, “sometimes correctly, sometimes not.” The work of responding entails substantial costs to the clients. A motion to strike an abusive submission will, to be sure, lead to collateral litigation in the short term. But once defense firms learn the lesson, they will conform to sensible practices. Other sanctions are not needed — it is enough that the lawyer who presents an abusive motion “would have to confront the client with the need to do it over.”

08-CV-123, Hon. Barbara B. Crabb: The only reason for considering a fact undisputed is for purposes of deciding the motion. (2) and (3) should be combined “so that it is clear that the court will not only consider the fact undisputed but may proceed to grant summary judgment for the movant on the basis of that undisputed fact and others.” (It is not clear whether this assumes that the court will always consider the fact undisputed.)

08-CV-176, State Bar of California, Committee on Administration of Justice: “[S]upports the proposed amendments, for the reasons stated in the Advisory Committee report.”

Rule 56(f)

NOTICE

08-CV-123, Hon. Barbara B. Crabb: What kind of notice is contemplated? Would a local rule or procedure saying the court can do these things suffice? “Or would it be necessary to pause between deciding the motion and making it public to give specific notice to the litigants * * *? Does notice have to come from the court and does it have to be anything more than the losing party’s being ‘on notice that she had to come forward with all her evidence?’ *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).”

(F)(1): GRANT FOR NONMOVANT

08-CV-121, Phil R. Richards, Esq.: (It is unclear whether this comment is submitted for the American College of Trial Lawyers.) “[T]he rule should provide that a court ‘should’ grant summary judgment for either party in the event that the motion and briefs show that they are entitled to it, either globally or on any specific issue, regardless of whether they are the movant or the respondent.”

08-CV-175, Hon. Marcia S. Krieger: It is unwise to require notice before granting summary judgment for the nonmovant. The movant takes that risk.

(F)(2): GRANT OR DENY ON GROUNDS NOT IN MOTION

08-CV-161, Federal Magistrate Judges Assn.: This provision requires notice and opportunity to respond before either grant or denial on grounds not raised by the motion. Proposed (c)(4)(B) requires notice before granting on materials not cited, but not before denying on materials not cited. The distinction is so subtle that it will give rise to arguments. “[T]hese two subsections should be consistent.”

(F)(3): CONSIDER ON COURT’S OWN

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: Codifying the practice that allows a court to initiate summary judgment without a party’s motion “would add greatly to whatever cost and delay the parties judged they could handle before the court intervened.” The parties may understand the facts far better than the court, and understand that the case is not appropriate for summary judgment.

08-CV-133, Sharon J. Arkin, Esq.: “One of the most frightening changes proposed is to permit judges to initiate summary judgment proceedings sua sponte.” “Because the parties know their case best, it is for them to determine whether a summary judgment motion is appropriate.”

08-CV-134, Prof. Bradley Scott Shannon: The court should not be permitted to grant summary judgment sua sponte. It suffices to invite a motion. All of subdivision (f) should be deleted.

08-CV-183, Professor Eric Schnapper: The supporting paper, but not the formal comment, expresses concerns that seem to reflect the risk of overlooking information not called to the court's attention because the motion did not present the issues the court addresses. The problem seems to be lack of notice and opportunity to respond, something proposed Rule 56(f) does require.

Rule 56(g)

08-CV-048, Stephen Z. Chertkof, Esq.: Rule 56(g), permitting a court to establish a fact as not genuinely in dispute is in irreconcilable tension with proposed Rule 56(c)(3), permitting acceptance of a fact for purposes of the motion only. No one will be willing to accept a fact for purposes of the motion only.

08-CV-123, Hon. Barbara B. Crabb: “[W]hat does the committee contemplate would be the relationship between facts treated as ‘established in the case’ and (c)(3), which talks of accepting or disputing a fact either generally or for purposes of the motion only”?

08-CV-134, Prof. Bradley Scott Shannon: “Must” should be used to describe the court’s obligation. “[I]f the rule provides for the possibility of partial summary judgment, the court should be obligated to grant partial summary judgment whenever appropriate.” And the rule should refer to the “action,” not the “case.”

08-CV-176, State Bar of California, Committee on Administration of Justice: (1) (g) seems properly limited to facts, not issues, claims, or defenses. If so, the title “Partial Grant of Motion” may be misleading — “Order Establishing Material Fact” would be better. (2) “~~including an item of damages or other relief~~” could be read to refer to something other than facts; these words should be deleted. (3) The Committee Note refers to “facts ~~and issues~~”; the reference to issues should be deleted.

Rule 56(h)

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: “We would like to see some further explication of ‘expenses’ in the Rule or Committee Note and support the shifting of all out-of-pocket costs, where relevant, including printing fees, deposition expenses, travel and subsistence expenses, fees for experts, etc.”

08-CV-039, Professor Alan B. Morrison: Generally does not favor sanction motions. But if they are to be made, the problem is not bad-faith affidavits or declarations. “If there is a problem, it is that a motion for summary judgment is made (or in some cases an opposition filed) solely for purposes of delay, especially when made by defendants who have every incentive to delay. I would change ‘affidavit or declaration’ to ‘motion or response.’” The focus would be on the entire motion or response, not one part.

08-CV-040, Theodore B. Van Itallie, Jr., Esq.: Writing as Associate General Counsel in charge of global litigation for Johnson & Johnson, urges “a reasonable fee-shifting rule” to tax the losing party

when “summary judgment is defeated or deferred based on an assertion that can be said to be objectively unreasonable.”

08-CV-045, Debra Tedeschi Herron, Esq.: Rule 56 should “provide for a reasonable cost allocation when materials are submitted without reasonable justification, in place of the current ‘bad faith’ standard.”

08-CV-050, Stephen G. Morrison, Esq.: “[T]he Committee should adopt an objective tool in the form of an allocation of expenses triggered by a party’s submission of materials without reasonable justification.”

08-CV-055, Gregory P. Joseph, Esq.: By saying that the court “may” order sanctions if satisfied that an affidavit is submitted in bad faith or solely for delay, the rule “appears to contemplate that some bad faith or dilatory affidavits may be permissible.” “It is time to accept that Rule 56(h) is a relic. The area is covered by Rule 11 and multiple other sanctions powers. I would just retire it.”

08-CV-061, Lawyers for Civil Justice and U.S. Chamber Institute for Legal Reform: The statement of undisputed facts procedure of proposed Rule 56(c) may allow a case to survive too long through extensive discovery and motion practice. There may be “frivolous motions” by any party. A nonmovant may insist on discovery to search for facts that do not exist or are immaterial. An indisputable fact may be contested without support. “[A] party that is in a position to know the undisputed facts” but demands additional discovery should bear the costs imposed on the movant. A party who disputes facts without reasonable justification should bear the costs. It is a mistake to rely on subjective intent, as do the limited provisions of present Rule 56(g) and proposed Rule 56(h). The rule should provide that reasonable expenses, including attorney fees, may be awarded if “a motion, response, reply, affidavit or declaration under this rule is submitted without reasonable justification.”

08-CV-110, G. Edward Pickle, Esq.: Sanctions should be imposed for “non-responsive arguments and obfuscation.”

08-CV-124, Wayne B. Mason, Esq. for Federation of Defense & Corporate Counsel: “Courts are often disinclined to make a finding of bad faith based on a subjective intent.” The rule should provide for “cost shifting when summary judgment papers are submitted without reasonable justification.” Rule 11 provides sufficient basis for sanctions.

08-CV-127, Michael R. Nelson, Esq.: Sanctions should be expanded beyond bad-faith affidavits and declarations, authorizing the court to order payment of reasonable expenses, including attorney fees, if a motion, response, reply, or affidavit or declaration is submitted without reasonable justification.

08-CV-134, Prof. Bradley Scott Shannon: This provision “is pathetic, and an embarrassment to the profession.” There is no need to set out in the rule the obvious proposition that sanctions can be imposed for making an affidavit for improper reasons.

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Approves recognizing current practice treating sanctions as a matter of discretion.

08-CV-167, Michael T. Lucey, Esq., for Federation of Defense & Corporate Counsel: “We favor a cost shifting when summary judgment papers are submitted without reasonable justification.” The allocation should be “objective, reasonable and discretionary.” But Rule 11 should remain as the source of sanctions.

Theodore Van Itallie, Esq., Nov. 17, 105, 111-112: There should be an appropriate cost-shifting standard both for inappropriately made motions and for oppositions that are objectively unreasonable. Cost-shifting will lead to greater care in deciding whether to make the motion and in how to oppose it.

Stephen G. Morrison, Esq., Nov. 17, 120, 126-127: Rule 56(h) should be modified to include an objective standard for cost shifting. This would not be a punitive rule, not a bad-faith rule, not a subjective standard, but cost-shifting when motion or response is made “without reasonable justification.” “As you know, Rule 56(g), nobody ever finds bad faith on the part of the lawyers, and so it’s an ineffective rule.”

Debra Tedeschi Herron, Esq., Nov. 17, 141, 142-143: An objective reasonableness test should be adopted, providing consequences for over-long statements of undisputed facts or similar responses. That will make the point-counterpoint procedure effective.

Latha Raghavan, Esq., Nov. 17, 143, 145: If there is any lingering doubt about point-counterpoint procedure for fear of over-long statements or responses, “you may want to look at your sanction section,” rewording it so “attorneys understand that the only things that should be put in the material statement of facts are things that will lead to the ultimate result and nothing else.”

Alfred W. Cortese, Jr., Esq., for Lawyers for Civil Justice, Nov. 17, 153, 161-162: Members are divided, but on balance “we think the system would benefit by having a reasonable cost allocation mechanism that would discipline adherence to these new rules and also the filing of motions.” There is a fear that only “target defendants” would incur these orders for making objectively unreasonable motions, but the risk is worth it to achieve a discipline that encourages adherence to the rules, “particularly when we see many instances in which there are frivolous responses to motions, as well as in some instances frivolous motions * * *.”

Wayne Mason, Esq., for Federation of Defense & Corporate Counsel, Jan. 14, 60, 75-76: Cost-shifting is the best way to deal with the lawyer who files an unreasonably long statement of undisputed facts. This is not as a sanction — Rule 11 suffices for that. It compensates the other party if a motion or response is inappropriate.

G. Edward Pickle, Esq., Jan. 14, 104, 112: There should be a cost allocation mechanism for abuse of the system.

Staged Discovery

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: Rules 16 and 26 on scheduling orders, scheduling conferences, and pre-discovery conferences should be amended to direct the parties to at least consider the possibility of phased discovery, directing attention first to the “real frailties” in the case that may lead to disposition by summary judgment.

Style

08-CV-056, Hon Frank H. Easterbrook: “as to” is misused in draft 56(a). Make it: “no genuine dispute ~~as to~~ about any material fact.”

Other

08-CV-057, R. Matthew Cairns, Esq.: Not only should summary judgment be made mandatory by adopting “must” in the standard. “Must” “should also extend to state court claims that have been joined in the federal action, rather than having those claims remanded to the state court should the federal claims be dismissed * * *.”



MEMORANDUM

To: The Advisory Committee on Rules of Civil Procedure
From: The Advisory Committee on Rules of Bankruptcy Procedure
Re: Discharge in Bankruptcy in Fed. R. Civ. P. 8(c)
Date: March 27, 2009

In December 2005, the Advisory Committee on Rules of Civil Procedure recommended for publication a proposal to remove “discharge in bankruptcy” from the list of affirmative defenses in Fed. R. Civ. P. 8(c). The recommendation was published in August 2007, and the Department of Justice submitted the only comment opposing the proposed rule change. In connection with further consideration of questions raised by the DOJ, the Civil Rules Committee asked for a recommendation from the Advisory Committee on Bankruptcy Rules. At its March 26, 2009 meeting, the Bankruptcy Committee considered the issue, aided by a memorandum (dated March 4, 2009) from the DOJ, detailing its arguments against the proposed change to Rule 8(c). After a full discussion of the matter, the Bankruptcy Committee determined to recommend adoption of the proposed change. This memorandum sets out the basis for the Bankruptcy Committee’s recommendation and responds to the arguments made by the DOJ.

A. The central issue: whether discharge in bankruptcy is a waivable defense

Rule 8(c) sets out a list of affirmative defenses that “a party must affirmatively state.” The rule “require[s] the defendant to plead any of the listed affirmative defenses

that it wishes to raise or risk waiving them.” 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1270 (3d ed. 2008). Among the listed defenses subject to waiver if not affirmatively stated is “discharge in bankruptcy.” The proposal to eliminate this defense from Rule 8(c) is based on § 524(a) of the Bankruptcy Code (Title 11, U.S.C.) which provides as follows:

(a) A discharge in a case under this title —

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived

In proposing the change to Rule 8(c), the Civil Rules Committee determined that § 524(a) prevents the bankruptcy discharge of a particular debt from being waived and voids any judgment obtained on a discharged debt, despite a procedural default by the debtor. The DOJ has responded with arguments raising issues of statutory construction and policy, contending that § 524(a) is consistent with the Rule 8(c) requirement that a party plead discharge as an affirmative defense.

As discussed below, the DOJ’s statutory construction arguments conflict with the language and history of § 524(a) and are unsupported by any case law. Moreover, contrary to the DOJ’s policy arguments, eliminating “discharge in bankruptcy” from Rule

8(c) will not create procedural difficulties, but rather correct what is now a misleading provision.

B. The language of § 524(a)

The DOJ makes three arguments in support of its position that § 524(a) allows a waiver of discharge by failure to assert the discharge as an affirmative defense. Two appear on page 6 of its memorandum:

[1] New Code § 524(a)(1) . . . provides that a discharge “voids any judgment at any time obtained, to the extent that such judgment” is for a discharged debt. [I]t uses the present tense verb “voids.” Under the plain language rule of statutory construction, the present tense verb suggests that the “at any time obtained” language is referring to judgments entered either pre- or post-petition but prior to the discharge and not to future judgments.

[2] At the same time, the injunctive provision in § 524(a)(2) proscribes the continuation of a pre-discharge suit on a debt [only] if the debt was clearly discharged, and similarly forbids a new action unless the creditor had a colorable claim to an exception.

The third argument is set out in footnote 3 on page 3: “The invalidation of waivers in the final clause of § 524(a) . . . addresses contractual waivers, and not the failure of a debtor to plead a discharge in a future lawsuit”

None of these arguments can be reconciled with the actual language of § 524(a). First, the provision that a bankruptcy discharge “voids any judgment at any time obtained” necessarily affects judgments obtained after discharge as well as before; otherwise, instead of applying to judgments obtained “at any time,” the statute would refer

to judgments obtained “before the entry of discharge.” Similarly, the use of the present tense “voids” simply reflects the continuing effect of the discharge: it both “voids” judgments previously obtained and “voids” judgments obtained thereafter. The DOJ’s suggestion that a future tense is somehow required has no basis in grammar.

Second, the suggestion that § 524(a) applies only to debts that are “clearly” discharged, and not to debts subject to a “colorable claim” of nondischargeability, contradicts the statutory language. No such limitation appears in the statute; if a debt is discharged, it cannot be subject to an enforceable judgment. Nothing in the statute dictates a different result depending on the degree to which a debt might be subject to nondischargeability claims. Statutes should not be read to include unexpressed limitations. *See Felder v. Casey*, 487 U.S. 131, 148 (1988) (noting the Court’s refusal to add exhaustion requirements to civil rights legislation); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007) (observing that the Supreme Court “has counseled against adding extra-legislative requirements to statutory text”); *cf. Gardenhire v. United States Internal Revenue Serv. (In re Gardenhire)*, 209 F.3d 1145, 1148 (9th Cir. 2000) (“Close adherence to the text of the relevant statutory provisions and rules is especially appropriate in a highly statutory area such as bankruptcy.”).

Finally, nothing in the statutory language suggests that the anti-waiver provisions of § 524(a) apply to contractual waivers but not to waivers resulting from procedural default. The term “waiver” plainly encompasses the bar resulting from a defen-

dant's failure to plead an affirmative defense. *See, e.g., Jakobsen v. Mass. Port Authority*, 520 F.2d 810, 813 (1st Cir. 1975) ("The ordinary consequence of failing to plead an affirmative defense is its forced waiver . . ."). In providing that the debtor may not waive discharge, § 524(a) draws no distinction between contractual and procedural waivers, and again, it is improper to engraft limitations on a statute's general provisions. However, even if the DOJ's argument on this point were correct, it would not limit the principal effect of § 524(a), which is to void any judgment on a discharged debt.

Thus, none of the DOJ's arguments effectively challenges the reading that the Civil Rules Committee suggested in proposing the change to Rule 8(c): "A discharge voids any judgment obtained on the discharged debt even if the debtor defaults or appears but fails to plead the discharge. . . . Section 524 has superseded the role of discharge as an affirmative defense."¹

C. The legislative history of § 524(a)

Since the language of § 524(a) plainly provides that a discharge in bankruptcy cannot be waived, there is no need to explore its legislative history. However, if

¹ The DOJ does not argue that Rule 8(c) could somehow supersede § 524. That argument would be foreclosed by the fact that the Bankruptcy Code was enacted after the rule was in place. The more recent enactment, of course, is controlling. *See Mitchell v. Farcass*, 112 F.3d 1483, 1489 (11th Cir. 1997) (holding that "a statute passed after the effective date of a federal rule repeals the rule to the extent that it actually conflicts" (quoting and adopting the holding of *Jackson v. Stinnett*, 102 F.3d 132, 135 (5th Cir. 1996))).

the arguments in the DOJ memorandum were sufficient to raise some question about the meaning of § 524(a), its legislative history could properly be consulted. *See Fla. Power & Light Co v. Lorion*, 470 U.S. 729, 737 (1985) (when a statute is ambiguous, the court may seek guidance in the relevant legislative history): *United States v. Yellin (In re Weinstein)*, 272 F.3d 39, 48 (1st Cir. 2001) (where the Bankruptcy Code is ambiguous, the courts look to “its historical context, its legislative history, and the underlying policies that animate its provisions”).

The history of § 524(a) clearly demonstrates the nonwaivable character of discharge under the Bankruptcy Code. That history unfolds in four steps:

1. Before 1937, courts interpreted the Bankruptcy Act of 1898 to provide that a debtor’s discharge was indeed an affirmative defense. If a debtor did not raise a bankruptcy discharge in response to a collection action brought after the discharge was granted, the debtor waived that defense. *See In re Evans*, 289 B.R. 813, 826 (Bankr. E.D. Va. 2002) (discussing practice under the Bankruptcy Act).

2. Consistent with then-existing bankruptcy law, Rule 8(c), as originally enacted in 1937, made discharge in bankruptcy an affirmative defense. *See Francis v. Humphrey*, 25 F. Supp. 1, 3 (E.D. Ill. 1938) (setting out the original text of the rule). The substance of the rule has not changed since.

3. In 1970, Congress amended the Bankruptcy Act to include a new § 14f, making the discharge in bankruptcy self-effectuating and so eliminating the need for its asser-

tion as an affirmative defense.² The House Report accompanying the amendment made this point emphatically:

[T]he major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment upon the discharge. Often the debtor in fact does not appear because of such misplaced reliance, or an inability to retain an attorney due to lack of funds, or because he was not properly served. As a result a default judgment is taken against him and his wages or property may again be subjected to garnishment or levy. All this results because the discharge is an affirmative defense which, if not pleaded, is waived.

H.R. Rep. No. 91-1502, at 1-2 (1970), as reprinted in 1970 U.S.C.C.A.N. 4156, 4156.

4. With the adoption of the Bankruptcy Code in 1978, § 524(a) replaced former § 14f. New § 524(a) employed different terminology, but it did not contract the scope of the § 14f discharge. To the contrary, the legislative history indicates that Congress in-

² Former § 14f stated:

An order of discharge shall—

(1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: (a) debts not excepted from the discharge under subdivision a of section 17 of this Act; (b) debts discharged under paragraph (2) of subdivision c of section 17 of this Act; and (c) debts determined to be discharged under paragraph (3) of subdivision c of section 17 of this Act; and

(2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

Bankruptcy Act of 1898, § 14f, codified at 11 U.S.C. § 362(f), enacted by Pub.L. 91-467, § 3, 84 Stat. 990, 991 (1970).

tended the Bankruptcy Code to expand the discharge, with an absolute prohibition against enforcing any waiver of a particular debt:

Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt, and operates as an injunction against the commencement or continuation of an action . . . to collect . . . any discharged debt as a personal liability of the debtor. . . whether or not the debtor has waived discharge of the debt involved. The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act § 14f to cover any act to collect The change is . . . intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect the discharge extinguishes the debt, and creditors may not attempt to avoid that. The language “whether or not discharge of such debt is waived” is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section.

H.R. Rep. No. 95-595, at 365-66 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6321-22;

S. Rep. No. 95-989, at 80 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5866.

D. Decisions interpreting § 524(a)

The DOJ has argued that the “considerable majority of courts have applied Rule 8(c).” (Memorandum at 2.) The meaning of this assertion is unclear. Although, as discussed below, a number of courts have enforced waivers of the bankruptcy discharge under Rule 8(c), they have done so without considering whether § 524(a) required a different result. The decisions actually addressing the impact of § 524(a) have all held that failure to assert a bankruptcy discharge as an affirmative defense does not result in a waiver.

The leading case is *Lone Star Sec. & Video, Inc. v. Gurrola (In re Gurrola)*, 328 B.R. 158, 170 (B.A.P. 9th Cir. 2005), which details the history of § 524(a) summarized above and holds “that the defense of discharge in bankruptcy is now an absolute nonwaivable defense.” Thus, the decision notes, “Since 1970, [discharge in bankruptcy] has not been an affirmative defense.” *Id.* *Gurrola* has been cited with approval both in judicial opinions and in secondary sources, most recently in *In re Jones*, 389 B.R. 146, 161-65 (Bankr. D. Mont. 2008), and 4 *Collier on Bankruptcy* ¶ 524.02 [2] at 524-15 & n.6A (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) (citing *Gurrola* in observing that “Section 524(a)(1) is meant to operate automatically, with no need for the debtor to assert the discharge to render the judgment void,” so that “a creditor cannot claim that the voidness of the judgment was waived under a theory of estoppel when a debtor fails to raise the discharge as a defense”).

Even before *Gurrola*, the impact of § 524(a) was widely recognized. See, for example, *Braun v. Champion Credit Union (In re Braun)*, 141 B.R. 133 (Bankr. N.D. Ohio 1992), *aff’d and remanded*, 152 B.R. 466 (N.D. Ohio 1993), which both rejected a waiver argument based on the debtor’s failure to assert discharge as an affirmative defense and imposed sanctions for the creditor’s pursuit of its action. Recently, the Sixth Circuit cited *Braun* in holding that § 524(a) makes it unnecessary for a debtor to take any action in response to a post-discharge collection suit. *Hamilton v. Herr et al. (In re Hamilton)*, 540 F.3d 367, 373 (6th Cir. 2008) (stating that “a debtor need not raise his discharge in bank-

ruptcy as an affirmative defense, because thanks to § 524(a), such an affirmative defense is unnecessary and has been since 1970” (internal quotations omitted)). Many other decisions have reached the same conclusion.³

The decisions cited by the DOJ in no way contradict this interpretation of § 524(a). The first decision the DOJ cites is illustrative. *Bauers v. Board of Regents of Univ. of Wisconsin*, 33 Fed. Appx. 812, 2002 WL 486062 (7th Cir. 2002), an unsigned, non-precedential order, involved a debtor who brought suit against her former employer and failed to assert her bankruptcy discharge in response to counterclaim by the employer. The Seventh Circuit did indeed affirm the district court’s ruling that the debtor waived the defense of discharge in bankruptcy as a result, citing Rule 8(c). However, the decision does not discuss or even mention § 524(a), and so does not support of the

³See, e.g., *Roos v. Kimmel (In re Kimmel)*, 378 B.R. 630, 638 (B.A.P. 9th Cir. 2007) (holding that “the Chapter 7 discharge is absolute and, in light of the anti-waiver provisions of § 524(a), does not admit of an equitable exception that would permit it to be waived by postdischarge conduct”); *Pavelich et al. v. McCormick, Barstow, Sheppard, Wayte & Carruth LLP (In re Pavelich)*, 229 B.R. 777, 781-82 (B.A.P. 9th Cir. 1999) (“The affirmative nature of the defense of discharge in bankruptcy . . . was effectively outlawed in 1970. It became an absolute defense that relieved a discharged debtor from the need to defend a subsequent action in state court.”); *Gilberston v. PEI/Genesis, Inc.*, No. 06-3341, 2007 WL 2710437, at *2 (Bankr. D. Or. Sept. 12, 2007) (“[A]s a matter of federal bankruptcy law, debtor’s failure to raise the defense of discharge in the post-discharge state court fraud action did not constitute a waiver of that defense.”); *In re Bock*, 297 B.R. 22, 332 (Bankr. W.D.N.C. 2002) (finding that the debtor did not waive her discharge by failing to plead her bankruptcy discharge as an affirmative defense in a state court collection action); *Bishop v. Conley (In re Conley)*, Nos. 98-30339, 98-6363, 1999 WL 33490228, at *8 (Bankr. D. Idaho Dec. 10, 1999) (holding that “a Debtor need not assert the discharge injunction as an affirmative defense in order to later pursue the argument that the judgment is void under § 524”).

DOJ's position that § 524(a) allows waiver of discharge through non-assertion of an affirmative defense. The same is true of each of the decisions cited by the DOJ. None of them offers any analysis of § 524(a); each simply applies Rule 8(c) without considering the effect of § 524(a) on waiver of discharge.

It does not appear that any court has published an opinion construing § 524(a) in the manner that the DOJ advocates.

E. Practical considerations

The proper interpretation of § 524(a)—voiding all judgments that contradict a bankruptcy discharge and prohibiting waivers of the discharge—makes it clear that Rule 8(c)'s inclusion of discharge in bankruptcy as an affirmative defense has been superseded. But because the rule still includes the defense, a number of courts—as reflected in the decisions cited by the DOJ—have been misled into finding that debtors have waived their bankruptcy discharges by failing to plead them affirmatively in subsequent collection actions. The fact that the rule's present form causes erroneous rulings presents a powerful practical reason to adopt the change proposed by the Civil Rules Committee.

The DOJ suggests that practical problems will arise if discharge in bankruptcy is no longer listed in Rule 8(c). The simple answer is that changing the rule will not change the law: whatever practical problems the non-waivable discharge creates will exist whether or not the rule is changed. The only effect of changing the rule will be to

eliminate confusion by making the rule consistent with § 524(a), which is in fact the governing law.

Nevertheless, it is worth noting that § 524(a) does not cause significant difficulties in practice. The problems mentioned by the DOJ arise either from the nondischargeability of certain debts or from the failure of a debtor to give notice of the bankruptcy filing to a creditor pursuing collection. The general response to the DOJ's concerns is that questions of dischargeability can usually be determined by a non-bankruptcy court with no violation of the discharge injunction, and a creditor who inadvertently takes action that violates the discharge, without knowledge of the bankruptcy filing, will not be sanctioned for the violation.

The DOJ offers five scenarios to illustrate the effect of eliminating discharge in bankruptcy from Rule 8(c). Since each involves post-discharge collection actions by creditors, the simplest response is to lay out the three possibilities that exist in connection with any such action.

1. *The creditor obtains a determination of dischargeability before pursuing a collection action.*

Section 524(a) only applies to actions to collect a discharged debt, not to actions to determine whether a debt is excepted from discharge. Thus, a creditor may seek a determination of dischargeability without violating the discharge injunction. Certain types of debts—for fraud, breach of fiduciary duty, and willful and malicious injury, as defined in § 523(a)(2),(4), and (6) of the Bankruptcy Code—can only be excepted from

discharge during the bankruptcy case itself. All other kinds of nondischargeability—for student loans, domestic support obligations, and certain tax debts, among others—can be determined by any court of competent jurisdiction. If a creditor raises the question of dischargeability in an appropriate forum, and if the debtor defaults or if there is a ruling on the merits that the debt is in fact excepted from discharge, the creditor may proceed with collection. Rule 8(c) has no application in this situation.

2. The creditor pursues collection activity without a prior determination of dischargeability and the debtor never raises the discharge.

For several reasons, a creditor might pursue collection activity without first obtaining a ruling that the debt is excepted from the debtor's discharge. The creditor may not know the bankruptcy was filed; the creditor may be confident that the debt is in fact excepted from discharge; or the creditor may simply hope that the debtor will not assert the discharge. If the debtor knows that a particular debt is excepted from discharge—for example, a tax obligation that has previously been found to arise from a fraudulent return or a student loan that the debtor can clearly pay without undue hardship—it is unlikely that the debtor will raise the discharge in response to a collection action. Regardless of the reason, if the creditor pursues collection and the debtor never raises the discharge, the creditor will obviously be able to complete the proceeding with no application of § 524(a) or Rule 8(c).

3. The creditor pursues collection activity without a prior determination of dischargeability and the debtor asserts the discharge.

The final possibility is that the creditor pursues a collection action after the debtor's bankruptcy, and the debtor does raise the discharge, either as an affirmative defense at the beginning of the action or later, perhaps when the creditor seeks to enforce a judgment in the collection action. It is in this situation that § 524(a) and Rule 8(c) have their effect.

As discussed above, the effect of § 524(a)—like former § 14f—is that debtors cannot waive discharge and that all judgments on discharged debts are void, eliminating the possibility of debtors losing their discharge by failing to respond promptly to a collection action. This imposes no substantial additional burden on creditors or the courts. A debtor who has received a discharge in bankruptcy is unlikely to incur the expense and inconvenience of contesting a collection action on the merits without raising the discharge. Therefore, most collection judgments subject to collateral attack as violations of a bankruptcy discharge will be default judgments. Addressing the question of dischargeability of the debt after such a judgment will involve the same issues and impose the same costs as if the question had been addressed before the judgment was entered.

On the other hand, the effect of current Rule 8(c) has been to cause some courts to overlook § 524(a), allowing creditors to obtain judgments on potentially discharged debts simply because the debtor did not plead the discharge affirmatively. In such cases, Rule 8(c) may persuade the debtor—incorrectly—that there was in fact an effec-

tive waiver. But if the debtor seeks to challenge the finding of waiver, there will be substantial additional costs for all of the parties, in post-judgment motions or appeals, before the question of dischargeability can be addressed on the merits. There are no legitimate cost-savings as a result of retaining the misleading rule provision.

Finally, there is the question of sanctions. It would indeed be unfair to assess sanctions for violation of the discharge injunction against a creditor who pursues a collection action without knowing of the debtor's bankruptcy or otherwise in good faith. However, Rule 8(c) waivers are unnecessary to avoid this result. In ruling on debtors' requests to enforce the discharge, courts have consistently declined to sanction creditors acting in good faith. "[A]s long as a creditor has a good faith basis for believing that its debt was excepted from discharge or . . . had no knowledge of any such discharge, the creditor is not subject to sanctions for violating the discharge injunction when it proceeds in state court." *In re Everly*, 346 B.R. 791, 797-98 (B.A.P. 8th Cir. 2006).

Conclusion

Discharge in bankruptcy is not a waivable affirmative defense. The inclusion of the bankruptcy discharge in Rule 8(c) is incorrect as a matter of law and misleading in practice. Accordingly, the Advisory Committee on Bankruptcy Rules recommends adoption of the proposed amendment removing discharge in bankruptcy from Rule 8(c).



U. S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

April 16, 2009

MEMORANDUM

TO: Advisory Committee on Federal Rules of Civil Procedure
(Attn: Professor Edward Cooper, Reporter)

FROM: *MFH* Michael F. Hertz
Acting Assistant Attorney General

SUBJECT: Response to March 27, 2009 Recommendation of the Advisory
Committee on Bankruptcy Rules Procedure: Deletion of Discharge
in Bankruptcy as an Affirmative Defense in Civil Rule 8(c)

This responds to the March 27, 2009 recommendation of the Advisory Committee on Bankruptcy Rules Procedure ("BRC Memo") regarding the deletion of discharge in bankruptcy from the list of affirmative defenses in Rule 8(c) of the Federal Rules of Civil Procedure. Although we respectfully disagree with that recommendation, we appreciate the Bankruptcy Rules Committee's considering the Department's concerns.

We continue to believe that the proposed change is ill-founded. We recognize that § 524(a) of the Bankruptcy Code voids a judgment with respect to a debt discharged under the Code "whether or not discharge of such a debt is waived." If the proposed change were limited to post-discharge collection actions in which the application of the discharge could not reasonably be disputed, we would not have much difficulty with the proposed change, and suggest below an alternative amendment to Rule 8(c) that would limit rather than eliminate the applicability of the affirmative defense. But, given the remedies and even contempt sanctions available for violations of the discharge injunction, we believe such clear-cut cases are rare – and, if a judgment was entered in such a case, the judgment could be voided either under Rule 60(b) or by a proceeding in the bankruptcy court precisely because it violated the discharge injunction in § 524(a)(2). If the Committee rejects our more limited change and determines to eliminate the affirmative defense, we renew our request that changes be made to the proposed Committee Note to avoid inappropriate inferences that could encourage debtors to ignore post-discharge suits even in cases in which a debt may qualify for an exception to discharge.

The proposed Rule 8(c) change would implicate not only situations in which the application of the discharge is clear-cut, but also those in which it is unclear, due to the multiple

exceptions to discharge found in § 523(a) of the Bankruptcy Code.¹ Such debatable cases present a question that can, and should, be resolved by the court entertaining the subsequent collection action. Retaining discharge in bankruptcy as an affirmative defense assures, as a matter of pleading, that the issue is promptly joined in such cases and then addressed by the court and, when a judgment is entered, it is not subject to collateral attack. This promotes judicial efficiency and avoids opportunities for forum shopping or delay.

Our principal concern is that the proposed amendment, or its accompanying Committee Note, might be interpreted to suggest that debtors may ignore post-discharge complaints in non-bankruptcy courts even when it is clear that the creditor has plausible grounds for an exception. Or, worse, the change might be misconstrued to suggest that debtors may fully litigate the merits of a debt without mentioning the discharge issue until after a judgment and the exhaustion of appeals and then go to a bankruptcy court to undo years of litigation.

In this regard, our central thesis has always been and remains that, because § 524(a)(1) only voids judgments respecting *discharged* debts, it remains necessary to ascertain whether a non-bankruptcy court has jurisdiction to determine whether a debt was discharged and, if there is jurisdiction, discharge would logically be a justiciable defense subject to rules regarding preclusion.² In that regard, the BRC Memo cites several cases that stress legislative history to a 1970 amendment to the old discharge provision and observe that Congress in 1970 intended to give bankruptcy courts exclusive jurisdiction over certain dischargeability determinations. But, in 1978, Congress not only changed the language of the discharge provision, but also explicitly made bankruptcy jurisdiction “not exclusive” with respect to dischargeability determinations, and it reiterated this in 1984 when the jurisdiction provisions were completely revamped. 28 U.S.C. § 1471(b) (1978 to 1984); 28 U.S.C. § 1334(b) (1984 to present). Accordingly, non-bankruptcy courts have concurrent jurisdiction to determine whether exceptions to discharge apply to any particular debt, as numerous cases since 1978 have held. Normally, if a court has jurisdiction to determine a defense to judgment, the judgment operates as *res judicata* as to that defense whether it was raised or not.

We acknowledge that some courts interpreting § 524 continue to opine, notwithstanding the 1978 enactment of “not exclusive” jurisdiction, that bankruptcy courts have exclusive jurisdiction over dischargeability determinations, but those decisions almost invariably involve the

¹ This is not to suggest that § 524(a)(1)’s provision voiding judgments for discharged debts applies only to “clearly” discharged debts. Our point in this connection was only that § 524(a)(2), which separately enjoins post-discharge suits to collect a discharged debt, has widely been held *not* to bar a suit if the creditor has a colorable claim that an exception to discharge applies.

² The BRC Memo disagrees with our secondary argument that the present tense verb, “voids,” in § 524(a) suggests that the judgments voided are those existing when the discharge is entered (and that the “at any time obtained” language assures applicability to post-petition as well as prepetition judgments, bearing in mind that years often elapse between a petition and a discharge). This argument was peripheral to our main position that only judgments for “discharged” debts are voided and non-bankruptcy courts have jurisdiction to determine whether a particular debt was discharged or not.

class of dischargeability determinations for which creditors (who have notice of the case) must file a dischargeability complaint in the bankruptcy court during the bankruptcy case pursuant to § 523(c) – currently for debts described in § 523(a)(2), (4), and (6), which together generally encompass debts involving misrepresentations, fraud, and intentional torts. Some cases explicitly limit their holdings to state court judgments regarding these kinds of claims, while others are less careful. A good example cited in the BRC Memo is *In re Bock*, 297 B.R. 22, 32 (Bankr. W.D.N.C. 2002). In concluding that “the debtor did not waive her discharge by failing to plead her bankruptcy discharge as an affirmative defense in a state court collection action,” *Bock* acknowledged that the creditor had a good argument that the *Rooker-Feldman* doctrine required giving preclusive effect to the state court judgment, but held that the state court lacked subject matter jurisdiction to determine dischargeability only for the kinds of debts for which § 523(c) of the Bankruptcy Code requires the filing of a timely complaint in the bankruptcy case by a creditor having notice of the bankruptcy (which was true of the creditor in *Bock*). It therefore held that the state court complaint both violated the discharge injunction provided in § 524(a)(2) and was void under § 524(a)(1). *See also Rein v. Providian Financial Corp.*, 270 F.3d 895, 904 & n.15 (9th Cir. 2001) (“[b]ankruptcy courts and state courts have concurrent jurisdiction over all nondischargeability actions except those brought under § 523(a)(2), (4), (6) and (15)”)³. Even under pre-1978 law, before jurisdiction was made explicitly “not exclusive,” the Tenth Circuit had held that Congress only meant exclusive jurisdiction to apply to those issues requiring a timely complaint under old Bankruptcy Act § 17c – the analogue to current Code § 523(c). *Goss v. Goss*, 722 F.2d 599 (10th Cir. 1983). The Tenth Circuit therefore held that a state court judgment was *res judicata* barring a claim of discharge where the basis for an exception was not one requiring a complaint in the bankruptcy court.

While we urge that Rule 8(c) remain unamended, we have alternatively proposed, consistent with the reasoning in *Bock*, *Rein*, *Goss*, and similar cases, that discharge in bankruptcy at least be retained as an affirmative defense with respect to the kinds of debts for which a state court, or federal district court exercising non-bankruptcy jurisdiction, would undisputedly have concurrent jurisdiction to determine the applicability of an exception to discharge – *i.e.*, exceptions to discharge listed in § 523(a) other than those listed in § 523(a)(2), (4), or (6), for which § 523(c) requires a timely complaint to preserve the exception. In this regard, we expand somewhat upon

³ The BRC Memo (p. 9) and our March 4, 2009 Memorandum to the Bankruptcy Rules Committee (pp. 2-4) both treat as a “leading case” on the side of eliminating the affirmative defense the subsequent Ninth Circuit BAP decision, *In re Gurrola*, 328 B.R. 158 (BAP 9th Cir. 2005). It should be noted that *Gurrola* does not cite the Court of Appeals’ decision in *Rein*. As we noted, *Gurrola* can be explained by reasoning less sweeping than it employed. It involved a debt that was undisputedly discharged and the default judgment, although post-discharge, was premised upon a complaint and a default entry both filed in violation of the automatic stay of 11 U.S.C. § 362. Accordingly, the post-discharge motion for default judgment plainly violated § 524(a)(2) and the resulting judgment was plainly void for that reason alone.

our earlier, narrower, proposed amendment to Rule 8(c) by proposing to add the following parenthetical:

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

* * *

- discharge in bankruptcy (unless the action is enjoined by 11 U.S.C. § 524(a)(2) or the party stating a claim for relief on a debt is precluded from asserting an exception to discharge by a prior judgment of dischargeability or by 11 U.S.C. § 523(c));

A Committee Note could clarify that this is not intended to preclude relief under Rule 60(b) even as to other kinds of debts if the debtor reasonably believed that he or she was not required to respond to the pleading.⁴

If the Committee is not inclined to reject the proposed change or adopt our more tailored version, we ask that, at a minimum, it modify its Committee Note in two respects.

First, the sentence, “The consequences of a discharge cannot be waived,” is a conclusion of substantive law which is unnecessary, and perhaps even misleading, for purposes of explaining the change. We do not believe that failing to raise a defense through litigation (or the failure to appear and defend) is identical with “waiving” the defense, and thus prohibited by the final clause in § 524(a)(1) of the Bankruptcy Code. For example, assume a creditor explicitly pleads that an exception to discharge applies and the debtor defaults (or admits the allegation and then, after a judgment is entered, changes his or her mind). If the anti-waiver language in § 524(a)(1) refers not merely to agreements in which the discharge of a particular debt is affirmatively waived but also to loss, through a tactical decision, procedural error or default in litigation, of the claim that the debt was discharged, a debtor could collaterally attack in the bankruptcy court any judgment involving a debt which arguably was discharged.⁵ The Supreme Court has recognized the distinction

⁴ Our March 4, 2009 memorandum to the Bankruptcy Rules Committee additionally suggested a possible new provision in Rule 60(d) to the effect that the rule does not limit a bankruptcy court’s power to “grant relief from the judgment under 11 U.S.C. § 105(a) if the judgment was obtained in violation of 11 U.S.C. § 524(a).” It also suggested a possible amendment to Rule 55(c)’s provision for relief from defaults to clarify that “Good cause may include that a defendant reasonably believed that 11 U.S.C. § 524 made it unnecessary to respond to the complaint” and/or to specify that “The court shall set aside a default if the complaint was filed or the default entered in violation of 11 U.S.C. §§ 362 or 524.”

⁵ In that regard, anything short of actual litigation could arguably be characterized loosely as a kind of “waiver” of the discharge defense, including failure to comply with a pretrial order requiring parties to file statements of all factual and legal issues to be tried. Indeed, some courts have gone still further and stated – we submit incorrectly – that even if a state court explicitly rules on dischargeability, a bankruptcy court may second guess the ruling. See *In re Hamilton*, 540 F.3d 367, 373 (6th Cir. 2008) (*dictum* endorsing the view of *In re Pavelich*, 229 B.R. 777, 781-84

between a waiver and the simple loss or forfeiture of a right. For example, in *Kontrick v. Ryan*, 540 U.S. 443, 458 & n.13 (2004), the Court considered whether a debtor could belatedly raise a time limitation barring a creditor's right to seek denial of the debtor's discharge. Agreeing that the issue was "more accurately described as one of forfeiture rather than waiver," the Court observed that, "Although jurists often use the word interchangeably, forfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* (citations and some internal quotation marks omitted). Thus, it held that the time bar could be forfeited. The Supreme Court used this same reasoning when it considered another non-waiver provision in the Bankruptcy Code similar to that found in § 524(a)(1). *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007).⁶ Consistent with the reasoning of *Kontrick*, lower courts have held that a debtor who fails to raise discharge in a post-discharge suit loses the defense, at least in situations where a § 523(c) complaint was not required to preserve an exception to discharge.⁷

(B.A.P. 9th Cir. 1999), that "state courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly." *But see In re Ferren*, 203 F.3d 559 (8th Cir. 2000) (rejecting *Pavelich* insofar as it suggests that § 524(a) provides an exception to the *Rooker-Feldman* doctrine, permitting review of final state court judgments regarding dischargeability); *In re Toussaint*, 259 B.R. 96, 102 (Bankr. E.D.N.C. 2000) (stating that *Pavelich*'s "logic is flawed"). *Pavelich*'s statement also ignored prior binding precedent in that circuit. *See In re Siragusa*, 27 F.3d 406, 407-08 (9th Cir. 1994) (rejecting the argument that § 524 meant the bankruptcy court could second guess a state court's determination, after discharge, that a debt was nondischargeable alimony rather than a property settlement debt that would have been dischargeable as the law existed at that time). *See also Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582 (7th Cir. 2005) (debtor could not litigate dischargeability in an adversary proceeding after litigating it in state court; declining to construe bankruptcy court order as having precluded the state court from determining the issue, and expressing doubt over whether the bankruptcy court would even have the power to have reserved the issue to itself in light of the concurrent jurisdiction granted by Congress).

⁶ In *Marrama*, the Court considered whether a debtor's misconduct could cause him to lose his right under § 706(a) of the Bankruptcy Code to convert a bankruptcy case from chapter 7 to chapter 11, 12, or 13, notwithstanding the following language in that section: "Any waiver of the right to convert a case under this subsection is unenforceable." Finding that it could, it held, "A statutory provision protecting a borrower from waiver is not a shield against forfeiture." *Id.* at 374. Our March 4, 2009 memorandum to the Bankruptcy Rules Committee also discussed substantial legislative history indicating that the clause, "whether or not a discharge of such debt is waived," referred to *agreements* to waive dischargeability of debt.

⁷ *See, e.g. In re Scott*, 244 B.R. 885 (Bankr. E.D.Mich., 1999) (rejecting the argument that § 524 alleviated a debtor's need to respond to a post-discharge complaint given that the state court had subject matter jurisdiction to determine dischargeability and that Michigan law would treat a discharge defense as precluded by *res judicata* where the issue could have been raised); *In re Read*, 183 B.R. 107, 111-12 (Bankr. E.D.La. 1995) (because Florida court had determined that debtor was liable for alimony, and because debtor could have argued in that post-discharge proceeding that the claim was really one for a property settlement dischargeable under old § 523(a)(15) only if a timely § 523(c) complaint was commenced, Florida judgment was *res judicata* on the issue of

If the Committee believes it must refer to the waiver provision, we request that the Note explain that the change is primarily to assure that the defense of discharge is not lost merely by the failure to include it in an initial pleading, but then leave to substantive law questions such as whether a debtor may ignore a complaint that asserts an exception to discharge (other than one barred by § 523(c)), or that pleads facts which, if proven, would establish such an exception, and whether a debtor may appear to defend an action on a debt and not only fail to include discharge in a responsive pleading but also fail to raise it at any time prior to judgment, and still retain a right to assert discharge of the debt.

Second, we support the suggestion in the introduction to the Rule 8(c) matter in the agenda book proposing to delete the last sentence of the draft Committee Note since, as our prior memoranda have shown, it is widely recognized that bankruptcy and non-bankruptcy courts have concurrent jurisdiction to determine the application of most exceptions to discharge. In any event, this statement of substantive law is unnecessary to explain the proposed change in Rule 8(c).

TAB 5B

**PROPOSED AMENDMENT TO THE
SUPPLEMENTAL RULES FOR ADMIRALTY OR
MARITIME CLAIMS AND ASSET FORFEITURE
ACTIONS¹**

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

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**(4) Execution of Process; Marshal’s Return; Custody
of Property; Procedures for Release.**

**(f) *Procedure for Release From Arrest or
Attachment.*** Whenever property is arrested
or attached, any person claiming an interest in
it shall be entitled to a prompt hearing at
which the plaintiff shall be required to show
why the arrest or attachment should not be
vacated or other relief granted consistent with
these rules. ~~This subdivision shall have no
application to suits for seamen’s wages when~~

¹New material is underlined; matter to be omitted is lined through.

2

SUPPLEMENTAL RULES

14 ~~process is issued upon a certification of~~
15 ~~sufficient cause filed pursuant to Title 46,~~
16 ~~U.S.C. §§ 603 and 604 or to actions by the~~
17 ~~United States for forfeitures for violation of~~
18 ~~any statute of the United States.~~
19 [Supplemental Rule G governs hearings in a
20 forfeiture action.]

21

* * * * *

COMMITTEE NOTE

Paragraph 4(f) is amended by striking the final sentence. The sentence referred first to statutory provisions applying to suits for seamen’s wages; those provisions have been repealed. The sentence also stated that this “subdivision” — apparently referring to paragraph (f) — did not apply to actions by the United States for forfeitures for violating a United States statute. Supplemental Rule G, added in 2006, provides a comprehensive procedure for forfeiture actions in rem. [Supplemental Rule E applies only to the extent that Rule G does not address an issue. Rule G governs hearings in a civil forfeiture action. It is no longer necessary to state an exception in Rule E(4)(f).]

Although publication is recommended, it also is recommended that publication be deferred until some other Civil Rules are published for comment. There is no apparent urgency about this proposal.

Style changes may be appropriate, despite the decision not to extend the Style Project to the Supplemental Rules generally. A restyled rule might look like this:

(f) *Release From Arrest or Attachment.* A person claiming an interest in property that has been arrested or attached is entitled to a prompt hearing. The plaintiff must show cause why the arrest or attachment should not be vacated or [why] other relief [should not be] granted.

TAB 5C

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
APRIL 20-21, 2009

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

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

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

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

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

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

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

49 *Minutes*

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

52 *Rule 56*

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

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

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

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

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

84 A different alternative was suggested — allow a motion on an “issue.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

154 It was agreed to retain “the movant shows.” It is useful as a reminder of the movant’s
155 burden.

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

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

176 support for retaining the citations as the most important touchstone of current practice. “The most
177 important audience is today.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

433 One possibility is to leave the rule text as it is, addressing case-management authority in the
434 Committee Note. The Note might say that subdivision (f)(2) does not limit authority to enforce Rule
435 56 procedures and court orders.

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

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

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

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

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

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

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

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

465 Subdivision (f) Note: The Note will be amended to delete the reference to “deny” in subdivision
466 (f)(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

551 The Committee agreed unanimously that republication is not needed.

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

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

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

562 **Rule 26: Expert Witnesses**

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

566 At the February meeting after the San Francisco hearing the Committee decided that the Rule
567 26 proposals should carry forward, subject to any improvements that may be found in light of the
568 comments and testimony. The Subcommittee has not reconsidered that decision. Among the issues
569 that remain to be explored, four are most prominent.

570 First is whether work-product discussion should be extended to communications between
571 an attorney and an employee expert trial witness who is not required to give a disclosure report
572 under Rule 26(a)(2)(B). The Subcommittee decided not to extend the protection, but the question
573 drew many comments and deserves the Committee's attention. Practical problems in litigation
574 prompted the proposal to protect communications with an expert who is required to provide a Rule
575 26(a)(2)(B) disclosure report because the expert is specially retained or employed to give testimony
576 in the case or is one whose duties as a party's employee regularly involve giving expert testimony.
577 Lawyers and experts avoid creating discoverable drafts and communications. Lawyers retain second
578 sets of "consulting" experts who are nearly immune from discovery. Other practical problems
579 follow. The proposal has been crafted with an eye on the New Jersey experience, which has been
580 a real help. The Committee had not talked about in-house experts, and was not informed about
581 possible inefficiencies arising from discovery of communications with them. And there are non-
582 employee experts that are not required to provide (a)(2)(B) reports. The Committee did not want
583 to protect communications by one party's lawyer with treating physicians, accident investigators,
584 and the like. An employee expert, moreover, may also be an important fact witness. Drawing
585 suitable lines to achieve an appropriate level of protection for communications with employee
586 experts could prove difficult. Finally, it seems likely that much of the interest in shielding
587 communications with employee experts arises from concern with the limits placed on attorney-client
588 privilege by states that employ a "control group" test to identify who is a client. It is not desirable
589 to create even an appearance of attempting to expand a privilege rule by way of a civil rule.

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

593 Third is the problem arising from the published proposal that extends work-product
594 protection to drafts of any report or disclosure required by Rule 26(a)(2) "regardless of the form of
595 the draft." The Committee Note explained that this language included oral, written, electronic, and
596 other forms. But referring to oral drafts may create a problem — a party might seek to defeat
597 discovery of the attorney-expert communications that are not protected by proposed Rule
598 26(b)(4)(C) by arguing that the communications are oral drafts of the expert's report. The
599 Subcommittee proposed revising the rule text so that it protects only "written or electronic drafts."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

699 A motion to delete “written or electronic” passed, 9 yes and 4 no.

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

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

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

717 It was suggested that the problem might be solved by viewing Rule 34 as a somewhat
718 circular provision that defines “document” to include electronically stored information. Then Rule
719 26(b)(3) would itself apply to electronically stored information; this is an interpretation that
720 “circumstances warrant” within the intent of the 2006 Committee Note.

721 This suggestion was elaborated in different directions. The statement in proposed (b)(4)(B)
722 that Rule 26(b)(3)(A) and (B) protect drafts can be read to settle the matter, no matter what Rule
723 26(b)(3) might mean independently. (b)(4)(B) extends (b)(3), just as surely as if it were written in
724 pre-Style form: “Rule 26(b)(3) is hereby extended to protect drafts,” and so on. The Committee
725 Note can explain that this is the meaning of the rule text. Alternatively, there are compelling reasons
726 to read Rule 34(a) to include electronically stored information in the definition of “documents.”
727 Documents or electronically stored information are defined to include many things that may exist
728 either in hard form or in electrons; the examples conclude with “stored in any medium from which
729 information can be obtained either directly or, if necessary, after translation by the responding party
730 into a reasonably usable form.” One illustration of the importance of this approach is provided by
731 Rule 34(b)(2)(E)(i), which directs that a party produce documents “as they are kept in the usual
732 course of business or must organize and label them to correspond to the categories in the request.”
733 It will not do to reorder electronically stored information before producing it so as to make it more
734 difficult to use.

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

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

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

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

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

752 A different suggestion was that the Note might say “regardless of the form in which the draft
753 is recorded.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

871 *Rule 8(c)*

872 Judge Kravitz noted that in August 2007 the Standing Committee published for comment a
873 proposal to remove “discharge in bankruptcy” from the list of affirmative defenses offered as
874 illustrations in Rule 8(c). Only the Department of Justice expressed opposition. At the
875 Department’s request the Committee decided not to press ahead for adoption. The issues raised by
876 the Department seemed obscure and it was important to reach a full understanding. Judge Wedoff
877 discussed the questions with Department lawyers through the summer of 2008. The Department
878 provided memoranda to supplement its comment and suggested it might help to solicit the views of
879 others. It seemed better to instead ask the Bankruptcy Rules Committee for its views. The
880 Bankruptcy Rules Committee recommends that “discharge in bankruptcy” be removed from Rule
881 8 (c). The question is thus clearly framed: should the proposal now be recommended for adoption,
882 perhaps with some changes in the Committee Note, or should it be deferred a while longer to pursue
883 further dialogue?

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

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

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

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

908 Courts have been clear in facing the statute and rule. Every decision that considers both §
909 524(a) and Rule 8(c) has ruled that discharge is not an affirmative defense that is lost by failure to
910 plead. The most recent decision is *In re Hamilton*, 540 F.3d 367, 373 (6th Cir.2008). Courts that
911 do not consider § 524(a), on the other hand, are misled by Rule 8(c). The very cases cited by the
912 Department of Justice are all cases that looked only to Rule 8(c) without considering § 524(a),

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

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

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

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

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

941 It was asked how these questions arise for the Department. Suppose the debtor appears,
942 pleads without raising discharge as a defense, no one inquires about discharge in discovery, and the
943 action goes through to judgment on the merits. It was answered that a creditor who has notice of
944 the bankruptcy will sue only if it thinks there is no discharge. But the question was put again: how
945 likely is it that the creditor will not be told, somehow, of the discharge? It was pointed out that the
946 likelihood may be substantially diminished by access to PACER to find the bankruptcy record of
947 a defendant. But it was responded that this problem can affect creditors who do not have the same
948 investigative resources as the Department. Some of the cases that consider § 524 together with Rule
949 8(c) involve egregious creditors who know of the bankruptcy and had no reason to think their claims
950 had not been discharged.

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

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

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

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

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

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

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

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

996 Bringing the discussion toward a conclusion, it was observed that the Committee had no
997 sense of urgency about this question when it was first raised — “discharge in bankruptcy” had
998 persisted in Rule 8(c) for many years after 1970 without causing any apparent problems. But the
999 Bankruptcy Rules Committee makes the point that courts in fact are being misled. That changes the
1000 urgency calculation. A sophisticated creditor can search for information about discharge outside a
1001 collection action, or by many means in a collection action, including a Rule 26(f) conference,
1002 pretrial conferences, and discovery.

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1003 This summary was seconded by observing that courts are being misled by relying on Rule
1004 8(c). That is not right. A discharge defense is not lost for failure to plead it.

1005 A motion to recommend that the Standing Committee approve deletion of “discharge in
1006 bankruptcy” from Rule 8(c) for adoption by the Judicial Conference and the Supreme Court passed
1007 11 yes, 1 no.

1008 Discussion turned to the Committee Note. Judge Wedoff presented a draft. Changes were
1009 discussed. As revised, the Note would carry forward the first three sentences of the Note as
1010 published, delete the final two sentences, and add:

1011 For these reasons it is confusing to describe discharge as an affirmative defense. But
1012 § 524(a) applies only to a claim that was actually discharged. Several categories of
1013 debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether
1014 a claim was excepted from discharge may be determined either in the court that
1015 entered the discharge or — in most instances — in another court with jurisdiction
1016 over the creditor’s claim, and in such a proceeding the debtor is required to respond.

1017 A Committee member asked whether it is desirable to explain at such length. Why not make
1018 it much simpler? One simplifying suggestion was that the Note could say simply that the change
1019 does not affect the methods for determining discharge.

1020 It was agreed that Judge Wedoff, the Reporter, and the Department representatives would
1021 work toward a suitably brief Note.

1022 *Supplemental Rule E(4)(f)*

1023 A working group of the Maritime Law Association has suggested that the time has come to
1024 eliminate the final sentence of Supplemental Rule E(4)(f). Rule E(4)(f) establishes the right to a
1025 hearing on a claim of interest in property that has been arrested or attached. The final sentence says
1026 that “this subdivision” does not apply to suits for seamen’s wages under 46 U.S.C. §§ 603 and 604,
1027 “or to actions by the United States for forfeitures for violation of any statute of the United States.”
1028 The two statutes were repealed in 1983. Supplemental Rule G, adopted in 2006, now governs
1029 forfeiture proceedings.

1030 The Department of Justice has expressed concern that simply deleting the reference to
1031 forfeiture proceedings may lead to arguments that Rule E(4)(f) has come to provide a right to a
1032 hearing in forfeiture actions. Rule G(1) provides that Supplemental Rules C and E also apply to
1033 forfeiture actions “[t]o the extent that this rule does not address an issue.” Rule G does not expressly
1034 address the question whether a hearing should be provided when an interest is claimed in property
1035 held for forfeiture. Rule E never has created a right to hearing in forfeiture proceedings, and we
1036 should make certain that no new right is created inadvertently. The Department proposes
1037 substitution of a new sentence at the end of Rule E(4)(f): “Supplemental Rule G governs
1038 proceedings regarding property subject to a forfeiture action in rem.” This language is better than
1039 the suggested alternative: “Supplemental Rule G governs the right to a hearing in a forfeiture
1040 action.” That alternative implies that there is a right to a hearing under G.

1041 Doubts were expressed about the Department’s drafting. It could be read to undermine the
1042 part of Rule G(1) that invokes Rule E to fill in gaps in Rule G. Perhaps more to the point,
1043 supplemental Rule G(8)(f) provides that a person who has filed a claim to property may petition for
1044 its release if the property is held for forfeiture under a statute governed by 18 U.S.C. § 983(f). That
1045 clearly implies a right to a hearing. Rule G(5) establishes a procedure to assert an interest in the

1046 defendant property and contest the forfeiture. That too implies a right to a hearing. The
1047 Department's concern, moreover, may be addressed by simplifying the final sentence to read:
1048 "Supplemental Rule G governs hearings in a forfeiture action."

1049 It was asked whether it would be better simply to delete the present final sentence without
1050 any proposed replacement. Comments could be invited. The discussion concluded by
1051 recommending that the proposal be published by including a new final sentence in brackets, inviting
1052 comment on the need to have any reference to Rule G and the form of the reference: "[Supplemental
1053 Rule governs hearings in a forfeiture action.]"

1054 The recommendation will include the suggestion that publication be deferred to a time when
1055 other Civil Rules also are published for comment. There is no urgency about fixing this residual
1056 anomaly in Rule E.

1057 *Rule 4(i)(3)*

1058 Rule 4(i)(3) governs service on a United States officer or employee sued in an individual
1059 capacity for an act or omission occurring in connection with duties performed on the United States'
1060 behalf. Service must be made on the United States. The employee also must be served under Rule
1061 4(e), (f), or (g). Rule 4(e) is the provision most likely to be invoked. Rule 4(e)(1) adopts state-law
1062 methods of service. (e)(2) allows service by personal delivery to the defendant, leaving a copy at
1063 the defendant's dwelling or usual place of abode with a suitable person who resides there, or
1064 "delivering a copy * * * to an agent authorized by appointment or by law to receive service of
1065 process."

1066 Judge Kravitz opened the discussion by describing the concerns that have grown up around
1067 this provision. It has been asked whether service on the United States should suffice. Alternatively,
1068 it has been asked whether it is possible to avoid the upset and occasional danger that accompany
1069 service at home, while walking down the street, and the like. These questions arise frequently in §
1070 1983 actions against state and local employees. Plaintiffs often want the government to accept
1071 service on behalf of an employee, particularly when the plaintiff cannot readily find the employee.
1072 A common example is an action by a prison inmate against a prison guard. The government
1073 commonly balks. But it often agrees to accept service when discovery of the employee's address
1074 is suggested. At the same time, the government may refuse to accept service because it may decide
1075 not to provide a defense for the employee, or may even plan to prosecute the employee. Apart from
1076 these problems, making the government accept service on behalf of a former employee would create
1077 other difficulties.

1078 The first response was that different approaches may be appropriate, distinguishing between
1079 the executive branch and the judiciary. This speaker, a former executive branch officer, said that
1080 there was not much visible concern about these questions during the time of his government service.
1081 He was personally served once while going to his car at home; "it was unpleasant." That was a case
1082 in which harassing individual government officials was part of the plaintiff's strategy. In most cases
1083 the plaintiff and the defendant have allied interests — the defendant authorizes the government to
1084 accept service, and the plaintiff easily accomplishes service. "This is routine for those who are
1085 automatic targets of suits" — they authorize an agent to receive service. And normally the plaintiff
1086 calls the Department of Justice and asks how to go about serving the defendant; "we work it out."
1087 At the same time, there would be problems if service could be made only on an agent and by
1088 requiring the employee to accept the government as agent. There may be risks of actual individual
1089 liability. And the problems with former employees may be mirrored by problems with employees
1090 who move from one agency to another. There may be conflicts of interest. And another member

1091 noted that in actions against low-level employees the Department often does not find out about the
1092 action.

1093 One possible approach, whether by court rule or by statute, would be to require service on
1094 the government in the first instance. The government would then have a period — perhaps 10 days
1095 — to provide the employee’s acknowledgment of service or appointment of a general agent for
1096 service. This could work in cases that do not involve a request for urgent, immediate relief.

1097 Court employees may face greater problems of security and harassment. And as compared
1098 to some executive branch agencies, there may be a higher level of trust among courts, judicial
1099 branch employees, and the Administrative Office. It might work to make the judge’s court the agent
1100 for service on the judge.

1101 An immediate question asked whether the Administrative Office would be comfortable
1102 accepting service for a judge in an action claiming direct, personal harassment by the judge?
1103 Administrative Office practice was described in response. The Office encourages courts to call
1104 immediately when a court official is sued. The office determines whether the Department of Justice
1105 will provide representation, and if not may retain a lawyer for the defendant.

1106 The next observation was that if harassment is part of a plaintiff’s tactics, protecting judges
1107 will work only if service on the court or the Administrative Office is made the exclusive means of
1108 service.

1109 It was noted that in many tort claims against government employees the government has to
1110 accept the burden of providing a defense. But it is difficult for the government to do much of
1111 anything within 10 days, such as finding the employee and securing an authorization to accept
1112 service. The problem is difficult. This observation was seconded in part by another Committee
1113 Member, who observed that he had often been sued while in government service. “The idea that the
1114 government can do anything in 10 days is ludicrous.” But this member continued to ask whether
1115 there is a real problem, and to wonder whether it is seemly to separate out government officials for
1116 special treatment. Why go into this?

1117 Another observation was that officials, including judges, may be sued in courts that
1118 manifestly lack personal jurisdiction. It is convenient to get rid of the case for lack of personal
1119 service. This observation led to a more general question: care should be taken to consider the
1120 consequences of any new rule for personal jurisdiction. Making the government an agent for service
1121 might seem to create nationwide personal jurisdiction.

1122 It was suggested again that judicial branch employees might be separated out, recognizing
1123 the greater security and privacy concerns they may face. The broad scope of judicial immunity,
1124 moreover, means that many actions against judges will be either frivolous or deliberately harassing.
1125 One possibility would be to make the United States Attorney or the clerk of court the judge’s agent
1126 for service.

1127 These views were supported by suggesting that the Committee should work on this. “There
1128 is an opportunity for harassment, and perhaps physical risk.” It needs to be determined whether
1129 service on the United States alone should suffice.

1130 Another committee member suggested that a low-level employee would worry about the risk
1131 of personal liability without personal service. There often are disputes whether an individual
1132 defendant’s conduct was in connection with duties on the United States’ behalf. Suppose the

1133 plaintiff does not serve the defendant personally — does the plaintiff lose the right to hold the
1134 defendant personally liable?

1135 The Committee agreed to carry this topic forward for further investigation. An initial focus
1136 will be on actions against judges for official acts. These actions tend to be brought by pro se
1137 plaintiffs. An effort will be made to find out from security agents and marshals how often they
1138 encounter problems arising from service of process.

1139 *Appellate-Civil Rules Questions*

1140 Judge Kravitz noted that the Appellate Rules Committee is working on projects that are
1141 likely to involve the Civil Rules. One of them raises the question whether Rule 58 should be
1142 amended to require entry of judgment on a separate document when the original judgment is altered
1143 or amended on one of the five post-judgment motions enumerated in Rule 58(a). Another asks
1144 whether the Civil Rules, the Appellate Rules, or both should be expanded to include some provisions
1145 for “manufactured finality.” Several past packages of amendments have demonstrated the
1146 advantages of coordinated work. The chairs of the Appellate and Civil Rules Committees have
1147 agreed that it will be useful to appoint a joint Subcommittee to work on these questions, and perhaps
1148 additional questions that may arise while the work continues. Three members from each Committee
1149 have been appointed. The Civil Rules Committee members are Judge Colloton, who will chair the
1150 Subcommittee, Judge Walker, and Peter Keisler.

1151 Judge Wedoff noted that the Bankruptcy Rules Committee is examining the Bankruptcy
1152 Rules provisions on appeals. There are likely to be fairly extensive revisions. They will coordinate
1153 with the Appellate Rules Committee. To the extent that Bankruptcy Rules issues overlap with issues
1154 being considered by the joint Subcommittee, the Bankruptcy Rules Committee will seek to
1155 coordinate on those issues as well.

1156 *Rule 45*

1157 Judge Campbell, reporting for the Discovery Subcommittee, noted that a year ago the
1158 Subcommittee was asked to begin studying Rule 45. The study has included a long memorandum
1159 by Andrea Kuperman surveying the secondary literature — much of it in bar-oriented publications
1160 — and communications with a number of bar groups.

1161 It is clear that Rule 45 is a long and complicated rule. “You have to work hard to find what
1162 it means.” Many judges say that it is a perfectly fine rule, that the problem is that lawyers do not
1163 understand it. A fine rule that lawyers cannot understand may deserve some clarification.

1164 Two issues have figured prominently in recent experience. Some courts have concluded that
1165 because the 100-mile limit in Rule 45(c)(3)(A)(ii) addresses only a person who is neither a party nor
1166 a party’s officer, a trial subpoena can command a party’s officer to appear anywhere in the country.
1167 That reading seems contrary to Rule 45(b)(2), but it continues to have real influence. Another
1168 problem arises when a deposition subpoena for a nonparty witness issues not from the court where
1169 the action is pending but from another court where the witness is. Rule 26(c)(1) allows the witness
1170 to apply to the main-action court for a protective order, but a motion to compel compliance can be
1171 filed only in the court that issued the subpoena. The resulting questions may be better suited to
1172 resolution in the court where the main action is pending, but the cases have divided on the power
1173 to transfer the question, and transfer may be a burden for the witness.

1174 Many other issues have been identified as well, including the contemporary wisdom of the
1175 100-mile limit that has remained in place from times before mechanized transportation was invented.

1176 For all of the questions, what Rule 45 does is remarkable. It covers most third-party
1177 discovery in the federal system. “There are many moving parts.” An attempt to address some of
1178 the issues that seem to present problems might create more problems than it solves. How broad
1179 should the Subcommittee’s inquiry be?

1180 Judge Kravitz seized the opportunity to express thanks to the American Bar Association
1181 Litigation Section, the American College of Trial Lawyers, Gregory Joseph, and others who
1182 provided thoughtful and helpful responses to Subcommittee inquiries.

1183 Professor Marcus introduced the list of possible Rule 45 issues by suggesting that a complete
1184 overhaul may be an overwhelming task. Rule 45 has been something of a stepchild. It is a very
1185 important part of private enforcement of the law in this country. It is not just a discovery tool. It
1186 applies at trial as well.

1187 The agenda memorandum lists 17 possible issues that emerged from reviewing two leading
1188 treatises. Andrea Kuperman’s survey of secondary literature discovered that Rule 45 has prompted
1189 a lot of writing, including additional issues. For purposes of introduction, the possible topics can
1190 be grouped.

1191 One set of issues involves cost and burden. The more aggressive position is that a nonparty
1192 must be compensated for every penny spent in complying, including attorney fees to review
1193 potentially responsive materials. This position may be qualified by arguing that reimbursement of
1194 anything is required only if the nonparty objects to the subpoena. Rule 45 does not really say either
1195 of these things. There may be something awkward in requiring reimbursement for the costs of
1196 weeding out materials that are not produced in response to the subpoena: “I have to pay for things
1197 I don’t even get to see?” These questions may raise the issue whether e-discovery should be treated
1198 differently from hard-copy discovery.

1199 A second set of issues asks whether Rule 45 should address preservation by a nonparty.

1200 A third set involves notice. Rule 45 was amended in 1991 to require notice to all parties
1201 before a document subpoena is served. It is not clear whether that has proved a good idea.
1202 Observers have raised the question whether the party who served the subpoena also should be
1203 required to notify other parties when documents are produced.

1204 A fourth set of questions go to location. Should the reach of a trial subpoena be different
1205 from the reach of a deposition subpoena? Should document subpoenas be treated separately? Is the
1206 100-mile limit still appropriate — and if there is a distance limit, should it be measured by air miles,
1207 most convenient route miles, shortest route miles, or something else?

1208 A fifth set goes to timing. Can Rule 45 be used to circumvent a discovery cut off? What
1209 should be the time to respond — Rule 45(c)(2)(B) may imply that the time to respond can be set at
1210 less than 14 days by requiring that objections be served before the earlier of the time specified for
1211 compliance or 14 days after the subpoena is served. And when must a privilege log be filed in
1212 relation to the time allowed to object?

1213 A sixth issue goes to sanctions for disobedience. The only sanction specified in Rule 45 is
1214 subdivision (e), which provides for contempt. Should there be other sanctions?

1215 A seventh issue asks whether a government agency is a “person” subject to subpoena. It may
1216 be that this issue has been generally resolved by the Court of Appeals for the District of Columbia
1217 Circuit.

1218 An eighth set of issues addresses subpoenas in aid of arbitration proceedings.

1219 Finally, is it possible to shorten and simplify Rule 45? To the extent that it may be
1220 ambiguous now, the goal of resolving ambiguities may conflict with the desire to shorten the rule.
1221 Ambiguities often are resolved by adding words.

1222 Globally, the question is whether Rule 45 needs a major overhaul. Gregory Joseph has
1223 advised that it is not generally a problem. Is that right?

1224 Discussion began with the reminder that Rule 45 is the only discovery rule that directly
1225 addresses nonparties. It is so complex that the recipient of a subpoena virtually has to consult a
1226 lawyer. But third-party discovery often makes the difference between winning and losing the case.
1227 A simpler and shorter rule would be better. Four concepts that can be covered in plain English may
1228 do the job. They will be elaborated as the work goes on. Agreement was expressed. The subpoena
1229 itself should include clear directions on what is required. Simply setting out the text of Rule 45(c)
1230 and (d), as required by 45(a)(1)(A)(iv), is no real help.

1231 The choice of court for resolving discovery issues was identified as an important issue. The
1232 court where the action is pending has a real interest. But there is a real tension when the dispute
1233 involves a nonparty subpoenaed in a different court. The nonparty may deserve protection against
1234 being sent elsewhere. An Illinois nonparty does not want to have to litigate objections or questions
1235 of compliance in California. Flexibility is important. Perhaps a system could be worked out for
1236 referring the issues to the court of the main action without sending the nonparty there. Arguing by
1237 remote communication systems may be a good compromise.

1238 The next observation was that “there is more control over discovery than is sometimes
1239 thought.” Discovery often does not start until the judge thinks the case is ready to go ahead. The
1240 court where the action is not pending may overemphasize the burden of compliance because it is not
1241 sufficiently familiar with the case and the importance of compliance. It may make sense to resort
1242 first to the main court, particularly as to disputes between the parties. After the main court has
1243 resolved any disputes between the parties, issues raised by the nonparty may be resolved in the court
1244 that issued the subpoena. The CM/ECF system can be used to send important file records to the
1245 court that issued the subpoena.

1246 Observers were invited to comment. One said that there are shortcomings in Rule 45. There
1247 should be a provision for notifying other parties that documents have been produced. It is important
1248 to address which court decides disputes. It may be possible to identify at least some of the factors,
1249 like costs to the person subpoenaed, to be weighed in determining what should be required.
1250 Privilege logs can be very burdensome. But generally the rule works well. Another said that the
1251 American College Civil Rules Committee has similar views. Rule 45 works well in most ways, but
1252 it might be improved. There is no sense of urgency about this. A third said that many employment
1253 lawyers feel that there are abuses in employment cases by subpoenas issued by employer defendants
1254 to former employers without giving plaintiffs the notice required by Rule 45. Another observer
1255 responded that in the types of cases he litigates the parties do comply with the Rule 45(b)(2) notice
1256 requirement. The second observer added that the problem of notice after documents are produced
1257 can be addressed in part by making a Rule 34 request to produce documents provided in response
1258 to a subpoena.

1259 A different set of questions was raised. The party who issued the subpoena may negotiate
1260 privately with the person served to determine what documents will be produced, without giving
1261 notice to other parties. A case-management order might address this, but it might be better to

1262 address the question in Rule 45 rather than depend on including these terms in a management order
1263 in every case.

1264 A judge noted that he simply orders parties to give to other parties the documents received
1265 under subpoenas. Otherwise Rule 34 requests are made.

1266 It was asked whether the Committee should venture into the problems and uncertainties
1267 arising from prehearing subpoenas issues by arbitrators. It was noted that these questions affect
1268 many constituencies in addition to the courts. The circuits have generated conflicts on some of the
1269 questions. These are not the kinds of issues that should be addressed by the Civil Rules.

1270 It also may be that preservation issues should not be addressed. There were many requests
1271 that the e-discovery rules address preservation, and the requests were resisted from concern that
1272 preservation is not a topic appropriate for the rules.

1273 Other issues may be put aside because there are workable pragmatic resolutions. The
1274 question whether a government agency is a “person” within Rule 45 is a good illustration.

1275 It was agreed that the Subcommittee should consider the question of trial subpoenas issued
1276 to officers of a corporate party. The problem “arises from different readings of the rule we wrote.”

1277 It was agreed that there seem to be enough issues that present practical problems in real
1278 practice to justify putting aside other possible issues that do not present practical problems. The
1279 Subcommittee will forge ahead with its Rule 45 project.

1280 *2010 Conference*

1281 Judge Kravitz introduced discussion of planning for the 2010 conference by boasting that
1282 it had been a terrific decision to ask Judge Koeltl to chair the planning committee. He also noted
1283 that the ABA Litigation Section has been a big help.

1284 Judge Koeltl confirmed that the conference will be held May 10 and 11, 2010, at the Duke
1285 University Law School. The purpose will be to explore the costs of litigation, especially discovery
1286 and e-discovery. Are there problems with the system? What are the possible solutions — new rules,
1287 judicial education, best practice advice for lawyers?

1288 Part I of the conference, focusing on empirical research, will be a cornerstone. The study
1289 by the American College of Trial Lawyers and the Institute for the Advancement of the American
1290 Legal System found widespread dissatisfaction with the federal discovery system. There are
1291 significant problems. That seems to be different from the results of the 1997 FJC study, which
1292 found that most lawyers did not have problems with the scope of discovery or proportionality. The
1293 FJC study did find problems in complex, high-stakes cases where relations between the lawyers
1294 were not as good. We need to find the current state of the system, measuring satisfaction and
1295 dissatisfaction. Is dissatisfaction limited to certain areas? Do we need systemic responses? More
1296 focused responses?

1297 The FJC will survey some 5,700 lawyers in more than 2,800 federal cases terminated in the
1298 last quarter of 2008. The survey will include e-discovery questions that were not asked in the 1997
1299 survey. The survey will be distributed in May; it is hoped that preliminary results will be available
1300 in the fall. There will be follow-up interviews with 20 or 30 lawyers to obtain responses at deeper
1301 levels.

1302 The ABA Litigation Section will, with some improvements, send the American College -
1303 IAALS survey to all its members. The survey will go out in June. Results are expected in
1304 November.

1305 It is not too early to express thanks for the work already done by the FJC and the Litigation
1306 Section.

1307 RAND has been working on e-discovery. Nick Pace is on the 2010 Conference planning
1308 committee. He has encountered some difficulty in getting the kinds of information he wants because
1309 there are proprietary concerns that make lawyers and clients reluctant to respond. Efforts are under
1310 way to persuade them that empirical research is important if they hope to support their complaints
1311 about the costs of e-discovery.

1312 Professor Theodore Eisenberg of Cornell has been asked to help. One possible topic for
1313 research would be whether fact-based pleading under the PSLRA actually streamlines litigation and
1314 reduces costs.

1315 It has been noted that California state court data seem to show a significantly higher rate of
1316 trials than found in federal courts in California. If that proves out, it would be interesting to explore
1317 the reasons. Is this due to federal pretrial procedures?

1318 These empirical inquiries can fill most of the morning of the first day.

1319 A second important part of the conference will be the overview papers. Great people already
1320 have agreed to produce some of these papers. They will be available relatively soon to help further
1321 development, but the authors will be free to revise them up to the time of the conference. Elizabeth
1322 Cabraser will address discovery. Gregory Joseph will address e-discovery. Arthur R. Miller will
1323 address pleadings and dispositive motions. Judge Patrick Higginbotham will address judicial
1324 perspectives. Justice Andrew Hurwitz will address state discovery — Arizona has rejected
1325 Twombly pleading, and has adopted expansive disclosure.

1326 Then there will be a series of panels on the papers. And a panel by users of the system,
1327 including representatives of general corporate counsel, the plaintiffs' bar, the Department of Justice,
1328 and public-interest firms. There also will be a panel of representatives from organized bar groups.
1329 They will be invited to spend the next year developing their views for presentation. And we hope
1330 to have a panel of alumni of the Rules process — Professor Miller, Judge Higginbotham, and
1331 perhaps two of the Duke faculty, Professor Carrington and Dean Levi.

1332 Thomas Willging described the nature of the FJC survey. The sampling design will include
1333 2865 cases. More than 5,700 attorneys will receive the survey. The sample will be selected at three
1334 levels, principally designed by Emery Lee. The sample will include every case that went to trial in
1335 the fourth quarter of 2008, October through December; that is 529 cases. It will include every long-
1336 pending case that took more than four years to be terminated; that is 321 cases. The rest is a random
1337 sample of 2,000 cases after filtering out cases not likely to have discovery — cases closed
1338 administratively, cases related to bankruptcy, and the like. Other excluded categories include social
1339 security cases, student loans, bankruptcy, condemnation, drug-forfeiture, asbestos, and cases
1340 transferred by the MDL panel.

1341 The final draft of the survey instrument has been prepared. Many people provided comments
1342 on initial drafts. The process is like a freight train — everyone wants to put something on board as
1343 it passes. Half of the questions address factors of the individual cases: what was discussed in the
1344 Rule 26(f) conference, and so on. (There are 28 possible responses to that question).

1345 It was noted that as compared to the American College survey, this instrument is very
1346 specific in terms of how many depositions, interrogatories, requests for documents, requests for
1347 admission, and so on. This specificity may help to flesh out the question whether there are problems
1348 with e-discovery.

1349 The FJC hopes the questions are engaging enough, and the topic important enough, that
1350 lawyers will make the effort to respond. The introduction is designed to make clear that the survey
1351 is important. The questions include what the judge did, what the costs were, and what were the
1352 stakes. Case characteristics and attorney characteristics are covered next. Then come questions
1353 addressed to reform proposals and “rules.” The reform proposals focus on ADR; on when the issues
1354 were narrowed in this case, and when are they narrowed in most cases. There also is a one-
1355 paragraph description of the simplified procedure model once developed for this Committee, asking
1356 whether the attorney would recommend such a system to a client. Other questions look to a
1357 comparison of costs in federal courts to costs in state courts, and to the desirability of changes in the
1358 rules to reduce all discovery or e-discovery or to increase case management.

1359 Lorna Schofield thanked Judge Rosenthal and Judge Kravitz for the productive relationship
1360 between the Committee and the Litigation Section, and to Judge Koeltl for including the Section in
1361 the program. Their encouragement for the survey has been welcome. The Section has e-mail
1362 addresses for 55,000 section members, who will receive the survey. A task force is being formed
1363 to explore problems of civil procedure, including not only topics that might be addressed by the
1364 Civil Rules but also topics that can be addressed only by other means.

1365 Judge Koeltl urged suggestions for people who would be good panelists. We should have
1366 a broad dispersion in terms of geography, youth and experience, plaintiffs and defendants.

1367 Judge Kravitz said that the Conference will be a big help for the Committee’s work. He
1368 expressed the Committee’s deep appreciation and thanks to Judge Rothstein for supporting the great
1369 help we are getting from the FJC.

1370 It was noted that individual responses to the FJC survey will not be made public.

1371 It also was noted that the spring 2010 Committee meeting probably will not be held in
1372 conjunction with the Conference. The Conference will be a lot of work on its own.

1373 Judge Koeltl expressed hope that the conference would result in directions for change. How
1374 specific recommendations for rules changes can be remains to be seen. We do need to guard against
1375 discussion that is too theoretical or too anecdotal to help advance specific reform responses.
1376 Concrete suggestions will be important, even when they involve things that can be done only by
1377 statute.

1378 The approaches taken by state courts will be part of the program. Judge Kourlis is working
1379 on this with the IAALS, and the work will be part of the program.

1380 Invitations will be extended to people who are not panelists, but there will be physical limits
1381 on the number of people who can be accommodated. The Conference will be public, as everything
1382 the Committee does. It was noted that the Seventh Circuit Bar Association recently arranged a
1383 relatively low-cost web cast of a program celebrating Lincoln’s 200th birthday. A DVD also was
1384 made. And it was suggested that the federal judiciary TV network might be hooked up. It also may
1385 be possible to create a camera link to screens in a room adjacent to the meeting room.

1386 One judge commented on the common tendency of lawyers at Committee hearings to testify
1387 to how things are done where they practice. Lawyers may respond to research questions in two

1388 ways, either by reacting on a hypothetical basis or by thinking of actual experiences. We do not
1389 want to be entirely self-referential. We aim get new data and to hear from new voices. And to be
1390 concrete about getting suggestions for things that can be accomplished in a lifetime.

1391 *Other Matters*

1392 A new Privacy Subcommittee has been formed with representatives from the Advisory
1393 Committees. Judge Raggi will chair the Subcommittee. Judge Koeltl is the Civil Rules nominee.
1394 Problems of the sort addressed by Civil Rule 5.2 persist, and new ones have arisen. Some court
1395 filings still have social security numbers and other personal identifiers. Identifiers not listed in Rule
1396 5.2 might be added to the list — alien registration numbers are often suggested. Current methods
1397 of implementing the rules are open to review. In criminal proceedings, questions arise about plea
1398 hearings and cooperation agreements; those questions are complicated. Maintaining public access
1399 to court records and protecting legitimate privacy concerns will be a problem for a long time. The
1400 problems will be exacerbated if PACER is made generally available without charge. The time to
1401 revisit these questions is upon us.

1402 The FJC continues to work on its CAFA study. Present work is focused on completing the
1403 coding of pre-CAFA case information. They hope to have a report in the fall. California has
1404 published information on class-action filings in both California state courts and federal courts in
1405 California. The data show a temporary decrease in filings after CAFA, and then a return.

1406 The Sealed Case Subcommittee continues its work. The analysis is very thorough. Quite
1407 a few sealed cases have been found. But many of them are magistrate-judge cases involving search
1408 warrants, applications for pen registers, and the like. There also are sealed appeals and sealed
1409 criminal cases. When courts are approached for information about cases that cannot be found in the
1410 docket, they often express surprise to discover that the cases remain sealed. As the information
1411 becomes complete, the Subcommittee will begin the task of considering what to make of it.

1412 *Next Meeting*

1413 The next meeting will be held on October 8 and 9 in Washington. The spring meeting in
1414 2010 may be held in Atlanta. Chilton Varner will explore the possibility of meeting at Emory
1415 University School of Law.

1416 Judge Rosenthal said that the meeting had been a real pleasure. It marks the apparent
1417 conclusion of the Committee's work on two important and difficult projects, summary judgment and
1418 discovery of expert trial witnesses. It has been a remarkable example of the rules process working
1419 very well. She also repeated her thanks to Judge Hagy for six years of fine work with the
1420 Committee.

Respectfully submitted,

Edward H. Cooper
Reporter



MINUTES
CIVIL RULES ADVISORY COMMITTEE
FEBRUARY 2-3, 2009

1 The Civil Rules Advisory Committee met in San Francisco on February 2 and 3, 2009, for
2 a hearing on proposed amendments to Civil Rules 26 and 56, and for a Committee meeting. The
3 meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge Steven
4 M. Colloton; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Peter
5 D. Keisler, Esq.; Judge John G. Koeltl; Chief Justice Randall T. Shepard; and Judge Vaughn R.
6 Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus
7 was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, represented the Standing
8 Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee.
9 Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, James
10 Ishida, and Jeffrey Barr represented the Administrative Office. Thomas Willging represented the
11 Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman,
12 Rules Clerk for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq., and
13 Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison).

Hearing

14
15 The hearing began at 8:30 a.m., February 2, in a Ninth Circuit courtroom. Twenty-four
16 witnesses testified. The hearing concluded at 4:00 p.m.. A separate summary of the testimony will
17 be prepared from the transcript and integrated with the summaries of the testimony at earlier
18 hearings and the summaries of the written comments.

Meeting

19
20 Judge Kravitz began the meeting by noting that the purpose was not to reach final decisions
21 on any specific questions. Many valuable contributions have been made in the three hearings and
22 in the written comments that have been submitted. The comment period remains open for another
23 two weeks, however, and review of the hearing transcripts may underscore the ideas offered. But
24 it is good to seize the opportunity created by coming together for the hearing to reflect on the broad
25 questions that were identified in the request for testimony and comments. The Discovery and Rule
26 56 Subcommittees have work to do in preparing recommendations for the Committee meeting in
27 April, and will benefit from whatever preliminary guidance may be offered.

Rule 56: Point-Counterpoint

28
29 Judge Kravitz opened the discussion by observing that the “point-counterpoint” procedure
30 described in proposed Rule 56(c) has provoked an outpouring of comment. Forceful questions have
31 been raised by judges in districts that have adopted and then abandoned similar procedures, and by
32 judges with extensive experience both in courts that have similar procedures and in courts that do
33 not. As often happens in the comment process, the 20 courts that adopted point-counterpoint
34 practices by local rules have not weighed in. They may believe that there is no point in offering
35 comments that this procedure has worked well, since publication of the proposal suggests that the
36 Advisory Committee and Standing Committee are relying on their experience. Acting without
37 hearing from them might mean giving up on an idea that is better than the picture painted by some
38 of the comments. And it would be perilous to act without hearing from them in a way that might
39 require changes in their local practices.

40 Judge Baylson said that the point-counterpoint procedure was recommended after extended
41 discussion. But the comments that question it have made solid points. The other parts of the
42 published proposal are valuable, and seem more important than this part. Much good can be
43 accomplished by going forward with Rule 56 even if the point-counterpoint process is relegated to
44 honorable mention in the Committee Note. The revised Rule could continue to require “pinpoint”
45 citations to the record, whether by directing a brief that requires citations or by simply requiring the

46 citations. The rule also could refer to a response brief and a reply brief, and say nothing about local
47 rules.

48 The discussion opened by these observations continued with a comment that the point-
49 counterpoint procedure had seemed attractive. But the testimony and comments seem to show that
50 this procedure can create unreasonable burdens — some litigants inflate the importance of the
51 statement, disputes about satisfactory implementation of the practice give rise to derivative motion
52 practice, and judges may not be able to police these problems at reasonable cost to the court and
53 parties. The Southern District of Indiana rule seems attractive. It requires a statement of undisputed
54 facts in the movant’s brief, and a responding statement in the nonmovant’s brief; because of page
55 limits on the briefs, the experience has been much more satisfactory than experience under that
56 court’s earlier rule that provided for statements and responses as separate papers. The brief
57 procedure is better integrated than the separate statement procedure.

58 A question was asked as to how the statement of facts and narrative are integrated in the brief
59 under the practice in the Southern District of Indiana. Ms. Briggs responded that in practice, “all
60 the facts wind up in the statement.”

61 It was observed that the Local Rule 56.1 statement and counterstatement work very well in
62 the Southern District of New York. The judge is likely to begin consideration of the motion with
63 the briefs, looking to the statement and counterstatement only after reading the stories of how the
64 facts fit into the case. It would be undesirable to write a national rule that requires a statement of
65 facts as part of the briefs — that would undermine the benefits of the direct point-counterpoint
66 process. The national rule should not establish a uniform practice that defeats the opportunity to
67 adopt point-counterpoint local rules. Lawyers do find ways to expand proceedings. The motions,
68 however, generally do not attack the statement directly. Instead, the motions attack the supporting
69 affidavits, arguing that the information in the affidavits cannot be produced in a form admissible at
70 trial. At the same time, it would be a shame to see the other advances embodied in proposed Rule
71 56 swamped by opposition to the point-counterpoint procedures in subdivision (c).

72 The question of preempting local rules was pursued further. Many districts require a point-
73 counterpoint procedure much like proposed Rule 56(c). A still greater number require a statement
74 of facts by the movant, but do not require a point-by-point response. And a plurality of districts do
75 not require either. It seems fair to assume that many districts prefer their current practices.
76 Opposition to the point-counterpoint procedure may raise sufficient doubts to defeat it as a national
77 requirement. But that does not mean that a different practice should be mandated by a national rule
78 that, in the name of uniformity, prevents local adoption of a point-counterpoint procedure. There
79 is likely to be significant opposition to any Rule 56 provision that would force uniformity in this
80 dimension of practice.

81 Another judge observed: “I have point-counterpoint and I don’t want you to take it away
82 from me.” No one fights “pinpoint citations.” Nor is anyone fighting “deemed admitted” practice,
83 and that is very important. We protect pro se litigants by telling them they have to make the
84 counterpoint response. Some courts have local rules prescribing form notices that must be given to
85 pro se litigants. We should pursue a Rule 56 that does not refer to statements of fact in the rule text,
86 achieving uniformity in substance without referring to the number of documents comprising the
87 motion.

88 This discussion opened the question whether the Committee should shape its
89 recommendations according to its sense of what may prove acceptable in the later stages of the
90 Enabling Act process. The answer was that the Committee should attempt to draft the best rule it
91 can, recognizing the advantages of procedures that, because reasonably agreeable, will be readily
92 enforced by district judges.

93 Further discussion also suggested that the point-counterpoint provisions of proposed Rule
94 56(c) should be deleted. We cannot be sure, in light of the comments and testimony, that it is the
95 best practice. Whether or not it is the best practice, it is not so clearly the best practice as to justify
96 forcing it on reluctant courts. Nor is there a sufficient need for national uniformity to pick one point
97 on this spectrum and force it on all. There is much in the proposed rule that deserves adoption. It
98 should be protected by omitting any rule text reference to statements of fact. At the same time, it
99 is appropriate to preserve principles that people are not fighting about — the “considered
100 undisputed” provision is an example.

101 A parallel suggestion was that the least satisfactory procedure is one that would require the
102 judge to scour the record. The parties should be forced to identify the facts and to point to the
103 materials in the record that support or dispute the facts. There is not as much need to choose
104 between brief, separate statement, or other mode of presentation.

105 Yet another member suggested that there is a lot of good material even in proposed Rule
106 56(c). Paragraphs (1) and (2) — the point-counterpoint procedure and the authority to omit it —
107 should be deleted. The remainder of (c), with some reorganization, can preserve the pinpoint-
108 citation requirement and other useful procedures. These procedures will be uniform. There is no
109 need to adopt rule text that notes such matters as point-counterpoint procedure.

110 In a similar vein, it was noted that Rule 56 text should not of itself encourage local rule
111 experimentation. And that departure by an order in a particular case gives notice to the parties in
112 a way that local rules sometimes do not. There is a difference between prohibiting and inviting local
113 rules, especially when there is no apparent correlation to differences in local conditions such as case
114 loads, local culture, or local state practice. Lawyers and judges are enormously inventive. There
115 will be local rules. And judges will develop case-specific orders.

116 It was suggested that the Subcommittee might frame a draft that neither adopts nor forbids
117 point-counterpoint procedure.

118 A counter-suggestion was that perhaps there should be a draft that retains the point-
119 counterpoint procedure as a model for opting in. Opposition was expressed on the ground that the
120 model would become a default, inviting all the problems that have been encountered in districts that
121 have adopted and then abandoned similar procedures. The Committee Note can refer to point-
122 counterpoint as one way of framing summary-judgment motions; that would leave the districts that
123 want this procedure free to adopt it, with their own local variations. Of course districts that are
124 adamantly opposed will not adopt it. But if there is an opt-in model in Rule 56, some judges will
125 start to impose it, and with it impose added costs on the parties. This procedure does not change the
126 standard for summary judgment, but it does impose costs.

127 Another member confessed to liking point-counterpoint in practice. At first he was prepared
128 to force it through as a matter of uniform national practice. But the comments and testimony show
129 that those who oppose it have genuine and valid reasons. The opposition is more than distaste for
130 being dictated to. Although he would not change his local point-counterpoint rule, it cannot be said
131 that this practice is so clearly the best practice that it should be forced on all federal courts.

132 *Rule 56: “Should,” “Must,” “Shall,” or Finesse*

133 The Style Project adopted “should” grant summary judgment to replace “shall.” Proposed
134 Rule 56 carries forward “should” as the word in place from December 1, 2007. But the comments
135 and testimony, and discussion at the January Standing Committee meeting, continue to press the
136 question whether it was wise to replace “shall” with “should.” Many of the comments express a
137 preference for “shall,” often a strong preference, and view “must” as an alternative inferior to “shall”
138 but better than “should.” The issue remains very much alive, along with the question whether it is

139 better to finesse the question by omitting any direction to the court. Rather than say that the court
140 shall, should, or must grant summary judgment, the rule might say simply that a party may move for
141 summary judgment, asserting that there is no genuine dispute as to any material fact, etc.

142 A first observation was that the Rule 56 proposal is not intended to change the “substantive
143 law” of summary judgment. The concern with “should” is that it takes a definitive position on an
144 unsettled issue — what is the nature of “discretion” to deny summary judgment when a party shows
145 there is no genuine issue and that it is “entitled to judgment as a matter of law.” At best this is a
146 matter of dispute. The Supreme Court’s opinions are not clear — they include seemingly
147 inconsistent pronouncements and can be read to go either way. The best way to retain pre-2007 law
148 is to substitute “must.” Rule 56 uses mandatory language, and the Celotex opinion says that it
149 “mandates” summary judgment when an appropriate showing is made. “Must” avoids changing
150 that. To the extent that the Supreme Court has recognized discretion to deny, it has done so in the
151 context of a rule that, with “shall,” used mandatory language. The same discretion will remain with
152 “must” as mandatory language. If this discretion is eventually extended, then the Committee should
153 revisit the reference that the movant is “entitled” to judgment as a matter of law. Beyond that, none
154 of those offering testimony and comments have urged that summary judgment should be denied
155 when there is no genuine dispute. And it is better to avoid the alternative that finesses the issue by
156 removing all mandatory or directive language. The standard has been in the rule since 1938. If we
157 take it out, there is a real risk that we will be changing the law in ways that we cannot anticipate.
158 “Must” is better on the assumption that we will not be allowed to say “shall.”

159 It was urged in a similar vein that a lot of case law has developed around “shall.” Care is
160 required in tinkering with it. With “should,” the Style Project “launched something that people take
161 as changing the law.”

162 The finessing alternative was offered again. Rule 12 provides a model. It describes grounds
163 for various motions, but does not direct the court how to rule. But it was suggested again that
164 removing the familiar direction will open the door for unforeseeable developments. In 1938 Rule
165 56 directed that “[t]he judgment sought shall be rendered forthwith if [the supporting materials]
166 show that, except as to the amount of damages, there is no genuine issue as to any material fact and
167 that the moving party is entitled to a judgment as a matter of law.”

168 The long pedigree of “shall” led to the suggestion that our first choice should be to restore
169 “shall” to the rule. We should not yield to the impression that the Style Subcommittee conventions
170 are ironclad and unchangeable no matter what the justification for using “shall.”

171 Reversion to “shall” was offered as an illustration of the challenges that will confront a
172 Committee Note explanation of each of the several alternatives. The Note might well remain as
173 published if “should” is retained, leaving it to the Report to the Standing Committee to explain the
174 decision.

175 A Committee Note explaining a change to “must” will prove trickier. Some explanation
176 seems called for when the rule text as recommended for adoption departs not only from what was
177 published but from the text adopted in 2007 with a Committee Note explaining that there is
178 discretion to deny summary judgment even when the movant shows there is no genuine dispute as
179 to any material fact. The explanation might be misleading if it stated simply that there is no
180 discretion. There are many cases stating that there is discretion to deny. A supposed “entitlement”
181 to summary judgment would be no more than conditional — many cases say that when denial of
182 summary judgment is followed by trial, the question is the sufficiency of the trial evidence. If there
183 is sufficient evidence at trial to defeat judgment as a matter of law, the jury verdict stands even
184 though the summary-judgment record would not have sufficed to defeat judgment as a matter of law.
185 It should be recognized that a showing sufficient to carry the summary-judgment burden may turn

186 on matters of credibility better left for trial, particularly when inference and credibility
187 determinations may be interdependent. It might be useful to honor the frequent practice of avoiding
188 close calls on summary judgment, particularly when partial summary judgment leaves the way open
189 for trial on issues that will require consideration of substantially the same evidence as bears on the
190 issues that might be resolved by summary judgment. The relationship between the timing of the
191 motion and the progress of discovery, including the need for further discovery under present Rule
192 56(f) as slightly revised in proposed Rule 56(d), might be noted. It might be made clear that “must”
193 does not entail an obligation to defer trial in order to take the time required to decide a motion filed
194 too close to trial to support reasoned consideration before trial.

195 A Committee Note explaining some alternative that omits any direction about granting the
196 motion could present still greater challenges. The effort to say that the new form is intended to carry
197 forward whatever was meant by “shall,” without offering any direction to the court, could easily be
198 ignored in the early days and almost certainly would be overlooked in the future.

199 A Committee Note explaining restoration of “shall” could be reasonably straight-forward.
200 It would note the tide of adverse comments expressing the view that “should” will influence courts
201 toward a gradual and undesirable expansion of the discretion that has been recognized under “shall.”
202 It could add that the choice was viewed as a forced choice between “must” and “should,” but express
203 the view that the unique history of Rule 56, stretching back to the original language adopted in 1938,
204 cannot reasonably be captured in either word. Restoring “shall” here would not create any
205 ambiguity for other Civil Rules or any other set of rules, at least if it remains unique.

206 Further support for “shall” was expressed by asking what are the arguments against using
207 it? Restoring it would provide the best protection against changing practice by a forced choice
208 between the equally inadequate alternatives, “must” or “should.”

209 It also was noted that many of the comments suggest that “should” is a “thumb on the scale”
210 pushing for expanded discretion to deny summary judgment, or simply not to rule on the motion.

211 The alternative of dropping all words commanding or directing the court was raised again.
212 Since the Style Project shifted to the direct voice, several rules say that the court “must” do
213 something. But, as with Rule 12, it is possible to describe the grounds for a motion without
214 addressing the court’s action. The Committee Note could say that no change in burdens or standards
215 is intended. It was responded that a rule without some form of the traditional direction will spur
216 another round of litigation that seeks to challenge or recreate the standard.

217 The last comment continued by observing that the choice is made difficult by the dictate that
218 “shall” must never be used. “Shall” is the cleanest way to express the standard that it fostered over
219 a period of nearly 70 years. If we cannot have that, “must” is the better alternative.

220 Further support was expressed for “shall” as the best alternative. The Committee Note would
221 retract the 2007 Committee Note. Perhaps the Committee Note should say that the nature and extent
222 of the discretion to deny a motion that seems to show there is no genuine dispute as to any material
223 fact remain uncertain and are hotly disputed. The only way to allow natural evolution without
224 inviting unforeseeable — and therefore unintended — consequences is to go back to the traditional
225 word.

226 After agreeing that “shall” is the best choice, it was suggested that a way out might be found
227 by some expression such as “must, unless for good cause shown on the record.” This suggestion
228 was met by the counter that invoking “good cause” could easily be read to confer greater discretion
229 than “should.”

230 Yet another member urged that “shall” should be restored. This choice has in fact been
231 shown to be the best way to achieve the goals of the Style Project. The extensive comments and
232 testimony on the current proposal have shown that neither “should” nor “must” are capable of
233 carrying forward the meaning that has accrued to “shall” in Rule 56. This situation is unique within
234 the Civil Rules. “Shall” should be restored here, without any thought that it should be reconsidered
235 in other rules. To be sure, the present proposal is not confined by the goals of the Style Project.
236 Changes in the level of discretion are well within the reach of the ordinary amendment process. But
237 no one has expressed any desire or intent to change the pre-Style standard, not even at the level of
238 defining further the discretion to deny summary judgment when the established standard seems to
239 be satisfied.

240 This discussion concluded by noting that Rule 56 may present a case that falls within another
241 rule of the Style Project. “Sacred phrases” were carried forward without change, partly for the
242 reassurance of familiarity but often because any change in expression might change meaning. Had
243 the comments heard now been stimulated by the Style Project — which provoked very few
244 comments and only one hearing — the style question could have been fought out then. By
245 substituting “should” for “shall,” the Style Project may have inadvertently desecrated a sacred
246 phrase. Reconsideration may be proper in light of the determination that the present project also is
247 not an appropriate occasion to tinker with the element of discretion that has been recognized but not
248 defined as the law has evolved.

249 A different point was made to finish the Rule 56 discussion. Even Style Rule 56 refers to
250 materials that “show” there is no genuine issue. We should think about restoring this word as a
251 means of ensuring that the new rule does not inadvertently affect the still uncertain definition of the
252 Rule 56 moving burden after the Celotex decision. The choice may depend on how much of
253 proposed Rule 56(c) survives — (c)(4) identifies the “Celotex no-evidence” motion, and responses,
254 “showing” the required things. It might be good to balance these by restoring “show” to 56(a).

255 Discussion of Rule 56 concluded by noting that the Subcommittee will consider alternative
256 drafts, most likely by conference call early in March. The Subcommittee should have proposals for
257 consideration at the April Committee meeting. If all goes smoothly, the Committee will be able to
258 make recommendations to the Standing Committee for consideration at the Standing Committee’s
259 June meeting.

260 *Rule 26*

261 Professor Marcus opened discussion of the Rule 26 proposals. Although Daniel Girard is the
262 only Rule 26 Subcommittee member able to attend this hearing and meeting, it will be useful to
263 review the issues raised by testimony and comments with the Committee. The issues are raised in
264 the January 27 Memorandum on Pending Issues prepared by Professor Marcus for the Committee.

265 The first and most basic question is whether to carry forward with these proposals. The
266 proposals respond to pragmatic concerns that have been raised by practicing lawyers, most notably
267 by the Litigation Section of the American Bar Association. These concerns reflect a judgment,
268 based on widespread experience, that the extensive inquiries into the evolution of draft reports and
269 into attorney-expert communications seldom yield any useful information but impose high costs.
270 They do not necessarily reflect any abstract evaluation of what discovery might fit best in an ideal
271 world of relationships between adversary counsel and their trial-expert witnesses. From the
272 beginning, the Committee and Subcommittee have considered the objection that restoring the
273 discovery limits included in the proposed amendments implies acceptance of unworthy practices that
274 use experts as advocates rather than true witnesses. This objection has been expressed forcefully
275 in a comment signed by many law professors, 08-CV-070. Their concern is legitimate. But the
276 hearings and comments show that the bar in general supports the proposals. The changes wrought

277 by the 1993 amendment of Rule 26(a)(2) and the accompanying Committee Note were not for the
278 better. So the question: should the proposals be abandoned? By consensus the Committee
279 determined to proceed with the proposals.

280 A distinct question has been raised as to the possible effects of the proposed amendments on
281 Daubert determinations of admissibility. One tangential source of information is that the New Jersey
282 lawyers participating in the New Jersey miniconference unanimously agreed that the New Jersey
283 discovery rules similar to the Rule 26 proposals are a good thing, but disagreed about the wisdom
284 of the Daubert approach to expert testimony. No hint there that the discovery rule has had an effect
285 one way or the other on Daubert determinations. This question could be addressed by adding to the
286 Committee Note a statement that the discovery rules do not affect Daubert determinations: "These
287 amendments signal no retreat from the judicial gatekeeping function established by the decision in
288 *Daubert* * * *." The addition might be placed with the material at line 153 on p. 57 of the
289 publication book. No one has offered any reason to suppose that Daubert determinations will be
290 hampered by limiting discovery as the proposals would do. It was agreed that it would be desirable
291 to consult with Professor Capra, Reporter for the Evidence Rules Committee, about the form any
292 statement about Daubert might take.

293 Identifying the expert witnesses to be covered by the work-product protection for attorney-
294 expert communications also has been raised. Several commentators have urged that the protection
295 should extend to some or all of the witnesses that are not required to give a Rule 26(a)(2)(B) report
296 — the "disclosure" experts covered by proposed 26(a)(2)(C). These are witnesses not "retained or
297 specially employed to give expert testimony in the case," and "whose duties as the party's employee
298 [do not] regularly involve giving expert testimony." The broadest suggestion is to protect
299 communications with any witness who would be testifying under Evidence Rule 702. It would be
300 easy to draft the extended protection. Most of the comments, however, have focused on experts who
301 are employed by a party but do not regularly give expert testimony. It is argued that the lawyer must
302 be as free to communicate with such expert witnesses as with those retained or specially employed
303 as experts, or with those regular employees who regularly give expert testimony. It might be
304 somewhat more difficult to draft provisions extending work-product protection to employee experts,
305 given the prospect that former employees might well become involved. However that may be, all
306 of the pre-publication comments and discussion focused on outside experts. There was no
307 suggestion that discovery of employee experts presented similar problems, and indeed it was
308 suggested that the relationship between attorney and employee-expert is different from the
309 relationship with an independent expert.

310 An additional concern was expressed: often employee experts also have fact knowledge apart
311 from their expert evaluations. It could be difficult in practice to sort through the distinction between
312 discovery of fact knowledge and discovery aimed at communications in the course of preparing
313 expert testimony. It was pointed out, however, that extending the protection of proposed Rule
314 26(b)(4)(C) would not limit in any way discovery as to the employee's fact knowledge. It would
315 not limit discovery as to the development of the employee's expert opinion, apart from
316 communications with counsel. And discovery would be freely available as to communications with
317 counsel as to compensation, facts or data identified by counsel and considered by the expert, and
318 assumptions that counsel provided and the expert relied upon.

319 Beyond fact discovery, it was noted that several of the commentators sought work-product
320 protection because of uncertainties as to the reach of attorney-client privilege for communications
321 with a party's employees. Some states use a "control group" test that limits the number of
322 employees who come within the privilege. Former employees may or may not be within the
323 privilege. Employees who have independent counsel present similar issues. It is not clear that the
324 variability of state privilege law is an important consideration in shaping federal discovery rules.

325 Discussion pointed out that the proposal to extend work-product protection arose from
326 concern with the complexity and expense of expert-witness discovery that generally yields little
327 useful information and that impedes the development of expert opinions and testimony. Consensus
328 was reached as to draft reports or disclosures — all experts are protected. As to communications,
329 there are risks in attempting to freeze something in the rule as to employees or former employees.
330 Perhaps some general formulation could be found, giving discretion to the judge in a way that avoids
331 the need for complex drafting about propositions that are not firmly set. There is a risk of abuse if
332 we simply protect communications with all employees — an attorney, for example, might seek to
333 limit discovery by simply asserting that a former employee is an expert witness.

334 A different observation was that the present project was launched to undo the unanticipated
335 bad effects of the 1993 Committee Note. The proposal seeks to create a protection against the
336 problem the Note created. If we do not say anything about communications with employee
337 witnesses, there may be a negative implication that they are not protected by work-product doctrine.
338 This observation was met by the suggestion that before 1993, it would have been assumed that work-
339 product protection applies to all attorney-expert communications. The 1993 Committee Note never
340 purported to change that as to experts not required to make a Rule 26(a)(2)(B) report. But striking
341 “or other information” from Rule 26(a)(2)(B) has not seemed enough. Still, adding rule text “could
342 create headaches.” Perhaps the Committee Note could address this topic.

343 A committee member agreed that “it does seem a bit odd to deny protection for an in-house
344 expert.” But the proposal does a lot; it may not be wise to attempt to do everything. Many
345 employee experts will be “hybrid” fact and expert-opinion witnesses. There may be too many
346 permutations to address in rule text. The request for comments did address these questions, but no
347 specific rule text was proposed. Adding new rule text now might be risky. The three hearings on
348 the 2008 proposals show that we learn a lot from reactions to specific rule language. It may be wise
349 to let this possibility go by, waiting to see whether problems we did not hear about during the pre-
350 publication phase emerge.

351 Another committee member seconded the observation that, at least from a plaintiff’s
352 perspective, there is a potential for abuse if employee experts are brought within the work-product
353 protection of proposed Rule 26(b)(4)(C).

354 It was agreed that the Subcommittee will consider the question of non-Report, 26(a)(2)(C)-
355 disclosure, experts.

356 Another issue raised by many comments is whether the work-product protection for
357 communications should extend to communications with an expert’s assistants. This question seems
358 to arise with respect to independent, non-employee experts. An expert may rely on others to do a
359 lot of the work that supports the opinion. One event, probably common, is that the attorney
360 communicates with the expert through assistants who act as conduits. The Committee Note could
361 say that the protection extends to communications through a subordinate as conduit, or made directly
362 to the expert in the presence of a subordinate. One place for this statement would be on p. 57 of the
363 publication book, after line 167. A different sort of event, also probably common, is that the
364 attorney may want to talk with the subordinate as if, in substance, a consulting expert who will not
365 be testifying at trial. It is not clear how we should deal with this possibility.

366 The distinction between subordinate as conduit and subordinate as consulting expert was
367 taken up by suggesting that focus on the “conduit” function may be too narrow, an attempt to
368 squeeze too much into one word. We want to protect communications with the expert’s team. The
369 attorney is talking to the assistant as an agent of the expert; the situation is akin to the “common
370 interest” aspect of privilege doctrine.

371 The distinction was reiterated. It is easy to conclude that protection should extend to
372 communications with an assistant as conduit to the expert. But the lawyer may well talk to the
373 assistant understanding that the conversation may not go to the expert. The assistant still may be
374 acting as agent for the expert. The assistant as agent may exercise discretion in deciding what to
375 report to the “boss expert.” “The idea is to provide wide protection to avoid gymnastics.”

376 Agreeing that it makes sense to protect communications with the expert’s staff, it was asked
377 how often the question comes up? “Who notices a deposition of the staff person who has not been
378 designated as a trial-witness expert”? One witness at the San Antonio hearing said this had
379 happened, but the situation was not described in sufficient detail to advance understanding of
380 possible problems.

381 It was suggested that the staff-assistant question could be addressed by a simple sentence in
382 the Committee Note. But it also was noted that Committee Notes should be kept as short as
383 possible.

384 Another set of issues may be described as “logistical.” Suppose a person has already been
385 deposed for fact information and then is disclosed as an expert witness: must a party obtain consent
386 or an order for a second deposition to explore the expert opinion? Would a second deposition count
387 against the presumptive limit of 10 depositions per side? Draft Committee Note language urging
388 a reasonable approach to these questions was considered and dropped. It could be restored. But
389 “anything specific would be too specific.” Should we try to say something? Although good lawyers
390 have raised this concern, judges will work it out. It is likely that a Committee Note statement would
391 use quite a few words, and do little more than recommend flexibility. The Committee Note should
392 not become a practice guide. And even if an attempt were made to identify best practices, it would
393 be difficult to describe all the appropriate factors.

394 The comment from the Eastern District of New York committee urges reconsideration of an
395 issue already considered. The Advisory Committee debated a fourth exception that would take
396 outside the Rule 26(b)(4)(C) work-product protection communications “defining the scope of the
397 assignment counsel gave to the expert regarding the opinions to be expressed.” This exception was
398 rejected because it would be difficult to find language that does not expand the exception to a point
399 that destroys protection for any communication. The wide scope of discovery that remains as to the
400 origins and development of the opinion, including the three exceptions already built into (b)(4)(C),
401 seems enough. The Eastern District committee is concerned that as drafted the rule will not permit
402 the discovery described as permissible in the request for comment, see p. 47 in the publication book.
403 But the rule text as published does permit this discovery; it is only attorney-expert communications
404 outside the three exceptions that are protected. And even that protection is defeasible if a party
405 makes the showing required to defeat work-product protection. This discussion concluded without
406 anyone suggesting any interest in reconsidering this question.

407 The next-to-final paragraph of the proposed Committee Note notes that Rule 26 focuses only
408 on discovery, but expresses an expectation “that the same limitations will ordinarily be honored at
409 trial.” It was agreed that inclusion of this paragraph should be reconsidered. It has been used to
410 support arguments that Rule 26 is being used to create an evidentiary privilege that under § 2074(b)
411 can take effect only if enacted by Congress. Professor Capra, Reporter for the Evidence Rules
412 Committee, believes it unwise to address evidence rulings at trial in a Civil Rules Committee Note.
413 The Evidence Rules Committee shares that concern in some measure. This paragraph makes it more
414 difficult to understand that Rule 26 is only a discovery rule, not a privilege rule. Some will argue
415 to Congress that the Note shows the rules committees are resorting to subterfuge to evade Enabling
416 Act limits. The expectation stated in the Note, moreover, is not necessary to make the discovery
417 limits effective. There are practical reasons to avoid at trial the kinds of wasteful behavior found
418 in depositions — a judge will understand the unimportance of the information being pursued, and

419 a jury will quickly become impatient. In addition, most lawyers will prefer to avoid asking
420 questions with unknown answers.

421 The discussion of Rule 26 concluded by noting that the Discovery Subcommittee will
422 consider the testimony and comments and prepare a final proposal — perhaps with some alternatives
423 — for consideration at the April Advisory Committee meeting.

424 *2010 Conference*

425 Judge Kravitz noted that planning is under way for the conference to be held in 2010. The
426 conference will consider the basic structure of the notice-pleading/discovery/summary judgment
427 system created in 1938. Anxiety about discovery of electronically stored information continues to
428 grow to levels that demand reflection on the system within which discovery operates. This endeavor
429 will be important even if it does not lead to immediate attempts to revise the basic structure.

430 Judge Koeltl will chair the planning committee. The planning committee includes both some
431 Advisory Committee members and other members.

432 The Federal Judicial Center is moving forward on pulling together empirical data. Tom
433 Willging and Emory Lee are designing a new discovery survey. RAND is working on e-discovery.
434 Other researchers also are gathering empirical information.

435 The planning committee is considering whether to ask a few people to prepare initial “think
436 pieces,” of modest length, to help focus further planning and stimulate discussion by those who will
437 be recruited for the panels.

438 The Conference will be held at the Duke Law School, most likely in mid-May. Dean Levi,
439 former chair of the Advisory Committee and then the Standing Committee, is pleased to host the
440 conference.

441 *Adjournment*

442 Judge Kravitz noted that the Discovery Subcommittee is reviewing a list of questions that
443 arise from Rule 45; a progress report may be available for the April meeting.

444 Judge Kravitz thanked Andrea Kuperman for her valuable research in support of Committee
445 work. He also thanked the Administrative Office staff.

Respectfully submitted

Edward H. Cooper
Reporter

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 1-2, 2009

Volume II

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 1-2, 2009

1. Opening Remarks of the Chair
 - A. Report on the March 2009 Judicial Conference session
 - B. Transmission of Supreme Court-approved proposed rules amendments to Congress
 - C. Enactment of Statutory Time-Periods Technical Amendments Act of 2009
2. **ACTION** – Approving Minutes of January 2009 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 Civil Rules Committee
 - A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Civil Rules 8(c), 26, and 56
 - B. **ACTION** – Approving publishing for public comment proposed amendments to Supplemental Rule E(4)(f) (publication deferred)
 - C. Minutes and other informational items
6. Report of the Appellate Rules Committee
 - A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Appellate Rules 1, 29, 40, and Form 4
 - B. Minutes and other informational items
7. Report of the Bankruptcy Rules Committee
 - A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, 9001, and new Rule 5012, and proposed amendments to Official Form 23

- B. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 2003, 2019, 3001, and 4004, and new Rules 1004.2 and 3002.1, and proposed amendments to Official Forms 22A, 22B, and 22C
 - C. Minutes and other informational items (later mailing)
8. Report of the Evidence Rules Committee
- A. **ACTION** – Approving proposed “style” amendments to Evidence Rules 801-1103
 - B. **ACTION** – Approving publishing for public comment proposed “style” revision of Evidence Rules 101-1103
 - C. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Evidence Rule 804(b)(3)
 - D. Minutes and other informational items
9. Report of the Criminal Rules Committee
- A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1
 - B. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 1, 3, 4, 9, 12, 32.1, 40, 41, 43, 47, and 49
 - C. Minutes and other informational items
10. **ACTION** — Approving and transmitting to the Judicial Conference proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court’s Website*
11. Report on Observance of Rules Enabling Act 75th Anniversary (oral report)
12. Report on Sealed Cases (oral report)
13. Long-Range Planning Report
14. Next Meeting: January 2010

TAB 6

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
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LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: May 8, 2009

TO: Judge Lee H. Rosenthal, 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 April 16 and 17 in Kansas City, Missouri. The Committee gave final approval to proposed amendments to Appellate Rules 1 and 29 and Appellate Form 4. The Committee discussed a number of other items and removed three items from its study agenda.

Part II of this report discusses the proposals for which the Committee seeks final approval: proposed amendments to Rules 1, 29 and 40 and to Form 4. Part III covers other matters.

The Committee has scheduled its next meeting for November 5 and 6, 2009, in Seattle, Washington.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting¹ and in the Committee's study agenda, both of which are attached to this report.

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

II. Action Items – for Final Approval

The Committee is seeking final approval of proposed amendments to Rules 1, 29 and 40 and to Form 4.

A. Rule 1

Proposed new Rule 1(b) would define the term “state” for the purposes of the Appellate Rules. The proposal to define the term “state” grew out of the time-computation project’s discussion of the definition of “legal holiday”; Rule 26(a)’s definition of “legal holiday” includes certain state holidays, and it was thought useful to define “state,” for that purpose, to encompass the District of Columbia and federal territories, commonwealths and possessions.

As discussed below, the adoption of the proposed definition in Rule 1(b) permits the deletion of the reference to a “Territory, Commonwealth, or the District of Columbia” from Rule 29(a). The term “state” also appears in Rules 22, 44, and 46. The Committee does not believe that the adoption of proposed Rule 1(b) requires any changes in Rules 22, 44 or 46.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 1 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Rule 1 after publication and comment.

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee discussed the suggestion by Daniel I.S.J. Rey-Bear that Rule 1(b)’s definition of “state” should also include federally recognized Indian tribes. Noting that this suggestion deserves careful consideration, the Committee placed the suggestion on its study agenda as a new item. Treating Mr. Rey-Bear’s suggestion as a new study item will enable the Committee to consider the implications of that suggestion for the operation of Rules 22, 26, 29, 44 and 46, all of which use the term “state.”

B. Rule 29

The proposed amendments would alter Rule 29(a) in the light of new Rule 1(b) and would add a new disclosure requirement to Rule 29(c).

Rule 29(a) currently provides that “[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by

leave of court or if the brief states that all parties have consented to its filing.” Proposed Rule 1(b) will define “state” to include the District of Columbia and U.S. commonwealths or territories. Accordingly, the reference to a “Territory, Commonwealth, or the District of Columbia” should be deleted from Rule 29(a).

The proposed amendments would add a new disclosure requirement to Rule 29(c). The new provision, which is modeled on Supreme Court Rule 37.6, would require amicus briefs to indicate whether counsel for a party authored the brief in whole or in part and whether a party or a party’s counsel contributed money that was intended to fund the preparation or submission of the brief, and to identify every person (other than the amicus, its members and its counsel) who contributed money that was intended to fund the brief’s preparation or submission. The provision would exempt from the disclosure requirement amicus filings by various government entities.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rule 29 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Rule 29(a). However, the Committee made a number of changes to Rule 29(c) in response to the comments.

One change concerns the third subdivision of the authorship and funding disclosure requirement. As published, that third subdivision would have directed the filer to “identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.” A commentator criticized this language as ambiguous, because the commentator argued that the provision as drafted did not make clear whether it is necessary for the brief to state that no such persons exist (if that is the case). The Committee accordingly revised this portion of the requirement to require a statement that indicates whether “a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.”

Another set of changes concerns the placement of the disclosure requirement. As published, the Rule 29(c) proposal would have placed the new authorship and funding disclosure requirement in a new subdivision (c)(7) and would have moved the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6). New subdivision (c)(7) would have directed that the authorship and funding disclosure be made “in the first footnote on the first page.” Commentators criticized this directive as ambiguous and suggested that a better approach would be to direct that the authorship and funding disclosure follow the statement currently required by existing Rule 29(c)(3). The Committee found merit in

these suggestions and decided to move the authorship and funding disclosure provision up into Rule 29(c)(3). Having made that change, the Committee abandoned (as unnecessary) its proposal to move the corporate-disclosure provision to a new subdivision (c)(6). However, as described below, the proposed numbering of the subdivisions in Rule 29(c) was further changed in light of style guidance from Professor Kimble.

Subsequent to the Appellate Rules Committee's meeting, the language adopted by the advisory committee was circulated to Professor Kimble for style review. Professor Kimble argued that the authorship and funding disclosure provision should be placed in a separate subdivision rather than being placed in existing subdivision (c)(3). In the light of the Appellate Rules Committee's goal of listing the required components in the order in which they should appear in the brief, the decision was made to place the authorship and funding disclosure provision in a new subdivision following existing subdivision (c)(3). Though this will require renumbering the subparts of Rule 29(c), those subparts have only existed for about a decade (since the 1998 restyling) and citations to the specific subparts of Rule 29(c) do not appear in the caselaw. Given that this change entails renumbering some subparts of Rule 29(c), it also seems advisable to move the corporate disclosure provision into a new subdivision (c)(1) and to renumber the subsequent subdivisions accordingly. Professor Kimble also suggested two stylistic changes to the language of what will now become new subdivision (c)(5). First, instead of using the language "unless filed by an amicus curiae listed in the first sentence of Rule 29(a)," the provision now reads "unless the amicus curiae is one listed in the first sentence of Rule 29(a)." Second, the words "indicates whether" have been moved up into the introductory text in 29(c)(5) instead of being repeated at the outset of the three subsections (29(c)(5)(A), (B) and (C)). Also, a comma has been added to what will become Rule 29(c)(3).

Commentators made a number of other suggestions concerning the proposed authorship and funding disclosure requirement, and the Committee gave each of those suggestions careful consideration. A detailed record of the Committee's discussions can be found in the draft minutes.

C. Rule 40

The proposed amendment to Rule 40(a)(1) would clarify the treatment of the time to seek rehearing in cases to which a United States officer or employee is a party. This proposal was published for comment in 2007 along with a proposal to make a similar clarifying amendment to Rule 4(a)(1)(B). However, the Committee subsequently noted that the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raises questions concerning the advisability of pursuing the proposed amendment to Rule 4(a)(1)(B). That amendment would address the scope of the 60-day appeal period in Rule 4(a)(1)(B) – a period that is also set by 28 U.S.C. § 2107. Because *Bowles* indicates that statutory appeal time periods are jurisdictional, concerns were raised that amending Rule 4(a)(1)(B)'s 60-day period without a similar statutory amendment to Section 2107 would not remove any uncertainty that exists concerning the scope of the 60-day appeal period. Accordingly, the Department of Justice (which initially proposed the Rule 4(a)(1)(B) and Rule 40(a)(1) amendments) withdrew its proposal to amend Rule 4(a)(1)(B). A

similar issue does not arise with respect to Rule 40(a)(1), because the deadlines for seeking rehearing are not set by statute. The Committee therefore determined to abandon the proposed amendment to Rule 4(a)(1)(B), but it voted without opposition to give final approval to the proposed amendment to Rule 40(a)(1). The Rule 40(a)(1) amendment will clarify the applicability of the extended (45-day) period for seeking rehearing, and it will render Rule 40(a)(1)'s language parallel to similar language in Civil Rule 12(a) concerning the time to serve an answer.

The proposed Rule 40(a)(1) amendment was placed before the Standing Committee for discussion rather than action at its January 2009 meeting. Shortly thereafter, the Supreme Court granted certiorari in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009). The question presented in *Eisenstein* reads as follows: "Where the United States elects not to proceed with a qui tam action under the False Claims Act, and the relator instead conducts the action for the United States, must a notice of appeal be filed within the 60-day period provided for in Fed. R. App. P. 4(a)(1)(B), applicable when the United States is a 'party,' or the 30-day period provided for in Fed. R. App. P. 4(a)(1)(A)?" *Eisenstein* was argued on April 21, and as of the writing of this report the case has not yet been decided. The upcoming decision in *Eisenstein* seems likely to inform any future consideration by the Committee of the 30-day and 60-day periods in Rule 4(a)(1) and 28 U.S.C. § 2107.

1. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 40(a)(1) as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

As noted above, after publication and comment the Committee decided to abandon the proposed amendment to Rule 4(a)(1)(B) and to proceed with the proposed amendment to Rule 40(a)(1) on a standalone basis. That decision led the Committee to delete from the Note to Rule 40(a)(1) a reference to the proposed amendment to Rule 4(a)(1)(B). Apart from that, the Committee made no changes to the proposed Rule 40(a)(1) amendment after publication and comment. The Committee is of the view that these changes do not require republication.

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee discussed, but ultimately decided not to implement, two suggestions concerning the wording of the proposed amendment. The Committee concluded that Chief Judge Easterbrook's comment concerning the use of the term "United States" as an adjective is a question of style; and the Committee noted that adopting Chief Judge Easterbrook's proposed change would cause the language used in the Rule 40(a)(1) amendment to diverge from the language employed in restyled Civil Rule 12(a). The Committee also discussed the Public Citizen Litigation Group's view that the wording of the amendment should be changed so that the extended time period's applicability turns on the nature of the act as alleged by the plaintiff

rather than on the nature of the act as ultimately found by the court. A meeting participant expressed opposition to this suggestion, arguing that the time period for rehearing should not turn on the way in which the complaint was framed. It was also noted that the uncertainty that concerns Public Citizen would presumably be less in connection with Rule 40(a)(1) than it would have been in connection with the Rule 4(a)(1)(B) amendment concerning appeal time, because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. Finally, it was noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

D. Form 4

The privacy rules that took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). These rules require changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. The Administrative Office ("AO") has made interim changes to the version of Form 4 that is posted on the AO's website, but those interim changes do not remove the need to amend the official version of Form 4 to conform to the privacy requirements.

Moving forward, the Committee will also consider other changes to Form 4. For one thing, an effort is underway to restyle all the forms. More substantively, not all i.f.p. applications require the detail specified in current Form 4; for example, a much simpler form might be appropriate in the habeas context. In addition, the Committee will consider whether to revise Question 10, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. The Committee has placed these matters on its study agenda, and plans to consult other Advisory Committees about them because Form 4 is often used in the district courts.

The Committee believes, however, that it is important to take immediate action to bring the official version of Form 4 into compliance with the new privacy requirements. Accordingly, the Committee seeks final approval of the proposed amendment.

1. Text of Proposed Amendment

The Committee recommends final approval of the proposed amendment to Form 4 as set out in the enclosure to this report.

2. Changes Made After Publication and Comment

No changes were made to the proposed amendment to Form 4 after publication and comment.

III. Information Items

The Appellate Rules Committee and the Civil Rules Committee have formed a new Civil / Appellate Subcommittee. This subcommittee will investigate issues of common interest to the Civil and Appellate Rules Committees and will provide a framework for those two Committees to share insights and engage in joint study. To represent the Civil Rules Committee, Judge Kravitz has named Judge Steven Colloton, Chief Judge Vaughn Walker, and Peter Keisler as members of the subcommittee. Judge Kermit Bye, Maureen Mahoney and Douglas Letter have agreed to serve as the Appellate Rules Committee's representatives on the subcommittee. Judge Colloton will likely serve as the subcommittee's chair. The subcommittee is likely to conduct its deliberations by telephone and email rather than by meeting in person. Professors Cooper and Struve will serve as reporters to the subcommittee.

The Civil / Appellate Subcommittee will facilitate the consideration of a number of current issues. One concerns the implications of *Bowles v. Russell*, 551 U.S. 205 (2007), for the nature of appeal deadlines (as well as other litigation deadlines). Another set of issues concerns Rule 4(a)(4)'s treatment of timing with respect to tolling motions. One commentator has pointed out that there can sometimes be a time gap between the entry of an order resolving a tolling motion and the entry of an amended judgment pursuant to that order; a possible way to address this issue would be to amend Civil Rule 58(a) to explicitly include orders granting postjudgment motions among the orders for which a separate document is required. Other commentators have suggested amending Rule 4(a) so that an initial notice of appeal encompasses appeals from any subsequent order disposing of postjudgment motions. A third topic to be considered by the Subcommittee concerns the viability of "manufactured finality" as a means of securing appellate review. Roughly speaking, the term "manufactured finality" refers to a plaintiff's attempt to "manufacture" a final judgment – so as to secure immediate appellate review of an order dismissing some of the litigant's claims – by voluntarily dismissing all remaining claims.

The Committee has asked its reporter to prepare a proposed draft of amendments to Rules 13 and 14 that would address the treatment of petitions for permission to bring interlocutory appeals from Tax Court orders. The Committee is also studying proposals to amend Rule 5 to provide for the inclusion (in the appendix to a petition for permission to appeal) of key documents from the district court record; to amend Rule 32 to provide for 1.5-spaced as opposed to double-spaced briefs and to provide for briefs to be printed on both sides of the page; and to amend the Rules to allow the use of digital audiorecordings in place of written transcripts for the purposes of the record on appeal. As noted elsewhere in this report, the Committee recently added to its study agenda a proposal to amend Rule 1(b) to include federally recognized Indian tribes within the definition of the term "state."

The Committee discussed and retained two other items on its agenda. One of those items relates to Rule 4(c)'s inmate-filing provision. Judge Diane Wood asked the Committee to consider whether Rule 4(c)(1)'s "prison mailbox rule" should be clarified. At its three most recent meetings, the Committee has discussed a number of relevant questions, including whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate

uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. Participants in the Committee's most recent discussion suggested that it could be beneficial to await further development of the caselaw as well as developments in the use of electronic filing systems for filings by prison inmates. Accordingly, the Committee retained the inmate-filing issue on its agenda while directing the reporter to monitor those developments. The Committee also discussed as a separate agenda item suggestions made by Chief Judge Frank H. Easterbrook and the ABA's Council of Appellate Lawyers as part of their respective comments on the pending proposal to amend Rule 29(c) (discussed earlier in this report). These commentators suggest that the Committee should rethink the scope of Rule 26.1's disclosure requirement. They also suggest that the Committee revise the part of Rule 29(c) that requires amicus briefs filed by a corporation to include "a disclosure statement like that required of parties by Rule 26.1." Participants in the Committee's spring 2009 meeting noted the need for coordination with the other advisory committees in considering any such changes. Participants also noted that the Codes of Conduct Committee has recently raised a number of questions concerning disclosure requirements and that future discussions of those questions might provide a context for considering the commentators' suggestions. Thus, the Committee resolved to retain this item on the study agenda and to monitor the topic for further developments.

The Committee removed from its agenda three items. One of those items concerned a suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. Another concerned a question raised by Professor Daniel Meltzer during a prior Standing Committee meeting about postjudgment motion practice. The third item concerned a suggestion that Rule 31 be amended to clarify briefing deadlines in appeals involving multiple parties on a side.

Enclosures

TAB 6A

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE****

Rule 1. Scope of Rules; Definition; Title

- 1 **(a) Scope of Rules.**
- 2 (1) These rules govern procedure in the United States
- 3 courts of appeals.
- 4 (2) When these rules provide for filing a motion or
- 5 other document in the district court, the procedure
- 6 must comply with the practice of the district court.
- 7 **(b) ~~[Abrogated.]~~ Definition. In these rules, ‘state’ includes**
- 8 the District of Columbia and any United States
- 9 commonwealth or territory.
- 10 **(c) Title.** These rules are to be known as the Federal Rules
- 11 of Appellate Procedure.

Committee Note

Subdivision (b). New subdivision (b) defines the term “state” to include the District of Columbia and any commonwealth or territory of the United States. Thus, as used in these Rules, “state” includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

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

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

08-AP-001: Benjamin J. Butts. Benjamin J. Butts, of Butts & Marrs in Oklahoma City, Oklahoma, writes to express general support for the proposed amendments to the Appellate Rules.

08-AP-007: Daniel I.S.J. Rey-Bear. Daniel I.S.J. Rey-Bear, a partner at Nordhaus Law Firm, LLP, in Albuquerque, New Mexico, wrote after the close of the comment period to suggest a revision to the proposed amendment to Rule 1(b). He argues that the definition of “state” should also include federally recognized Indian tribes. He points out that Native American tribes, like states, are sovereign governments. That all three branches of the federal government recognize this fact, he suggests, “support[s] classification of federally recognized Indian tribes as ‘states’ along with the District of Columbia, federal territories, commonwealths, and possessions.” He notes the interpretive canon that provides that statutes should be liberally construed in favor of Native American tribes, and he cites court decisions that “have found tribes to qualify as ‘territories’ under various statutes.” He notes that tribes “have greater status than territories.”

Mr. Rey-Bear also focuses his arguments on the proposed definition’s effect on the operation of Rules 22, 29, 44 and 46. He asserts that it would be appropriate for Rule 22 to apply to habeas proceedings under the Indian Civil Rights Act by petitioners seeking to challenge their detention by an Indian tribe. He argues that Native American tribes should be treated like states for purposes of Rule 29’s amicus-filing provisions, and notes that this concern “is the main reason” for his submission of the comment. He points out that “[l]ike states, Indian tribes often find the need to submit amicus briefs in important cases affecting their sovereign interests,” and he argues that tribes should not be required to seek party consent or court permission for such filings. Noting the proposed amendment to Rule 29(c), Mr. Rey-Bear argues that treating tribes like states “is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs.” Turning to Rule 44, Mr. Rey-Bear argues that “[i]t would be very appropriate and valuable for Indian tribes to be included in the notice and certification provided for in this Rule.” Finally, Mr. Rey-Bear asserts that the inclusion of Indian tribes

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17 (1) if the amicus curiae is a corporation, a disclosure
18 statement like that required of parties by Rule
19 26.1;

20 ~~(1)~~(2) a table of contents, with page references;

21 ~~(2)~~(3) a table of authorities — cases (alphabetically
22 arranged), statutes, and other authorities —
23 with references to the pages of the brief
24 where they are cited;

25 ~~(3)~~(4) a concise statement of the identity of the
26 amicus curiae, its interest in the case, and the
27 source of its authority to file;

28 (5) unless the amicus curiae is one listed in the first
29 sentence of Rule 29(a), a statement that indicates
30 whether:

31 (A) a party’s counsel authored the brief in whole
32 or in part;

33 (B) a party or a party’s counsel contributed
34 money that was intended to fund preparing or
35 submitting the brief; and

36 (C) a person – other than the amicus curiae, its
37 members, or its counsel – contributed money
38 that was intended to fund preparing or

39 submitting the brief and, if so, identifies each
 40 such person;
 41 ~~(4)~~(6) an argument, which may be preceded by a
 42 summary and which need not include a
 43 statement of the applicable standard of
 44 review; and
 45 ~~(5)~~(7) a certificate of compliance, if required by
 46 Rule 32(a)(7).
 47 * * * * *

Committee Note

Subdivision (a). New Rule 1(b) defines the term “state” to include “the District of Columbia and any United States commonwealth or territory.” That definition renders subdivision (a)’s reference to a “Territory, Commonwealth, or the District of Columbia” redundant. Accordingly, subdivision (a) is amended to refer simply to “[t]he United States or its officer or agency or a state.”

Subdivision (c). The subparts of subdivision (c) are renumbered due to the relocation of an existing provision in new subdivision (c)(1) and the addition of a new provision in new subdivision (c)(5). Existing subdivisions (c)(1) through (c)(5) are renumbered, respectively, (c)(2), (c)(3), (c)(4), (c)(6) and (c)(7). The new ordering of the subdivisions tracks the order in which the items should appear in the brief.

Subdivision (c)(1). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(1) for ease of reference.

Subdivision (c)(5). New subdivision (c)(5) sets certain disclosure requirements concerning authorship and funding. Subdivision (c)(5) exempts from the authorship and funding

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disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(5) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(5) also requires amicus briefs to state whether any other "person" (other than the amicus, its members, or its counsel) contributed money with the intention of funding the brief's preparation or submission, and, if so, to identify all such persons. "Person," as used in subdivision (c)(5), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination — in the sense of sharing drafts of briefs — need not be disclosed under subdivision (c)(5). *Cf.* Eugene Gressman et al., *Supreme Court Practice* 739 (9th ed. 2007) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments . . .").

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendment to Rule 29(a). However, the Committee made a number of changes to Rule 29(c).

One change concerns the third subdivision of the authorship and funding disclosure requirement. As published, that third subdivision would have directed the filer to “identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.” A commentator criticized this language as ambiguous, because the commentator argued that the provision as drafted did not make clear whether it is necessary for the brief to state that no such persons exist (if that is the case). The Committee revised this portion of the requirement to require a statement that indicates whether “a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.”

Another set of changes concerns the placement of the disclosure requirement. As published, the Rule 29(c) proposal would have placed the new authorship and funding disclosure requirement in a new subdivision (c)(7) and would have moved the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6). New subdivision (c)(7) would have directed that the authorship and funding disclosure be made “in the first footnote on the first page.” Commentators criticized this directive as ambiguous and suggested that a better approach would be to direct that the authorship and funding disclosure follow the statement currently required by existing Rule 29(c)(3). The Committee found merit in these suggestions and decided to add the authorship and funding disclosure provision to existing subdivision (c)(3). However, a further revision to the structure of subdivision (c) was later made in response to style guidance from Professor Kimble, as discussed below.

Subsequent to the Appellate Rules Committee’s meeting, the language adopted by the advisory committee was circulated to Professor Kimble for style review. Professor Kimble argued that the authorship and funding disclosure provision should be placed in a separate subdivision rather than being placed in existing subdivision (c)(3). In the light of the Appellate Rules Committee’s goal of listing the required components in the order in which they should appear in the brief, the decision was made to place the authorship and funding disclosure provision in a new subdivision following existing subdivision (c)(3). Though this requires renumbering the subparts of Rule 29(c), those subparts have only existed for about a decade (since the 1998 restyling) and citations to the specific subparts of Rule 29(c) do not appear in the caselaw. Given that this change entails renumbering some subparts of Rule 29(c), it also seems advisable to

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move the corporate disclosure provision into a new subdivision (c)(1) and to renumber the subsequent subdivisions accordingly. Professor Kimble also suggested two stylistic changes to the language of what will now become new subdivision (c)(5). First, instead of using the language “unless filed by an amicus curiae listed in the first sentence of Rule 29(a),” the provision now reads “unless the amicus curiae is one listed in the first sentence of Rule 29(a).” Second, the words “indicates whether” have been moved up into the introductory text in 29(c)(5) instead of being repeated at the outset of the three subsections (29(c)(5)(A), (B) and (C)). Also, a comma has been added to what will become Rule 29(c)(3).

SUMMARY OF PUBLIC COMMENTS

08-AP-001: Benjamin J. Butts. Benjamin J. Butts, of Butts & Marrs in Oklahoma City, Oklahoma, writes to express general support for the proposed amendments to the Appellate Rules.

08-AP-002: Washington Legal Foundation. Richard A. Samp writes on behalf of the Washington Legal Foundation to suggest that the language of proposed Rule 29(c)(7) should be clarified. As he states, “[w]hile WLF has no objection to the objective of the proposed change, it is concerned by a potential ambiguity in its wording.” As published, Rule 29(c)(7)(C) requires the relevant footnote to “identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.” WLF is concerned that this language could be read in two ways: it could be read to permit the footnote to remain silent on the subject if no such person exists, but it could alternatively be read to require an affirmative statement that no such person exists. WLF asserts that the latter interpretation is the one that the U.S. Supreme Court Clerk’s Office has conveyed to Mr. Samp and others in response to inquiries about the meaning of the similar language in Supreme Court Rule 37.6. WLF notes that compliance with the Supreme Court’s interpretation of Rule 37.6 does not pose a problem. But WLF expresses concern that different circuits could vary in their interpretations of the language in proposed Appellate Rule 29(c)(7)(C), and that circuit-to-circuit variation on this point could result in “unsuspecting amicus filers ... hav[ing] their briefs bounced.” WLF does not take a position concerning whether Rule 29(c)(7)(C) should require an affirmative statement if no such person exists; it merely suggests that the Rule should be drafted so as to make the answer to that question clear. For instance, WLF suggests,

proposed Rule 29(c)(7)(C) could be re-drafted to read “~~identifies every~~ indicates whether a person — other than the amicus curiae, its members, or its counsel — ~~who~~ contributed money that was intended to fund preparing or submitting the brief; and, if so, identifies all such persons.”

08-AP-003. Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook makes stylistic comments about the proposed new provision in Rule 29(c)(7) and a substantive comment about existing language that would be placed in Rule 29(c)(6).

In proposed Rule 29(c)(7)(A), Chief Judge Easterbrook asserts that “author” is a noun rather than a verb, and he suggests replacing “authored” with “wrote.” Chief Judge Easterbrook finds proposed Rule 29(c)(7)(B) wordy and vague. He asks, “[d]oes this language suggest that a cash contribution used to prepare an amicus brief need not be reported if the donor did not ‘intend’ to support the brief?” He suggests changing Rule 29(c)(7)(B) to read as follows: “indicates whether a party or a party’s counsel contributed money ~~that was intended to fund preparing or submitting~~ toward the cost of the brief ...” (Chief Judge Easterbrook does not mention Rule 29(c)(7)(C) specifically, but this comment would seem to apply equally to that subsection.)

Rule 29(c) currently states that “[i]f an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.” For ease of reference and to parallel the structure of new Rule 29(c)(7), the proposed amendments (as published) would move this statement to a new Rule 29(c)(6) stating that amicus briefs must include, “if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1.” Chief Judge Easterbrook suggests that this requirement is both overinclusive (because it covers entities such as municipalities, educational institutions, and prelates) and underinclusive (because it fails to cover entities such as partnerships, trusts and limited liability companies). Chief Judge Easterbrook notes that Rule 26.1’s disclosure requirement likewise targets corporate parties, and he argues that both Rules’ focus on corporations “needs some attention.”

08-AP-004. Luther T. Munford. Luther T. Munford, a partner at Phelps Dunbar LLP in Jackson, Mississippi, suggests a number of changes in the proposed Rule.

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Mr. Munford notes that the directive that the Rule 29(c)(7) statement be placed “in the first footnote on the first page” is ambiguous “because typically briefs have a page ‘i’ as well as a page ‘1.’” And in contrast to Supreme Court briefs, in which page ‘i’ is the page for the question(s) presented, page ‘i’ in briefs in the courts of appeals will feature the table of contents (though if a corporate disclosure statement is required it will appear on page i). Mr. Munford suggests directing that the Rule 29(c)(7) statement appear “in a footnote to the Rule 29(c)(3) statement.”

More substantively, Mr. Munford takes issue with the proposed Rule’s approach. Instead of merely requiring disclosure, Mr. Munford suggests that the Rule “should prohibit parties from authoring or paying for amicus briefs.” Merely imposing a disclosure requirement, he argues, “implies that in some circumstances it might be acceptable for a party to contribute to an amicus brief.” To implement his preferred approach, Mr. Munford suggests that the required disclosure include a statement “that no counsel for a party authored the brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.” Alternatively, if this prohibition is not adopted, Mr. Munford suggests that the rule “simply require the disclosure of funding sources (and authorship if desired) without any special discussion of party sponsorship.”

Mr. Munford acknowledges that his suggestions would cause Rule 29(c)(7) to diverge from Supreme Court Rule 37.6. He suggests that the rulemakers could “give the Supreme Court an explicit choice by sending the Court a ‘preferred rule’ along with one based on Rule 37.6, and allowing the Supreme Court to choose between them.”

08-AP-005. Council of Appellate Lawyers. The Council of Appellate Lawyers (a bench-bar organization that is part of the Appellate Judges Conference of the American Bar Association’s Judicial Division) offers detailed suggestions on the proposed amendment.

The Council’s comments address the placement of both the corporate disclosure statement and the brief-preparation disclosure statement. As to the corporate disclosure statement, the Council does not appear to disagree with the Committee Note’s directive that the statement should be placed before the table of contents. But the Council argues that the guidance on placement should appear in the text of the Rule, not just in the Note. The Council suggests “that the proposed subdivision (c)(6) prescribe the same location for this

disclosure, and in substantially the same language, as Rule 28(a)(1) does for a party.” As to the disclosure required (in the published Rule) by subdivision (c)(7), the Council argues that the disclosure should appear in the text (not in a footnote) directly after the amicus-interest statement required by Rule 29(c)(3). The Council suggests that the contents of proposed subdivision (c)(7) “could be added to subdivision (c)(3), which would preserve the logical ordering of the brief’s contents without disturbing the existing numbering of the subdivisions.” For the future, the Council suggests that the Committee consider “revising Rule 29(c) along the lines of Rule 28(b), and then specifying the placement of those contents that are specific to amicus curiae briefs.”

The Council suggests expanding the coverage of Rule 26.1’s disclosure requirement “to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal.” If this change is made in Rule 26.1, then the Council also suggests revising Rule 29(c) to refer to “the same disclosure statement” as that required of parties by Rule 26.1 rather than the current wording, which refers to “a disclosure statement like that required of parties by Rule 26.1.” The Council is concerned that the current use of the word “like” might be read to permit “some degree of difference” between the amicus’s and the party’s disclosures.

The Council suggests that in subdivision (c)(7)(A) and (B) “states” should replace “indicates.” In subdivision (c)(7)(A), the Council believes further guidance is necessary on the meaning of “authored the brief ... in part.” The Council argues that the topic “is too important to be left to a Committee Note.” The Council suggests that the text of the Rule incorporate the explanation from the Supreme Court Practice treatise, which states that authorship entails “an active role in writing or rewriting a substantial or important ‘part’ of the amicus brief, ... something more substantial than editing a few sentences.”

The Council suggests that subdivision (c)(7)(A) “might be broadened to read, ‘whether a *party or the party’s counsel or other representative* authored the brief in whole or in part.’”

The Council asserts that “subdivision (c)(7)(B) is embraced within subdivision (c)(7)(C),” and thus that “the two subdivisions can be merged to require disclosure of whether there was outside funding

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... and, if so, to require identification of each person who provided funding.”

The Council suggests that the Committee Note cite the current edition of the Supreme Court Practice treatise rather than the prior edition (which was the current edition at the time the Committee Note was first prepared).

08-AP-006. Steven Finell. Mr. Finell, who chairs the Rules Committee of the ABA’s Council of Appellate Lawyers, concurs in the Council’s comments and writes separately to add his “personal views ... on policy and draftsmanship.”

As to policy, Mr. Finell agrees with Mr. Munford that “it is improper for a party to fund or write any substantial part” of an amicus brief. However, Mr. Finell suggests that “prohibition by rule could provoke a legal challenge of the rule, either under the First Amendment or as exceeding the rule-making authority conferred by the Rules Enabling Act.” He notes that requiring disclosure is likely to have the same effect, in practice, as a prohibition. He suggests, however, that Rule 29 could be improved by the addition of text that expresses the view in Supreme Court 37.1, which provides: “An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.”

As to drafting, Mr. Finell suggests that the Advisory Committee “might [have] done better [by] drafting the proposed disclosure amendments to Rule 29 on a clean slate, rather than following so closely the text of” Supreme Court Rule 37.6. He objects that proposed Rule 29(c)(7) departs from the “established style” of the Appellate Rules. He contrasts the proposed Rule’s use of “indicates” with the use of the verb “state” elsewhere in the Appellate Rules. And he contrasts the proposed Rule’s use of “authored” with the use of the verb “prepare” elsewhere in the Appellate Rules.

08-AP-007: Daniel I.S.J. Rey-Bear. Daniel I.S.J. Rey-Bear, a partner at Nordhaus Law Firm, LLP, in Albuquerque, New Mexico, wrote after the close of the comment period to suggest a revision to the proposed amendment to Rule 1(b). Mr. Rey-Bear’s comments are discussed above in connection with the proposal concerning Rule 1(b). Mr. Rey-Bear states that the main reason for his comments is to advocate the inclusion of federally recognized Indian tribes among the entities authorized, by Rule 29(a), to file amicus briefs without

party consent or leave of court. Among other considerations, Mr. Rey-Bear states that “the classification of Indian tribes along with other governments under the Appellate Rules is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs.”

Rule 40. Petition for Panel Rehearing

1 **(a) Time to File; Contents; Answer; Action by the Court**
 2 **if Granted.**

3 (1) **Time.** Unless the time is shortened or extended by
 4 order or local rule, a petition for panel rehearing
 5 may be filed within 14 days after entry of
 6 judgment. But in a civil case, ~~if the United States~~
 7 ~~or its officer or agency is a party, the time within~~
 8 ~~which any party may seek rehearing is 45 days~~
 9 ~~after entry of judgment, unless an order shortens or~~
 10 ~~extends the time-, the petition may be filed by any~~
 11 party within 45 days after entry of judgment if one
 12 of the parties is:

- 13 (A) the United States;
- 14 (B) a United States agency;
- 15 (C) a United States officer or employee sued in
 16 an official capacity; or
- 17 (D) a United States officer or employee sued in
 18 an individual capacity for an act or omission

14 FEDERAL RULES OF APPELLATE PROCEDURE

19 occurring in connection with duties

20 performed on the United States' behalf.

21 * * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The proposed amendment to Rule 40(a)(1) was published for comment in 2007 along with a proposal to make a similar clarifying amendment to Rule 4(a)(1)(B). But due to possible complications as a result of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), the Committee decided not to proceed with the proposed amendment to Rule 4(a)(1)(B) and to proceed with the proposed amendment to Rule 40(a)(1) on a standalone basis. That decision led the Committee to delete from the Note to Rule 40(a)(1) a reference to the proposed amendment to Rule 4(a)(1)(B). Apart from that, the Committee made no changes to the proposed Rule 40(a)(1) amendment as released for public comment.

SUMMARY OF PUBLIC COMMENTS

The following comments were received on the jointly-published proposals to amend Rules 4(a)(1)(B) and 40(a)(1).

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook criticized the proposals' "stylistic backsliding." He asserted that "[t]reating a proper noun as an adjective ('a United States agency') is not correct;

it is an example of noun plague.” Instead, he suggested, “[f]ederal agency’ is better, using a real adjective as an adjective. If you have some compelling need to used ‘United States,’ then say ‘agency of the United States’ (etc.)”

07-AP-011: Public Citizen Litigation Group. Brian Wolfman wrote on behalf of Public Citizen Litigation Group to express general support for the proposed amendments, but to suggest one change. Public Citizen was concerned that proposed Rule 4(a)(1)(B)(iv) and proposed Rule 40(a)(1)(D) could be read to exclude instances when the court of appeals ultimately concludes that the federal officer’s or employee’s act did *not* occur “in connection with duties performed on the United States’ behalf.” Public Citizen argued that this possibility creates a risk that appellants might rely on the longer appeal time only to have their appeals dismissed due to a ruling by the court of appeals on this factual question. Public Citizen argued that the wording should be changed to make clear that the extended time periods’ availability (under 4(a)(1)(B)(iv) and 40(a)(1)(D)) turns on the nature of the act *as alleged by the plaintiff* rather than on the nature of the act *as ultimately found by the court*. Public Citizen suggested that this could be achieved by changing “an act or omission occurring in connection with” to read “an act or omission alleged to have occurred in connection with.”

07-AP-014: United States Solicitor General. United States Solicitor General Paul D. Clement wrote in support of the proposed amendments to Rules 4(a)(1) and 40(a)(1). He argued that these amendments “would be consistent with the rules governing the district courts, and will serve important policy interests.” (The Department of Justice subsequently withdrew its support for the proposed amendment to Rule 4(a)(1)(B).)

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

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* * * * *

7. *State the persons who rely on you or your spouse for support.*

Name [or, if under 18, initials only] Relationship Age

* * * * *

13. *State the ~~address~~ city and state of your legal residence.*

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

~~Your~~ Last four digits of your social-security number: _____

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

08-AP-001: Benjamin J. Butts. Benjamin J. Butts, of Butts & Marris in Oklahoma City, Oklahoma, writes to express general support for the proposed amendments to the Appellate Rules.

TAB 6B

DRAFT

Minutes of Spring 2009 Meeting of Advisory Committee on Appellate Rules April 16 and 17, 2009 Kansas City, Missouri

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 2009, at 8:30 a.m. at the Hotel Phillips in Kansas City, Missouri. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. Mark I. Levy, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice (“DOJ”), was present representing the Solicitor General. Also present were Judge Harris L. Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary 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 Ms. Marie Leary from the Federal Judicial Center (“FJC”). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. He expressed regret that Maureen Mahoney, Judge Ellis, Judge Rosenthal and Professor Coquillette were unable to be present. Judge Stewart noted the Committee’s great appreciation of Judge Rosenthal’s work on all the Committee’s matters including the package of proposed time-computation legislation that is currently before Congress.

II. Approval of Minutes of November 2008 Meeting

The minutes of the November 2008 meeting were approved subject to the correction of a typographical error on page 11.

III. Report on January 2009 meeting of Standing Committee

Judge Stewart and the Reporter highlighted relevant aspects of the Standing Committee’s discussions at its January 2009 meeting. The proposed amendment to Appellate Rule 40(a)(1) had been approved by the Appellate Rules Committee at its fall 2008 meeting. Judge Stewart presented that proposed amendment to the Standing Committee for discussion rather than for action, in order to provide an opportunity for the new administration to consider the proposal

before the presentation of the proposal for final approval by the Standing Committee. Judge Stewart also described to the Standing Committee the Appellate Rules Committee's ongoing work on other matters such as the question of manufactured finality.

The Reporter noted that the Supreme Court has approved a number of proposed amendments which are currently on track to take effect on December 1, 2009, assuming that Congress takes no contrary action. The amendments include the proposed clarifying amendment to FRAP 26(c)'s three-day rule; new FRAP 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in FRAP 4(a)(4)(B)(ii); an amendment to FRAP 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments.

The Reporter also pointed out that the Bankruptcy Rules Committee has begun a review of Part VIII of the Bankruptcy Rules concerning appellate practice. The Bankruptcy Rules Committee has held one mini-conference on the subject in spring 2009 and intends to hold another mini-conference in fall 2009; Judge Swain has invited Professor Struve to attend the fall mini-conference, which will take place in September 2009.

IV. Other Information Items

Judge Stewart noted that the Appellate Rules Committee had discussed at its fall 2008 meeting the draft Best Practices Guide to Using Subcommittees. He observed that the preparation of the draft was occasioned by concerns that subcommittees of some Judicial Conference Committees were taking on a life of their own. Such problems, Judge Stewart noted, had not arisen with subcommittees of the Rules Committees. A judge member asked Judge Stewart about the nature of those concerns; Judge Stewart explained that some subcommittees of other Judicial Conference Committees were dealing with matters involving large monetary amounts or controversial issues, and in some instances there were concerns that the subcommittees were communicating with non-members on issues that the full committee had not yet dealt with. Judge Stewart reported that he had written to Judge Rosenthal to summarize the Appellate Rules Committee's past use of subcommittees and to proffer suggestions on the draft Best Practices Guide; Judge Rosenthal then collected the responses of the Rules Committees and provided them to Chief Judge Scirica. Mr. Rabiej reported that the Judicial Conference Executive Committee has removed from its policy the language explicitly disfavoring the use of subcommittees (though the use of full committees is preferred whenever possible). Judge Stewart stated that the Appellate Rules Committee will continue to comply with Judicial Conference policy concerning the use of subcommittees. Two subcommittees have recently been formed or revived and will involve participation by the Appellate Rules Committee.

The first such subcommittee is the newly reconstituted Privacy Subcommittee. That subcommittee, which had been active in preparing the privacy rules adopted in response to the E-Government Act, has been revived in order to respond to ongoing privacy concerns. Judge Reena Raggi, a member of the Standing Committee, chairs the Privacy Subcommittee. James

Bennett has accepted Judge Stewart's invitation to serve as the Appellate Rules Committee's representative to the Privacy Subcommittee. Judge Stewart noted that the Privacy Subcommittee will provide a framework for considering important privacy issues. Mr. McCabe reported that Senator Lieberman has recently raised concerns about social security numbers appearing in court opinions. Mr. Rabiej stated that this inquiry responds to information provided by Carl Malamud of Public.Resource.Org, and that the Administrative Office is currently analyzing that information. Mr. Rabiej noted that the Administrative Office will investigate the possibility of developing software to search for social security numbers in court filings. He pointed out that Mr. Malamud has also raised concerns with respect to alien registration numbers. Mr. Fulbruge reported that he had shared these developments with some of the appellate clerks, and their consensus is that the local circuit rules put the burden of complying with privacy requirements on the filer. Mr. Fulbruge stated that the appellate clerks do not want to be made responsible for reviewing filings; he noted that such a responsibility would be particularly problematic with respect to handwritten pro se filings and with respect to state-court records that are filed in federal habeas cases. Mr. Fulbruge pointed out that the clerks' offices lack the personnel necessary for such tasks.

The second subcommittee is the newly created Civil / Appellate Subcommittee. This subcommittee will investigate issues of common interest to the Civil and Appellate Rules Committees and will provide a framework for those two Committees to share insights and engage in joint study. Judge Stewart noted that the new Appellate Rule 12.1 and Civil Rule 62.1 exemplify the sort of joint project to be tackled by the new subcommittee. Not all the projects addressed by the subcommittee will necessarily lead to amendments of both sets of Rules. But the subcommittee framework will facilitate communication between the two Committees. Topics that may be considered by the subcommittee include the manufactured finality issue as well as the issues relating to the implications of *Bowles v. Russell*. To represent the Civil Rules Committee, Judge Kravitz has named Judge Steven Colloton, Chief Judge Vaughn Walker, and Peter Keisler as members of the subcommittee. Judge Bye, Maureen Mahoney and Douglas Letter have agreed to serve as the Appellate Rules Committee's representatives on the subcommittee. Judge Colloton will likely serve as the subcommittee's chair. The subcommittee is likely to conduct its deliberations by telephone and email rather than by meeting in person. Professors Cooper and Struve will serve as reporters to the subcommittee.

V. Action Items

A. For final approval

1. Item No. 07-AP-D (amend FRAP 1 to define "state")

Judge Stewart invited the Reporter to present the proposed amendment to Appellate Rule 1(b). New Rule 1(b) would define the term "state," for purposes of the Appellate Rules, to include the District of Columbia and any United States commonwealth or territory. The Committee received two comments relating to this proposed amendment. Mr. Benjamin Butts

wrote in support of the proposed Appellate Rules amendments generally, including the proposed new Rule 1(b). After the close of the comment period, the Committee received comments from Mr. Daniel Rey-Bear, who wrote to propose that federally recognized Indian tribes be included within the definition of “state.”

The Reporter suggested that the Committee approve the proposed new Rule 1(b) as published and that it add Mr. Rey-Bear’s suggestion to the study agenda as a new item. Mr. Rey-Bear’s suggestion is thoughtful and important and deserves careful study. The suggestion does not, however, seem amenable to treatment in the context of the proposed new Rule 1(b). Mr. Rey-Bear rightly points out that Native American nations are sovereigns and deserve to be treated with the dignity accorded other sovereigns. That fact, however, does not establish that Indian nations should be encompassed within the definition of “state” for purposes of the Appellate Rules; as a point of comparison, that definition does not encompass foreign nations.

Moreover, before defining “state” to include Native American tribes it would be necessary to consider carefully the effect of such a definition on Rules 22, 26(a), 29, 44 and 46. As to Rule 22, it is not at all clear that one seeking to appeal the denial of a habeas petition brought under the Indian Civil Rights Act (to challenge detention by a Native American tribe) currently must obtain a certificate of appealability (“COA”). To the extent that no COA is currently required for appellants challenging detention by a tribe, including tribes within the term “state” for purposes of Rule 22 would significantly alter current law. As to Rule 26(a), there are technical questions concerning how one would treat tribal holidays for purposes of defining “legal holiday” in the context of Rule 26(a)’s time-computation provisions. Even apart from such technical questions, there is an overarching need for coordination of Rule 26(a)’s time-computation framework with the time-computation provisions in the Civil, Criminal and Bankruptcy Rules; any change to Rule 26(a), thus, must be considered in coordination with the other advisory committees.

Mr. Rey-Bear’s comments indicate that the main impetus for his proposal is his view that Native American nations should be treated the same as states for purposes of amicus filings: He proposes that tribes should be entitled under Rule 29(a) to file amicus briefs without obtaining party consent or leave of court, and he also argues that tribes should not be subjected to the new authorship and funding disclosure requirement that was published for comment as proposed new Rule 29(c)(7). These points are well worth considering, but it is unclear that they could be adequately considered in the context of the current Rules amendments; therefore, it seems preferable to consider them as a new item.

Mr. Rey-Bear’s proposal concerning the definition of “state” also implicates Rules 44 and 46. As to Rule 44, it would make sense to require notification of a tribe if the legality of that tribe’s laws is challenged in a case. But it is not clear that Rule 44 as currently drafted would fit comfortably with the special issues relating to Native American tribes: For instance, it is not at all clear that all tribes would wish to cast issues concerning the *validity* of a tribal law as issues concerning *constitutionality*. With respect to Rule 46, it may be useful to learn more about the

attorney admission rules of different Native American nations before defining those nations as “states” for purposes of admission to practice before the courts of appeals.

Mr. Letter agreed that Mr. Rey-Bear’s points deserve serious consideration, but also that such consideration requires close study as well as consultation with many relevant entities. Defining tribes as “states,” he noted, might have implications for a variety of areas of law and practice. A member wondered whether an across-the-board definition of Native American tribes as “states” might be too dramatic a change. That member suggested, however, that as to amicus filings Native American tribes should be treated with the same dignity accorded to states. An attorney member agreed that it might be preferable to consider the treatment of Native American tribes on a rule-by-rule basis rather than defining tribes as “states” for purposes of all the rules. That member wondered whether it would be possible to obtain data concerning the frequency with which Native American tribes are denied leave to file amicus briefs. A judge member stated that he did not think that a court would deny a tribe permission to file an amicus brief.

A motion was made and seconded to place on the agenda the question of amicus filings by Native American tribes and to ask Mr. Letter to make initial inquiries among relevant federal government entities concerning both Rule 29(a)’s provision for filing without party consent or court leave and the provision (to be added to Rule 29(c) by the proposed amendment discussed below) concerning disclosure of amicus-brief authorship and funding. The motion passed by voice vote without opposition. By consensus, Mr. Rey-Bear’s proposals concerning Rules 22, 26, 44 and 46 were also placed on the study agenda. Mr. McCabe will write to Mr. Rey-Bear to advise him that the Committee is studying his proposals.

Turning back to the Rule 1(b) proposal as published, a judge member asked why “state” is not capitalized in the proposed amendment. The Reporter stated her belief that this was a style choice on which the Committee had deferred to Professor Kimble.

A motion was made and seconded to approve the proposed new Rule 1(b) as published. The motion passed by voice vote without opposition.

2. Item No. 07-AP-D (amend FRAP 29 in light of definition of “state”)

The proposed amendment to Rule 29(a) was presented for discussion in connection with the Rule 1(b) amendment discussed above. In the light of Rule 1(b)’s new definition, Rule 29(a) can now refer simply to “a state” rather than to “a State, Territory, Commonwealth, or the District of Columbia.”

A judge member asked why Rule 29(a) states that federal officers or agencies may make amicus filings without party consent or court permission but does not include a similar statement concerning *state* officers or agencies. The Reporter responded that she would need to investigate the Rule’s history in order to determine the reason for the difference.

A motion was made and seconded to approve the proposed amendment to Rule 29(a) as published. The motion passed by voice vote without opposition.

3. Item No. 06-04 (amend FRAP 29 to require amicus brief disclosure)

Judge Stewart invited the Reporter to introduce the proposed amendment to Rule 29(c). This amendment would add to Rule 29(c) a disclosure requirement – modeled on Supreme Court Rule 37.6 – concerning the authorship and funding of an amicus brief. This proposed amendment attracted seven sets of comments, from Mr. Butts; Richard Samp on behalf of the Washington Legal Foundation; Chief Judge Frank Easterbrook; Luther Munford; the Council of Appellate Lawyers (“Council”) (a bench-bar group within the American Bar Association); Steven Finell (who chairs the Council’s rules committee); and Mr. Rey-Bear. The comments raise many thoughtful points, and the Reporter suggested that it might be useful for the Committee to group those points conceptually for the purposes of discussion.

The Reporter noted that both Chief Judge Easterbrook and the Council have made suggestions concerning the existing corporate-disclosure requirements set by Rule 26.1 and by the sentence in Rule 29(c) that directs corporate amici to make a disclosure “like that required of parties by Rule 26.1.” The published proposal concerning Rule 29(c) would not alter the substance of those requirements (though as published the proposal would have moved the Rule 29(c) requirement to a new subdivision (c)(6)). That being so, the Reporter suggested that proposals to alter the corporate-disclosure provisions would more appropriately be treated as new agenda items rather than in the context of the proposed authorship and funding disclosure requirement. By consensus, the Committee resolved to treat these suggestions as new agenda items (see the discussion later in these minutes of Item Nos. 08-AP-R & 09-AP-A).

The Reporter next described the Council’s proposal that Rule 29(c) be revised to follow the structure of Rule 28(b) – i.e., to set a default directive that amicus briefs conform to Rule 28(a)’s requirements for appellants’ briefs and to list the deviations from that default position. The Reporter questioned whether such an approach would be useful for amicus briefs, given that when one compares the contents of appellants’ briefs and amicus briefs the distinctions outnumber the similarities. By consensus the Committee determined not to adopt the Council’s suggestion on this point.

The Reporter observed that Mr. Munford questions the basic approach taken by the proposed Rule 29(c) amendment. Rather than require disclosure of party funding or authorship of amicus briefs, Mr. Munford suggests, the Rule should ban the practice outright. Mr. Munford notes that the recent book by Justice Scalia and Bryan Garner states that it is unethical for a party or its counsel “to have any part of funding or preparing [an] amicus brief.” Another commenter, however, has questioned whether a ban on party funding or authorship might raise First Amendment or Enabling Act concerns. The Reporter stated that she had not analyzed such issues in detail, because her sense was that the Committee had deliberately chosen the disclosure approach rather than the ban approach. A disclosure requirement, she noted, is likely to deter

parties and their counsel from funding or authoring amicus briefs. By consensus, the Committee determined to maintain the disclosure approach rather than adopting a ban.

The Reporter noted that Mr. Munford also has voiced the concern that by specifically mentioning party funding and authorship the disclosure requirement might be seen to legitimize the practice. Mr. Munford suggests that if the Committee is determined to use a disclosure approach it should word the disclosure requirement more generally so as not to mention parties and their counsel in particular. But the Reporter noted that substituting the broader wording suggested by Mr. Munford would prevent the Committee from distinguishing – as the published proposal does – between parties and their counsel and every other person who might author or fund the amicus brief. Under the published proposal, if a party or its counsel contributed money intended to fund the preparation or submission of the brief, disclosure is required whether or not the contributor is a member of the amicus. But contributions by one who is neither a party nor counsel to a party need not be disclosed if the contributor is a member of the amicus. The Reporter also suggested that if mentioning party funding in the disclosure rule has the effect of legitimizing that practice, such an effect has already occurred to some extent due to the existence of Supreme Court Rule 37.6. By consensus, the Committee determined not to make the disclosure’s wording more general.

The Reporter next described Mr. Finell’s proposal that language be added to Rule 29(c) to warn would-be amici against making redundant arguments. The Reporter noted that when leave to file is needed Rule 29(b) already requires the motion for leave to state why the amicus brief is desirable and relevant. And the Reporter observed that some circuits have local provisions that provide a warning similar to the one proposed by Mr. Finell. By consensus, the Committee decided not to adopt Mr. Finell’s suggestion.

The Committee discussed the placement of the authorship and funding disclosure requirement. The published proposal, tracking Supreme Court Rule 37.6, directed that the disclosure be made in “the first footnote on the first page.” Both Mr. Munford and the Council question this choice. Mr. Munford suggests that the disclosure instead be placed in a footnote appended to the Rule 29(c)(3) statement. The Council objects to the placement of the disclosure in a footnote and instead suggests that it follow the Rule 29(c)(3) statement in the text. An attorney member agreed that it would work well for the new disclosure to be placed after the Rule 29(c)(3) statement. After further discussion the Committee determined by consensus that the issue of placement could be resolved by moving the authorship and funding disclosure requirements – which had been published as subdivision (c)(7) – up into subdivision (c)(3).

The Committee also made a change in response to an observation by the Washington Legal Foundation concerning the published proposal’s requirement that the filer identify “every person – other than the amicus curiae, its members, or its counsel – who contributed money that was intended to fund preparing or submitting the brief.” The Washington Legal Foundation expressed concern that this wording would not make clear that if there is no such person, the filer must so state. The Committee determined by consensus to reword this subpart to require a statement that “indicates whether a person – other than the amicus curiae, its members, or its

counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.”

The Reporter observed that both Chief Judge Easterbrook and Mr. Finell criticize the published rule’s use of the term “authored.” Chief Judge Easterbrook suggests substituting “wrote,” while Mr. Finell suggests substituting “prepared.” A member voiced a preference for using “authored” because that is the word used in Supreme Court Rule 37.6. A judge suggested that “authored” seems to reflect the Committee’s sense of the appropriate scope of the disclosure requirement. By consensus, the Committee decided to retain “authored.”

The Committee discussed a number of other suggestions concerning the proposal’s wording and decided not to implement them. These suggestions included the Council’s suggestion that additional Rule text be added to define what is meant by “authored ... in part”; the Council’s suggestion that the authorship disclosure provision should mention not only a party’s counsel but also the party itself or a party’s non-counsel representative; suggestions by Mr. Finell and the Council that “states” be substituted for “indicates”; and Chief Judge Easterbrook’s suggestion that the language “contributed money that was intended to fund preparing or submitting the brief” be changed to read “contributed money toward the cost of the brief.” As to the latter suggestion, it was observed that the intent requirement had not been part of the proposed amendment to Supreme Court Rule 37.6 as originally published, and that the intent requirement had been added to the Supreme Court Rule 37.6 amendment in response to vigorous criticism (during the public comment period) of the original proposal’s breadth.

A motion was made and seconded to approve the proposed amendment to Rule 29(c) subject to the changes described above. The motion passed by voice vote without opposition. A clean copy reflecting the revised text and Note of the amendment were distributed to Committee members later in the meeting for their review. The revised text and Note read as follows:

Rule 29. Brief of an Amicus Curiae

* * * * *

- (c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

- (1) a table of contents, with page references;
- (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;
- (3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file, and – unless filed by an amicus curiae listed in the first sentence of Rule 29(a) – a statement that:
 - (A) indicates whether a party’s counsel authored the brief in whole or in part;
 - (B) indicates whether a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and
 - (C) indicates whether a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;
- (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and
- (5) a certificate of compliance, if required by Rule 32(a)(7).

* * * * *

Committee Note

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Subdivision (c)(3). Subdivision (c)(3) – which already requires a statement of the amicus’s identity, interest in the case, and authority to file – is revised to set certain disclosure requirements concerning authorship and funding. Subdivision (c)(3) exempts

from the authorship and funding disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(3) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(3) also requires amicus briefs to state whether any other "person" (other than the amicus, its members, or its counsel) contributed money with the intention of funding the brief's preparation or submission, and, if so, to identify all such persons. "Person," as used in subdivision (c)(3), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination — in the sense of sharing drafts of briefs — need not be disclosed under subdivision (c)(3). *Cf.* Eugene Gressman et al., *Supreme Court Practice* 739 (9th ed. 2007) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments . . .").

4. Item No. 07-AP-G (amend Form 4 in light of privacy requirements)

Judge Stewart invited the Reporter to present the proposed amendment to Form 4. The amendment will adapt Form 4 so that it conforms to the privacy rules that took effect December 1, 2007. Those rules require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). Only one comment addressed this proposed amendment: As noted above, Mr. Butts expressed general support for all the proposed Appellate Rules amendments. A motion was made and seconded to approve the proposed amendment as published. The motion passed by voice vote without opposition.

VI. Discussion Items

A. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Stewart noted that the Appellate Rules Committee at its fall 2008 meeting had given final approval to the proposed amendment to Rule 40(a)(1). The Department of Justice had originally proposed amending both Rule 40(a)(1) and Rule 4(a)(1)(B) to clarify those Rules' treatment of suits involving federal officers or employees. However, the Department withdrew its proposal concerning Rule 4(a)(1)(B) and the Committee did not proceed further with that proposal. Judge Stewart reminded the Committee that he had presented the proposed Rule 40(a)(1) amendment at the January 2009 Standing Committee meeting for discussion rather than final approval, so as to provide the new administration with an opportunity to review the Department's preferences concerning the possibility of coordinating changes to both Rule 4(a)(1)(B) and Rule 40(a)(1).

The Reporter observed that the grant of certiorari in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009), was of interest with respect to the interpretation of Rule 4(a)(1)(B) and 28 U.S.C. § 2107. The circuits have split on the classification – for purposes of the 30-day and 60-day appeal periods set by Rule 4(a)(1) and Section 2107 – of qui tam actions in which the government has not appeared. Four circuits have held that the 60-day period applies even if the government has chosen not to intervene. But in the Tenth Circuit, the 30-day appeal period ordinarily applies if the government has chosen not to intervene, unless special circumstances exist. And last August the Second Circuit held that the 30-day period applies. The Supreme Court's resolution of this issue in *Eisenstein* may provide some guidance on how best to interpret Section 2107.

Mr. Letter reported that the Solicitor General has been very busy dealing with urgent litigation-related decisions and that he has not yet been able to seek her guidance on the questions relating to Rules 40(a)(1) and 4(a)(1)(B). He promised to try to consult with the Solicitor General and provide input to Judge Stewart and the Committee prior to the June 2009 Standing Committee meeting. The Committee determined by consensus that in the meantime Judge Stewart will seek to place the Rule 40(a)(1) amendment on the Standing Committee's agenda for action at the June meeting.

B. Item No. 07-AP-E (issues relating to *Bowles v. Russell*)

Judge Stewart introduced the Committee's discussion of this item – concerning the implications of *Bowles v. Russell* for appeal deadlines – by noting that the joint Civil / Appellate Subcommittee will consider the matter. Obviously, that does not foreclose discussion by the Appellate Rules Committee; rather, the Committee's discussion can be conveyed to the Subcommittee so as to inform the Subcommittee's work.

Professor Struve noted that *Bowles*-related questions have aroused interest among members of the bar. For example, one practitioner has pointed out to the Reporter that a court of appeals' directive concerning the appropriate choice of time period for filing a rehearing petition (14 or 45 days) may have implications for the timeliness of a subsequent petition for certiorari, and that such a situation could present another context in which the availability of the "unique circumstances" doctrine might become salient.

In preparation for the Committee's discussion the Reporter prepared three spreadsheets. The first spreadsheet lists statutory and rule-based time periods for taking an appeal to the court of appeals from a lower court or for seeking court of appeals review of an agency determination. The second spreadsheet lists some of the cases that analyze such time periods. The third spreadsheet lists statutory provisions concerning non-appellate litigation – such as statutes of limitations, prerequisites to suit, numerical limits on statutory scope, and trial-level litigation deadlines. The Reporter stressed that the spreadsheet lists are exemplary rather than exhaustive; more research would be needed to try to identify all relevant provisions and cases. But one can reach some tentative conclusions based on the current lists. There are many statutory deadlines relating to practice in the courts of appeals. Those deadlines span a wide range in terms of the nature of the interested parties, the type of substantive legal area, the time of the relevant statute's adoption, and the possible applicability of interpretive presumptions. In at least a few instances, a statute contains provisions relating to practice in the trial court as well as the court of appeals, suggesting that a proposed amendment of such a statute should be evaluated with a view to its effects at both levels.

An attorney member asked how big a problem the *Bowles*-related issues are in practice. An appellate judge wondered how many of the case citations to *Bowles* appear in dictum rather than holdings. Another appellate judge echoed this question and suggested that further research might shed light on the frequency with which *Bowles*'s doctrinal implications determine the outcome of an appeal. Another appellate judge suggested that many questions concerning the nature of a statutory deadline can be usefully dealt with by applying a clear statement rule like that stated in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); another line of research might investigate how broadly *Arbaugh* is applied in connection with such questions. He also noted that *Bowles* has raised questions concerning the tolling of certain deadlines and he suggested that it could be useful to provide guidance on such questions. Another focus of research might be the extent to which precedents such as *Becker v. Montgomery*, 532 U.S. 757 (2001), are applied to protect litigants against the loss of rights due to insubstantial defects in the notice of appeal.

An attorney member asked what policies are served by classifying a litigation deadline as jurisdictional. The Reporter responded that the context of the question will influence the answer: If a court is interpreting a statutory deadline, the relevant concerns may include separation-of-powers values, as suggested in *Bowles*. Mr. Letter agreed with this point. Apart from that observation, the Reporter suggested that the jurisdictional / non-jurisdictional choice may also take account of considerations such as the finality of judgments and the value of fairness to parties. An appellate judge observed that in pro se prisoner litigation, the government

defendants might fail to brief a timeliness question and it would then fall to the court to raise the timeliness issue sua sponte. The Reporter noted that even non-jurisdictional deadlines might sometimes be raised by the court on its own motion; the Tenth Circuit has provided a thoughtful discussion of this question in *United States v. Mitchell*, 518 F.3d 740 (10th Cir. 2008).

By consensus, the Committee retained this item on its study agenda. Judge Stewart promised that the Reporter would keep the Committee updated on her research concerning *Bowles*-related issues and would also update the Committee on relevant discussions by the joint Civil / Appellate Subcommittee.

C. Item No. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart summarized the Committee's fall 2008 discussion concerning this item, which relates to Rule 4(c)(1)'s provision for notices of appeal filed by inmates confined in institutions. Judge Diane Wood has suggested to the Committee that Rule 4(c)(1) is not as clear as it might be concerning the prepayment of postage. At the fall 2008 meeting, Judge Sutton, Dean McAllister and Mr. Letter had agreed to work with the Reporter to analyze these questions; in preparation for the spring 2009 meeting, they had listed relevant issues for the Committee's consideration.

The Reporter sketched a number of the issues. One question is whether Rule 4(c)(1) requires prepayment of postage as a condition of timeliness; this question is sometimes treated differently depending on whether the institution does or does not have a legal mail system. It is unclear under current caselaw whether the prepayment requirement (to the extent that it exists) is jurisdictional. But even if such a requirement is jurisdictional it could be changed via rulemaking. Another question is whether Rule 4(c)(1) *should* condition timeliness on the prepayment of postage. Admittedly, a first-class stamp costs little, but on the other hand an inmate may lack any funds to buy the stamp. And an inmate, unlike a free person, lacks the option of filing the notice of appeal in person. Another question is whether it makes sense for prepayment of postage to be treated differently for an institution with a legal mail system than for an institution without one. A further question is whether Rule 4(c)(1) might be amended to specify circumstances under which the failure to prepay postage might be forgiven. Yet another question is whether the Rule might be amended to respond to *United States v. Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004), in which the court of appeals dismissed a prisoner's appeal because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid (even though the postmark demonstrated that the notice of appeal was deposited in the prison mail system within the time for filing the notice). Still another question is whether Rule 4(c)(1)'s use of the term "inmate" appropriately denotes the range of persons who are confined in institutions and who may invoke the rule.

The Reporter observed that Rule 4(c)(1)'s inmate-filing provision relates to other provisions: Appellate Rule 25(a)(2)(C), Supreme Court Rule 29.2, and Rule 3(d) of the rules governing habeas and Section 2255 proceedings. To the extent that the Appellate Rules Committee is inclined to proceed with proposals on this topic, consultation with other Advisory Committees seems desirable. The Committee may also wish to consider the question of the project's scope. Should the project encompass other appellate timeliness issues such as delays in an institution's transmittal to an inmate of notice of the entry of a judgment or order? On this point, the Reporter noted that the Rules already address the possibility that a party may fail to learn of the entry of judgment in time to take an appeal, but the existing provisions do not focus on the circumstances of inmates in particular. Another question is whether the project should encompass the timeliness of trial court filings such as tolling motions or complaints.

Mr. Fulbruge described the policy of the Texas Department of Criminal Justice ("TDCJ"). Under that policy, if an inmate is on the "indigent list," the inmate is provided five legal letters per month. If the inmate does not put a stamp on a legal letter, the prison checks to see whether the inmate is on the indigent list and if he is, the prison puts a stamp on the letter, up to the five-letter limit per month (unless there are extraordinary circumstances that justify lifting this limit). Mr. Fulbruge expressed uncertainty as to whether this policy is applied in a uniform fashion by all units within the TDCJ. Mr. Fulbruge noted that if the timeliness of a filing is in question, the Fifth Circuit clerk's office will sometimes request clarification on that point from the district court or the institution.

An appellate judge asked whether the concern that an inmate may lack funds to pay for postage is already addressed by the caselaw indicating that inmates have a constitutional right to some amount of free postage for court filings. Another appellate judge suggested that it might be worth considering a provision that would permit an inmate who lacked the funds for postage to attest that he or she had a constitutional right to have the postage paid by the government. An attorney member suggested that the best course might be to retain the item on the Committee's study agenda so that the issues can percolate further in the courts. Mr. McCabe predicted that in five to ten years most prisons will provide a system that enables inmates to make electronic filings. By consensus, the Committee retained this item on its study agenda and directed the Reporter to monitor relevant developments in the caselaw and in practices relating to electronic filing.

D. Item Nos. 08-AP-D, 08-AP-E, & 08-AP-F (possible changes to FRAP 4(a)(4))

Judge Stewart invited the Reporter to introduce these items, which concern Rule 4(a)(4)'s treatment of timing with respect to tolling motions. These issues form one of the topics that will be considered by the joint Civil / Appellate Subcommittee. One of the items was raised by Peder Batalden, who points out that there can sometimes be a time gap between the entry of an order resolving a tolling motion and the entry of an amended judgment pursuant to that order. The other item responds to suggestions by Public Citizen Litigation Group and the Seventh Circuit Bar Association Rules and Practice Committee, who suggest amending Rule 4(a) so that an

initial notice of appeal encompasses appeals from any subsequent order disposing of postjudgment motions.

Mr. Batalden's concern is unlikely to arise in the Seventh Circuit, due to caselaw that interprets Civil Rule 58(a)'s reference to orders "disposing of" tolling motions to mean orders *denying* postjudgment motions. Under the Seventh Circuit's reading of Civil Rule 58(a), that Rule requires a separate document for an order *granting* a postjudgment motion. When a court enters an order granting a postjudgment motion and the order contemplates an amendment of the judgment, the court is most unlikely to provide the requisite separate document until the judgment has in fact been amended. Accordingly, in the Seventh Circuit Mr. Batalden's concern is very unlikely to arise. One possible way to address Mr. Batalden's concern, then, would be to amend Civil Rule 58(a) to explicitly adopt the Seventh Circuit's approach in this respect. An attorney member stated that the possible amendment to Civil Rule 58(a) is worth investigating. An appellate judge member suggested that the Seventh Circuit's approach to this question is the right one; he asked whether any circuit has rejected that approach. The Reporter stated that she was not aware of caselaw from other circuits disapproving of the Seventh Circuit's approach.

The Public Citizen and Seventh Circuit Bar Association proposals present a distinct set of issues. A threshold question is whether these proposals should be implemented. If the answer to that question is yes, then there will follow more specific questions concerning implementation. As a possible example, Rule 4(b)(3)(C) states (with respect to criminal appeals) that "[a] valid notice of appeal is effective – without amendment – to appeal from an order disposing of" tolling motions referred to in Rule 4(b)(3)(A). But adapting Rule 4(b)(3)(C)'s approach to the Rule 4(a) context may not be simple, because wording like that in Rule 4(b)(3)(C) could sweep quite broadly in some complex civil cases. Another issue relates to the caselaw that sometimes applies the *expressio unius* canon to interpret narrowly a notice of appeal that references fewer than all the possible orders that might be appealed. Some caselaw reasons that such a notice of appeal – by specifying that the appeal is taken from some orders – excludes the possibility that the appeal is also taken from other orders that are not listed in the notice of appeal. If Rule 4(a) were amended to provide that an initial notice of appeal also effects an appeal from orders subsequently disposing of tolling motions, how should that provision treat an initial notice of appeal that is narrowly drafted to specify only some orders?

On the Public Citizen / Seventh Circuit Bar Association proposals, an attorney member stated that Rule 4(b)'s approach is an appealing one. Another attorney member agreed that simpler procedure is better procedure. But this member also suggested that because the appellant is master of the notice of appeal, the appellant can draft the notice of appeal in a way that limits its scope.

By consensus, the Committee retained these items on its study agenda.

E. Item No. 08-AP-G (substantive and style changes to FRAP Form 4)

Judge Stewart invited the Reporter to introduce this item, which concerns substantive and style changes to Appellate Form 4. Appellate Rule 24 requires an applicant seeking to appeal in forma pauperis (“i.f.p.”) to attach an affidavit that “shows in the detail prescribed by Form 4” the party’s inability to pay or give security for fees and costs. Supreme Court Rule 39.1 requires a party seeking to proceed i.f.p. in the Supreme Court to use Form 4. As noted above, the Committee earlier in the meeting approved privacy-related amendments to Form 4. Apart from those amendments, the Committee has on its study agenda other possible changes to Form 4. One possibility is that Form 4, like other forms, may be restyled. Another question is whether a short form should be adopted as an alternative to the current (and very detailed) Form 4. And another set of issues concerns whether Questions 10 and 11 in Form 4 might intrude on matters covered by attorney-client privilege or work product immunity or might otherwise raise policy concerns. Question 10 requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments; Question 11 inquires about payments for non-attorney services in connection with the case.

The Reporter stated that on a preliminary review, it seems that much of the information sought by Questions 10 and 11 is unlikely to be covered by attorney-client privilege. However, it seems possible that – depending on how broadly Question 11 is interpreted – it might request some information concerning investigators or experts that might be covered by work product immunity. There are other questions to investigate, such as the effect on these concerns of the timing of applications for which Form 4 would be employed. Another line of research might investigate the scope of work product protection for pro se litigants (given that many i.f.p. applicants may be proceeding pro se).

The Reporter noted that Questions 10 and 11 might be argued to raise policy concerns as well. One such concern might be that by requiring the applicant to divulge the applicant’s compensation arrangement with his or her attorney, Question 10 might give the applicant’s opponent information that could provide a strategic advantage in settlement negotiations. Another concern is that by asking about payments to a lawyer in connection with the case, Question 10 could require a pro se litigant to divulge the fact that the litigant has paid a lawyer for discrete services (short of representation) in connection with the case. Such discrete services are sometimes referred to as “unbundled” legal services. The professional-responsibility implications of the “unbundling” of legal services have been much discussed. Proponents of unbundling argue that the practice increases access to courts and helps to level the playing field by enabling litigants who could not afford full representation to obtain specific types of episodic legal assistance. Opponents respond that such a practice is deceptive and undesirable because it allows litigants to obtain advantages by seeming to be “pro se” when they are not and because it allows the lawyer to avoid the strictures of Rule 11. To the extent that Question 10 requires an applicant to divulge payments for unbundled legal services, it might offer the applicant’s opponent an opportunity to raise objections to the practice.

An attorney member noted the possibility that an i.f.p. litigant's lawyer might be paid by a relative of the litigant. The member also noted that the defendant will often be able to seek discovery concerning attorney fees during the pendency of the litigation in cases where the fees are an element of the plaintiff's claim.

A judge member noted that i.f.p. applications may be made by represented parties. A member suggested that the "unbundling" of legal services is a hot topic in his home state, and he suggested that it is important for the Rules Committee to avoid making a value judgment on this topic. A judge member stated his impression that the trend is to permit "unbundling" so as to promote pro bono work.

An appellate judge asked whether Form 4, once it is submitted, is public, and if so, why it should be public. The member wondered whether the court might treat Form 4 as a confidential document that is not provided to the applicant's opponent. Though an attorney member mentioned the usual presumption that court filings are public, it was noted (by analogy) that some filings made in connection with Criminal Justice Act applications do not go into the court file. A judge member suggested that making an applicant's Form 4 responses public seems unduly invasive. One member asked whether i.f.p. applications are ever opposed, and, if so, whether that would weigh in favor of disclosing the Form 4 to the applicant's opponent. An attorney member wondered when the information requested by Questions 10 and 11 would really be material to an i.f.p. determination.

Judge Stewart asked Mr. Fulbruge whether Form 4's contents are kept confidential in the Fifth Circuit. Mr. Fulbruge stated that he did not think that the contents are made available on PACER. An attorney member suggested that this is an area for coordination with the other advisory committees, given that this issue may also arise in the lower courts.

By consensus, the Committee retained this matter on the study agenda.

F. Item No. 08-AP-H ("manufactured finality" and appealability)

Judge Stewart invited the Reporter to introduce this item, which was raised originally by Mr. Levy and which concerns the viability of "manufactured finality" as a means of securing appellate review. The topic can be briefly described as follows: If the court dismisses the plaintiff's most important claims ("central claims"), leaving only claims about which the plaintiff cares less ("peripheral claims"), the continued pendency of the peripheral claims means there is no final judgment despite the dismissal of the central claims. If it is not possible to obtain a partial final judgment under Civil Rule 54(b) or to obtain the requisite rulings from both the district court and the court of appeals for a permissive appeal under 28 U.S.C. § 1292(b), can the plaintiff "manufacture" a final judgment by voluntarily dismissing the peripheral claims?

The Reporter noted that the Committee had discussed the variations in circuit caselaw on this question at its fall 2008 meeting. This is a topic on which the work of the Civil / Appellate Subcommittee will be very useful; it will also be important to consult with the Bankruptcy and Criminal Rules Committees. Preliminary discussions with Judge Stewart, Judge Kravitz, and Professor Cooper have identified some possible policy choices. It would make sense – and would generally accord with existing circuit caselaw – to provide that where the plaintiff dismisses the peripheral claims with prejudice, this produces a final judgment that permits appellate review of the central claims. Where the dismissal was nominally without prejudice but a time-bar or other impediment ensures that the peripheral claims can no longer be reasserted (one might term this dismissal with “de facto prejudice”), one might argue that it would make sense to treat the dismissal the same as one that is nominally “with prejudice.” This, however, seems less important to establish, assuming that the plaintiff can cure any problem by stipulating after the fact that the dismissal is with prejudice. Moreover, when it is uncertain whether the peripheral claim can or cannot be reasserted, that uncertainty might provide a reason not to treat the dismissal as one with prejudice unless the plaintiff provides a stipulation (or the district court amends the order of dismissal) to that effect. Where the peripheral claims are conditionally dismissed with prejudice, the plaintiff agrees to dismiss the peripheral claims and not to reassert them unless the central claim’s dismissal is reversed on appeal. It would probably make sense to provide that this creates a final judgment. By contrast, when the peripheral claims are dismissed without prejudice, it is much less clear that the resulting judgment should be considered final.

The Reporter mentioned that in addition to these broad policy choices, there would also be more specific drafting choices. For instance, there is the question how to specify what events can trigger a conditional dismissal that results in an appealable judgment. There will also be questions concerning how to handle complex cases. And there is a further question whether the rule should recognize discretion in the court of appeals to take up and decide (on the appeal) the merits of the conditionally-dismissed claim as well as the claim on which the appeal was taken (so as to focus the proceedings on remand). As to that last question, Mr. Levy expressed concern that such a reservoir of discretion might prove to be a trap for the unwary appellant, and he suggested that such a concept would need to be carefully thought through.

Mr. Levy stated that if a rule can be drafted to resolve this set of questions, it would perform an important service. He suggested that the dismissal of the peripheral claims with prejudice is the easiest case – that should result in an appealable judgment. In his view the next easiest case is the conditional dismissal with prejudice, and here too, he thinks that the result should be an appealable judgment; this concept would be administrable because there would be a formal piece of paper memorializing the conditional dismissal with prejudice. By contrast, he is concerned that in the case of a dismissal with “de facto prejudice,” there may be uncertainty as to whether the peripheral claim really cannot be reasserted, and that this uncertainty could generate satellite litigation. As to a dismissal of peripheral claims without prejudice, he sees this as falling within the heartland of the matters already addressed by Civil Rule 54(b).

An appellate judge wondered why the Supreme Court has not granted certiorari to resolve these issues. It was suggested that perhaps the posture in which these issues arise would make it unlikely that a party would seek certiorari on this issue.

By consensus, the Committee retained this item on its study agenda.

G. Item No. 08-AP-M (interlocutory appeals in tax cases)

Judge Stewart invited the Reporter to introduce this item, which concerns the framework for interlocutory tax appeals. At its fall 2008 meeting, the Committee discussed the fact that Appellate Rules 13 and 14 appear designed to deal only with appeals as of right from Tax Court decisions and not to deal with permissive appeals from Tax Court orders under 26 U.S.C. § 7482(a)(2). The Reporter stated that in the time since the Committee's discussion of this item last fall, she had obtained useful insights from Judge Mark Holmes of the United States Tax Court. Judge Holmes states that this seems like an omission in the Appellate Rules that it would be a good idea to fix, but he also states that the number of cases that would be affected is tiny.

Mr. Letter noted that though the number of affected cases may be small, some of them can present very important issues. Mr. Letter reported that he discussed the question with his colleagues who handle tax appeals, and that those discussions indicate that the problem is worth fixing.

A motion was made and seconded to consider a possible rules amendment to address interlocutory tax appeals. The motion passed by voice vote without opposition.

H. Item No. 06-08 (amicus briefs with respect to rehearing)

Judge Stewart invited the Reporter to summarize this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. The Committee had discussed this item at its three previous meetings (in fall 2007, spring 2008 and fall 2008). By consensus, the Committee removed this item from its study agenda.

I. Item No. 08-AP-I (discussion of the uses of postjudgment motions)

Judge Stewart invited the Reporter to summarize this item, which relates to a suggestion made by Professor Daniel Meltzer during the June 2008 Standing Committee meeting. Professor Meltzer noted his impression that some of those involved in trial-level practice had raised concern about superfluous post-trial motions, and he asked whether the Committees might wish to consider whether the Civil Rules are too permissive about when a postjudgment motion can be

made. The Appellate Rules Committee's discussion of this question at the fall 2008 meeting revealed support for the view that postjudgment motions serve important functions, and did not reveal support for the view that a change is needed in order to rein in the use of such motions. At the Committee's request, the Reporter conveyed the substance of the discussion to Professor Cooper. By consensus, the Committee removed this item from its study agenda.

VII. Additional Old Business and New Business

A. Item No. 08-AP-N (appendix for petitions for permission to appeal)

Judge Stewart invited the Reporter to introduce this item, which was suggested to the Committee by Mr. Batalden. Mr. Batalden proposes that Rule 5 be amended to provide for the inclusion (in the appendix to a petition for permission to appeal) of key documents from the district court record. Rule 5(b)(1) requires the petition for permission to appeal to include, among other things, a copy of the challenged order or judgment and any related opinion, as well as any order stating the district court's permission to appeal or stating the district court's findings concerning any preconditions for appeal. Rule 5(c) sets a presumptive limit of 20 pages, excluding (among other things) the orders or judgments specified by Rule 5(b)(1). Rule 5 does not prevent the applicant from including additional record documents as attachments to the petition but such documents would appear to count toward the presumptive length limit.

The Reporter noted that Mr. Batalden pointed out that it may be particularly useful to include record documents with the petition in the context of petitions for permission to appeal under Civil Rule 23(f). The Reporter's memorandum in preparation for the meeting had asked whether the Federal Judicial Center's research on the Class Action Fairness Act (the "CAFA project") might shed light on these issues. In preparation for the meeting, Ms. Leary had consulted with her colleague Thomas Willging and based on that consultation she suggested that the Committee should not delay its consideration of this item for the purpose of seeking further data from the CAFA project. Ms. Leary explained that the focus of the CAFA project is to look at CAFA's effect on trial-level activity, and therefore the project was unlikely to provide a great deal of data that would directly pertain to practice on petitions for permission to appeal. She reported that the project still has about another year of work to go.

Mr. Fulbruge observed that the circuits take varying approaches to the questions raised by Mr. Batalden. Mr. Fulbruge suggested that it is hard to generalize about these approaches and that they are still developing in the light of the shift to electronic filing. An appellate judge stated that in the Sixth Circuit joint appendices are no longer generally used; rather, the matter proceeds on the basis of the original record as it is available through the CM / ECF system. Another appellate judge suggested that the shift to electronic filing may eventually render this item moot. Mr. Fulbruge agreed that the CM / ECF system generally provides the court of appeals with access to the electronic records filed in the district court. He mentioned, however, that sealed documents can be hard to obtain in electronic form. Mr. Fulbruge also mentioned that handwritten documents require different treatment; but he observed that the court can run

paper documents through an optical character recognition (“OCR”) system which can render many of them electronically searchable.

An appellate judge noted that though judges may be able to access documents electronically through CM / ECF, some judges may also prefer to have key documents appended to a paper copy of the petition; but he suggested that a wait-and-see approach may be appropriate with respect to this item. Another appellate judge noted that law clerks tend to be particularly comfortable using electronic copies of the record. This judge noted that another question is how to deal with instances when a particular judge wants a paper copy of the documents; in particular, there is the question of who prints the paper copy (the clerk’s office or the judge’s chambers). Mr. Fulbruge noted that one way to resolve that question is for the clerk’s office to send the documents electronically to print on a special printer in chambers. An appellate judge noted that prisoner and other pro se filings present distinct issues. He pointed out that death-penalty habeas cases involving state-court convictions will involve the filing of the paper state-court record. An attorney member asked how much expense the government incurs in printing paper copies of filings; Mr. Fulbruge responded that it can be costly.

By consensus, the Committee retained this item on its study agenda.

B. Item No. 08-AP-O (clarify briefing deadlines in appeals with multiple parties)

Judge Stewart invited the Reporter to introduce this item, which arises from Mr. Batalden’s question concerning the application of Rule 31’s briefing deadlines in appeals in which multiple parties on a side serve and file separate briefs on different days. Rule 31(a) pegs the time for serving and filing the appellee’s brief and the appellant’s reply brief to the date of service of the previous brief. Rule 28.1 takes a similar approach to the timing of briefs in cases involving cross-appeals. The Committee Notes to Rule 28.1 and Rule 31 do not discuss the timing of briefs in an appeal in which there are multiple parties on a side. In two circuits, local provisions address Mr. Batalden’s question. This timing question is not likely to trouble litigants in circuits where the briefing schedule is set by order, assuming that the scheduling order uses dates certain. In circuits where the briefing schedule is not set by order or where the scheduling order does not use dates certain, this timing question will still not arise if the multiple parties on a given side file a joint brief rather than separate briefs.

An attorney member expressed doubt that this question would pose a serious problem: If the attorney is unsure of the deadline, he or she can call the clerk’s office to seek clarification. Another attorney agreed; he suggested that Mr. Batalden’s question might be worth considering if the Committee decides to undertake a broader set of rules amendments in the future, but that the question is not worth addressing at this time. Another attorney member agreed. This member stated that he had never seen this problem arise in his practice in the courts of appeals; though he has seen a similar question arise in Supreme Court briefing, when the question arises one simply asks the Clerk for clarification.

By consensus, the Committee decided to remove this item from its study agenda.

C. Item No. 08-AP-P (FRAP 32 – line spacing of briefs)

Judge Stewart invited the Reporter to introduce this item, which concerns Mr. Batalden's suggestion that Rule 32 be amended to provide for 1.5-spaced briefs rather than double-spaced briefs. At Mr. Levy's suggestion, the Reporter had prepared two samples – one using 1.5 spacing and the other using double spacing. Those samples were circulated among the Committee members during the meeting.

An appellate judge suggested that so long as the briefs are readable, 1.5 spacing could save costs. A member asked why the proposed change should specify 1.5 spacing rather than permitting single spacing. It was suggested, however, that single spacing might make a non-printed brief less readable. Members noted that the double-spacing requirement is a holdover from the time when non-printed briefs were typed as opposed to printed on a computer printer. Mr. Letter asked why the rules should not permit computer-printed briefs to be printed on both sides of the page. An attorney member agreed that double-sided printing should be permitted. An appellate judge member noted that when he prints briefs in his chambers he prints them double-sided. Judge Stewart noted that his law clerks print briefs double-sided. Judge Stewart stressed the importance of ensuring that judges find the briefs readable; if briefs could be presented in a format that is both readable and light-weight, that would be desirable. An appellate judge member observed that the questions of line spacing and single-sided versus double-sided printing have implications at the trial level too.

An appellate judge suggested that the Appellate Rules Committee is likely to be considering possible Rules amendments relating to electronic filings and that the line-spacing and single-sided versus double-sided printing questions might be considered as part of that larger set of possible amendments. This member wondered whether judges may already be able to print their copies of electronically-filed briefs with the exact line spacing and other format choices that they prefer. He also predicted that if the Committee proposes rules that change the current line-spacing or single-sided printing practices without permitting local variations, such proposals would elicit very strong reactions. Mr. Rabiej noted that the development of the current provisions concerning brief fonts proved very controversial. Mr. Letter suggested that the cost savings of 1.5 spacing and double-sided printing might be significant enough to justify proceeding with a proposal targeting these topics without awaiting a broader set of amendments concerning electronic filing. He pointed out that even with the advent of electronic filing, judges are likely to continue to require parties to submit hard copies.

Mr. Fulbruge observed that if the rules are changed to permit double-sided printing, this will require the Committee to re-consider the question of how the briefs should be bound. If the brief is double-sided, it becomes very important to ensure that the brief lies flat when it is open; he suggested that spiral binding is preferable for this purpose. Mr. Letter noted that if the rules are changed to permit double-sided printing, they should make that practice voluntary rather than

mandatory, because older computer printers may not be capable of printing double-sided. An attorney member predicted that views on these questions will be divergent and perhaps irreconcilable; he asked whether this might be an area in which an appropriate interim step might be to permit local variation. Another member stated that raising these issues might produce a very constructive dialogue. Another attorney member emphasized that adopting these reforms would cut the bulk of the files in half. An appellate judge stated that the Eighth Circuit is heading in the direction of using double-sided, spiral-bound briefs; he suggested that this is the best approach and that the sooner it is adopted, the better. Judge Stewart observed that cost containment is a priority, and that making briefs less costly to produce also increases the accessibility of the courts. An attorney member stated that he, personally, prefers reading briefs that are printed single-sided – for example, single-sided briefs are easier to read on airplanes. An appellate judge member predicted that eventually courts will cease to require paper copies, and he stressed that if the only people doing the printing are the judges, and if they can alter the format of electronic briefs to suit their tastes, there will be no need to change the rule.

By consensus, the Committee determined to retain this item on its study agenda.

D. Item No. 08-AP-Q (FRAP 10 – digital audiorecordings in lieu of transcripts)

Judge Stewart invited the Reporter to introduce this item, which concerns a suggestion by Judge Michael Baylson that the Appellate Rules Committee consider the possibility of allowing the use of digital audiorecordings in place of written transcripts for the purposes of the record on appeal. Judge Baylson has permitted the use of digital audiorecordings in lieu of written transcripts for the purpose of post-trial motions. Such a practice can save the parties the expense of obtaining a transcript. However, it is likely that a transcript will need to be prepared for purposes of the appeal. Even if a particular circuit were inclined to experiment with the use of audiorecordings in lieu of transcripts, the current Appellate Rules would not fit comfortably with such an experiment. Thus, the Reporter suggested, this topic merits monitoring by the Committee.

An appellate judge member asked whether it is possible to convert a written brief into an audio file. Mr. Fulbruge stated that there is software that can enable one to convert a written brief into spoken word, but that the software can be finicky. Mr. McCabe provided the Committee with background on the history of audiorecording in federal court proceedings. He observed that discussions concerning transcripts and audiorecordings have been going on for years and that the topic is a controversial one. There is little consensus; views are divergent and strongly held. Mr. Fulbruge noted that views on audiorecordings may evolve as the technology becomes easier to use.

Judge Hartz observed that, for the last 25 years, most appeals in the New Mexico Court of Appeals have been proceeding on the basis of audiorecordings. That court adopted the practice out of frustration with the delays that attended the preparation of transcripts. He noted that the court was very strict with attorneys if they did not accurately quote from the

audiorecordings. In his experience, the judges did not have to listen to the audiorecordings very often. On the other hand, he noted, the New Mexico Court of Appeals has more central staff assistance than the federal courts of appeals generally do. It was suggested that the provision of an audiorecorded record can affect the standard of review; for example, when the question is whether a closing argument was inflammatory the answer might be unclear on the face of the transcript but the audiorecording might demonstrate that the argument was not, in fact, inflammatory. An appellate judge member noted that the Kentucky Supreme Court has used audiorecordings in place of transcripts for years, but that court nonetheless states that it employs a deferential standard when reviewing credibility assessments.

Judge Stewart noted that the relevant technology is changing rapidly. He noted that the recent Supreme Court decision in *Scott v. Harris*, 550 U.S. 372 (2007), referred to the videotape evidence that had been entered into the record below. An attorney member supported studying Judge Baylson's suggestion; he noted that obtaining a transcript poses a significant expense (for example, obtaining the transcript for a small four-day trial recently cost \$1,200.00).

By consensus, the Committee retained this item on its study agenda.

E. Item Nos. 08-AP-R & 09-AP-A (FRAP 26.1 & FRAP 29(c) – corporate disclosure requirement)

Judge Stewart invited the Reporter to introduce this item, which concerns suggestions made by Chief Judge Frank H. Easterbrook and the ABA's Council of Appellate Lawyers as part of their respective comments on the pending proposal to amend Rule 29(c) (discussed earlier in these minutes). These commenters suggest that the Committee should rethink the scope of Appellate Rule 26.1's disclosure requirement. They also suggest that the Committee revise the part of Rule 29(c) that requires amicus briefs filed by a corporation to include "a disclosure statement like that required of parties by Rule 26.1."

The ABA's Council of Appellate Lawyers suggests amending Rule 26.1 to cover amicus briefs and amending Rule 29(c) to require provision of the "same disclosure statement" required by Rule 26.1. This suggestion appears to arise from a view that Rule 29(c)'s current language – "a disclosure statement like that required of parties by Rule 26.1" – is unclear in some way and that the current language could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But that concern is somewhat puzzling, because it is difficult to imagine (and the Council does not specify) what sort of difference would arise.

An attorney member asked whether a filing by an amicus could cause a recusal. The Reporter observed that a related issue surfaced in the discussions concerning amicus filings in connection with rehearing en banc; in that context, at least one circuit prohibits such filings if they would cause the recusal of a judge. An appellate judge suggested that some recusal issues are to some extent discretionary and perhaps the standard is slightly less stringent with respect to

amicus briefs. Another appellate judge noted that though it may be unusual for an amicus filing to trigger a recusal, it is possible – for example, if a judge’s relative authors the amicus brief.

Chief Judge Easterbrook argues that the term “corporation” (in Rules 26.1 and 29(c)) is both over- and under-inclusive. On the first point, Chief Judge Easterbrook asserts that some corporations – such as municipal corporations, Harvard University or the Catholic Bishop of Chicago – have no stock and no parent corporations and ought not to be required to make disclosures of the type specified by Rule 26.1. Presumably, the concern about municipal corporations focuses on Rule 29(c), given that Rule 26.1(a) explicitly limits the disclosure requirement to “nongovernmental” corporate parties. It may be the case that Rule 29(c) requires an amicus that is a municipal corporation to file a disclosure statement. But the only downside, in that event, is that such an amicus must include a statement that there is no parent corporation and no publicly held corporation that owns 10 % or more of its stock.

On the second point, it is true that both Rule 26.1(a) and Rule 29(c) require disclosures by a corporation even if the corporation does not have stock. But the problem with amending the rules to exempt corporations that do not have stock from the disclosure obligation is that such an amendment would create ambiguity when a corporate amicus makes no disclosure. In at least some instances when a corporate entity makes no disclosure, it could be unclear whether the lack of disclosure arises from a lack of anything to disclose or from a failure to comply with the disclosure requirement. Where the filer is the Catholic Bishop of Chicago, it may be clear that the lack of disclosure arises from the absence of anything to disclose. But without knowing much more about the use of the corporate form in every relevant jurisdiction, it would be difficult to say with confidence that the answer would be equally clear in every other possible instance. The downside of the current language is that some corporate parties will have to include a sentence noting that they have no stock and no parents. But that downside is counter-balanced by the advantage of avoiding ambiguity.

Chief Judge Easterbrook’s other critique is that the Rules are under-inclusive because they fail to elicit all information that would be relevant to a judge in considering whether to recuse. A number of circuits have adopted considerably more expansive local disclosure rules. There are strong local variations on this point. There have been a number of deliberations on this issue over the past 20 years. It would significantly alter practice in some circuits to expand the range of disclosures required by the Appellate Rules. If the Appellate Rules Committee were to consider proposals to amend Rule 26.1, it would presumably wish to do so in coordination with the Civil, Criminal and Bankruptcy Rules Advisory Committees and also with the Codes of Conduct Committee. The Codes of Conduct Committee has recently raised a number of questions concerning disclosure requirements. The committees’ discussion of those questions might also provide a context for discussing Chief Judge Easterbrook’s proposal.

Mr. McCabe agreed that there is a long history of deliberations on such questions. The current Rules reflect a compromise position of setting a baseline requirement and then allowing the circuits to add further requirements if they see fit. Mr. Rabiej noted that the previous

Appellate Rules Committee Reporter had initially drafted a detailed rule, but the Committee on Codes of Conduct argued for a less detailed and narrower rule.

An attorney member observed that it can be time-consuming to comply with this type of disclosure requirement. He noted that if any affiliate of his client has public debt or shares or sells limited partnership units to the general public, he errs on the side of disclosure. He suggested that the current Rule sets a fairly good baseline.

By consensus, the Committee determined to retain this item on its study agenda and to monitor the topic for further developments.

VIII. Schedule Date and Location of Fall 2009 Meeting

The dates of November 5 and 6, 2009, were selected for the Committee's fall 2009 meeting.

IX. Adjournment

During the meeting, Judge Stewart had noted his regret that Judge Ellis and Mr. Levy would be leaving the Committee. Both have provided astounding contributions to the Committee's discussions. At the meeting's conclusion, Judge Stewart thanked all the meeting participants, and expressed deep appreciation to Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr and the AO staff for their superb work and attention to detail. Judge Stewart stated that he had greatly enjoyed his work with the Committee.

The Committee adjourned at 10:15 a.m. on April 17, 2009.

Respectfully submitted,

Catherine T. Struve
Reporter



**Advisory Committee on Appellate Rules
Table of Agenda Items — May 2009**

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
01-03	Amend FRAP 26(a)(2) to clarify interaction with “3-day rule” of FRAP 26(c).	Roy H. Wepner, Esq.	Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 <i>calendar</i> days after <i>service</i> of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Discussed and retained on agenda 04/06; awaiting report from Department of Justice Further consideration deferred pending consideration of items 06-01 and 06-02, 11/06

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Discussed and retained on agenda 04/06; deadline subcommittee appointed Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08 Published for comment 08/08 Revised draft approved 04/09 for submission to Standing Committee

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
07-AP-B	Add new FRAP 12.1 concerning the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal.	Civil Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
07-AP-C	Amend FRAP 4(a)(4)(A) and 22 in light of proposed amendments to Rules 11 of the rules governing 2254 and 2255 proceedings.	Criminal Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee FRAP 22 amendment approved for publication by Standing Committee 06/07 FRAP 22 amendment published for comment 08/07 Revised FRAP 22 draft approved 04/08, contingent on approval of corresponding amendments to the rules for § 2254 and § 2255 proceedings FRAP 22 amendment approved by Standing Committee 06/08 FRAP 22 amendment approved by Judicial Conference 09/08 FRAP 22 amendment approved by Supreme Court 03/09
07-AP-D	Amend FRAP to define the term “state.”	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07 Drafts approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07 Draft approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
07-AP-H	Consider issues raised by <u>Warren v. American Bankers Insurance of Florida</u> , 2007 WL 3151884 (10 th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-E	Amend FRAP 4(a) so that an original NOA encompasses dispositions of any post-trial motions	Public Citizen Litigation Group	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-F	Amend FRAP 4(a) so that an original NOA encompasses any post-appeal amendments of the judgment	Members of Seventh Circuit Bar Association	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-K	Consider privacy issues relating to alien registration numbers	Public.Resource.Org	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09

TAB 7

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 11, 2009

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 26 and 27, 2009, in San Diego, California. The draft minutes of that meeting are attached as Appendix A. Among the matters before the Committee were the proposed amendments and new rules that were published for public comment in August 2008. Six written comments were submitted in response to the publication, and the Advisory Committee carefully considered them. Because no one requested to appear at the public hearings scheduled for January 23 and February 6, 2009, the hearings were canceled. The Advisory Committee also studied a number of new proposals for amendments to the Bankruptcy Rules and Forms.

After careful consideration and discussion, the Committee took action on the following matters, which it presents to the Standing Committee with the indicated recommendations:

- (a) approval for transmission to the Judicial Conference of published amendments to Rules 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, 9001, and new Rule 5012;
- (b) approval for transmission to the Judicial Conference without publication of amendments to Rule 4001 and Official Form 23;
- (c) approval for publication for comment of amendments to Rules 2003, 2019, 3001, 4004(b), new Rule 3002.1, and Official Forms 22A, 22B, and 22C; and

(d) approval for republication of new Rule 1004.2, which has been revised in response to comments received following publication in August 2008.

After a discussion of the action items listed above, this report presents information on the following topics: a special open subcommittee meeting held on March 25, 2009, concerning the possible revision of the bankruptcy appellate rules; the status of the Forms Modernization project; and the Committee's recommendation to the Civil Rules Committee that discharge in bankruptcy be eliminated as an affirmative defense under Civil Rule 8(c).

II. Action Items

A. Items for Final Approval

1. *Amendments and New Rule 5012 Published for Comment in August 2008.* **The Advisory Committee recommends that the proposed amendments and new rule that are summarized below be approved and forwarded to the Judicial Conference.** With the exception of Rules 4004 and 7001, it is recommended that the rules be approved as published. The Advisory Committee recommends that Rules 4004 and 7001 be approved as revised subsequent to publication. The texts of the amended rules and new rule are set out in Appendix B.

Rule 1007 is amended in subdivision (a) to shorten the time from 15 to seven days for the debtor to file a list of creditors after the entry of an order for relief in an involuntary case. Subdivision (c) of the rule is amended to extend from 45 to 60 days the time for individual debtors in chapter 7 to file the statement of completion of a course in personal financial management. The latter amendment is proposed in conjunction with the proposed amendment to Rule 5009.

No comment was submitted on the proposed amendments, and no change was made after publication.

Rule 1014 is amended to include chapter 15 cases among those subject to the rule that authorizes the court to determine where cases should proceed when multiple petitions involving the same debtor are pending.

No comment was submitted on the proposed amendment, and no change was made after publication.

Rule 1015 is amended to include chapter 15 cases among those subject to the rule that authorizes the court to order the consolidation or joint administration of cases.

No comment was submitted on the proposed amendment, and no change was made after publication.

Rule 1018 is amended to reflect the enactment of chapter 15 of the Bankruptcy Code in 2005. The rule is also amended to clarify that, in specifying the applicability of certain Part VII rules, it applies to contests over involuntary petitions, but it does not apply to matters that are merely related to a contested involuntary petition.

No comment was submitted on the proposed amendments, and no change was made after publication.

Rule 1019 is amended by redesignating subdivision (2) as subdivision (2)(A) and adding a new subdivision (2)(B). Subdivision (2)(B) provides that a new time period to object to a claim of exemption arises when a case is converted to chapter 7 from chapter 11, 12, or 13. The new time period does not arise, however, if the conversion occurs more than one year after the first order confirming a plan, or if the case was previously pending under chapter 7 and the objection period had expired in the original chapter 7 case.

One comment was submitted on this amendment, **Comment 08-BK-005**. It expressed support for allowing a new objection period after a case is converted to chapter 7, but disagreed with creating an exception for cases converted more than a year after the plan in chapter 11, 12, or 13 was confirmed.

No change was made after publication. The Committee supported the one-year exception because a debtor in that situation may have made substantial payments to creditors under a plan and may also have made improvements on property or otherwise relied on its exempt status prior to conversion of the case.

Rule 4004 is amended to include a deadline in subdivision (a) for the filing of motions (rather than complaints) objecting to discharge under §§ 727(a)(8), (a)(9), and § 1328(f) of the Bankruptcy Code. Subdivision (c)(1) is amended to take account of the authority under subdivision (d) to raise objections to discharge under § 727(a)(8) and (a)(9) by motion. Subdivision (c)(4) is added to the rule. It directs the court in chapter 11 and 13 cases to withhold the entry of the discharge if the debtor has not filed with the court a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7). Finally, subdivision (d) is amended to provide that objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) are commenced by motion and are treated as contested matters rather than adversary proceedings.

Two comments were submitted on the originally proposed amendments to this rule and to Rule 7001, **Comments 08-BK-001 and 08-BK-003**. Both comments suggested that the authorization for raising objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) by motion should be located in Rule 4004, rather than in the proposed new subdivision (b) of Rule 7001. The Part VII rules address adversary proceedings, and the new motions will initiate contested matters. One of the comments also expressed concern that the treatment of only three of the grounds for objecting to discharge as contested matters, rather than as adversary proceedings, will create confusion.

Following publication, the Committee moved the content of Rule 7001(b) to Rule 4004(d). Rule 4004(a) and (c)(1) were also revised to change references to “motion under Rule 7001(b)” to “motion under § 727(a)(8) or (a)(9) of the Code.” The Committee concluded that, by clarifying when an objection to discharge is raised by motion and when by complaint, the amendment should contribute to the uniformity of practice nationwide and reduce, not increase, confusion in individual courts.

Rule 5009 is amended to redesignate the former rule as new subdivision (a) and to add new subdivisions (b) and (c) to the rule. Subdivision (b) requires the clerk to provide notice to

individual debtors in chapter 7 and chapter 13 cases that their case may be closed without the entry of a discharge if they fail to file a timely statement that they have completed a personal financial management course. Subdivision (c) requires a foreign representative in a chapter 15 case to file and give notice of the filing of a final report in the case.

Two comments were submitted on this amendment, **Comments 08-BK-003 and 08-BK-006**. One comment expressed concern that the requirement in new subdivision (b) places an unnecessary burden on the clerk's office and that it might appear to be overly solicitous of debtors. The other commented that the service list under subdivision (c) should be expanded to include all secured and major unsecured creditors both in the United States and abroad.

No change was made after publication. A survey of clerks revealed that many bankruptcy courts are already providing a notice of the type required by subdivision (b) and that a majority of the respondents did not believe that the requirement would impose an unreasonable burden on the clerk's office. The service list under subdivision (c) is consistent with the list of those who receive notice of the hearing on the chapter 15 petition under Rule 2002(q). Should the foreign representative commence a case under another chapter, notice would be given to all creditors.

Rule 5012 is new. It establishes the procedure in chapter 15 cases for obtaining court approval of an agreement or protocol regarding communications and the coordination of proceedings with cases involving the debtor pending in other countries.

The same suggestion regarding expansion of the service list that was made regarding Rule 5009(c) was made with respect to this rule (**Comment 08-BK-006**).

No change was made after publication.

Rule 7001 is amended in paragraph (4) to except from the listing of adversary proceedings objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f).

As discussed above, two comments were submitted on the originally proposed amendments to this rule and to Rule 4004, **Comments 08-BK-001 and 08-BK-003**.

After publication, the Advisory Committee deleted proposed subdivision (b) and moved its content to Rule 4004(d). The redesignation of the existing rule as subdivision (a) was also deleted, and the exception in paragraph (4) of the rule was changed to refer to objections under §§ 727(a)(8), (a)(9), and 1328(f) of the Code.

Rule 9001 is amended to add § 1502 to the list of definitional provisions in the Bankruptcy Code that are applicable to the Bankruptcy Rules.

No comment was submitted on the proposed amendment, and no change was made after publication.

2. *Amendments for Which Final Approval is Sought Without Publication.* **The Advisory Committee recommends that the proposed amendments that are summarized below be approved and forwarded to the Judicial Conference.** Because the proposed

amendments are conforming in nature, the Committee concluded that publication for comment is not required. The texts of the amended rule and form are set out in Appendix B.

Rule 4001 is amended to change two time periods that were inadvertently omitted from the time computation amendments package. Subdivision (d)(2) is amended to change the time period for filing objections to certain motions from 15 to 14 days of the mailing of notice. Subdivision (d)(3) is amended to change the length of notice required for certain hearings from five to seven days.

Official Form 23 is amended to conform to the amendment to Rule 1007(c), which is discussed above and for which final approval is also sought. The rule amendment changes the deadline for a chapter 7 debtor to file a statement of completion of a personal financial management course from 45 to 60 days after the first date set for the meeting of creditors. The form's statement of that deadline is amended to reflect the change. The Committee recommends that the effective date of the amendment of Form 23 be the same as the effective date of the amendment to Rule 1007(c) – December 1, 2010.

B. Items for Publication in August 2009

The Advisory Committee recommends that the proposed amendments and new rules that are summarized below be published for public comment. The texts of the amended rules, official forms, and new rules are set out in Appendix C.

Rule 1004.2 is new. Subdivision (a) requires that the entity filing a chapter 15 petition state on the petition the country of the debtor's center of its main interests ("COMI"). It also requires that the filer list each country in which a case involving the debtor is pending. Subdivision (b) sets a deadline for challenging the statement in the petition of the debtor's COMI.

This proposed rule was published for comment in August 2008. Three comments were submitted in response: **Comments 08-BK-002, 08-BK-004, and 08-BK-006.** The first two comments raised concerns that the time period in subdivision (b) for filing a motion challenging the COMI designation in the petition was too long since it extended beyond the notice period for the hearing on the chapter 15 petition. One comment pointed out that § 1517(c) of the Bankruptcy Code requires the petition to be decided upon at the earliest possible time and that, if there is a dispute over the location of the debtor's COMI, that issue needs to be resolved at the hearing on the petition. The third comment recommended expansion of the service list for a motion under subdivision (b).

The Committee determined that the concerns raised about the timing of a motion challenging the COMI designation were well taken and that the rule should be revised. It therefore proposes that the deadline in subdivision (b) for filing a motion challenging the COMI designation be changed from "60 days after the notice of the petition has been given" to "no later than 7 days before the date set for the hearing on the petition for recognition." The rest of the rule as published in 2008 remains unchanged. The Committee believes that the change to subdivision (b) is of sufficient significance to warrant republication of the rule as revised.

Rule 2003 is amended to require that written notice be given of the adjournment of a meeting of creditors and that the statement specify the date and time to which the meeting is adjourned. Section 1308(b)(1) allows a meeting of creditors to be held open in order to allow a chapter 13 debtor additional time to file tax returns with taxing authorities. The provision of written notice of adjournment will discourage premature motions to dismiss or convert a case under § 1307(e) for failure to make a timely filing of the tax returns.

Rule 2019 is amended to expand the scope of the rule's coverage and the content of its disclosure requirements. As amended, the rule requires disclosures in chapter 9 and chapter 11 cases by all committees or groups that consist of more than one creditor or equity security holder, as well as by entities or committees that represent more than one creditor or equity security holder. It also authorizes the court to require disclosures by an individual party in interest who seeks or opposes the granting of relief when knowledge of that party's economic stake in the debtor will assist the court in evaluating the party's arguments.

The type of financial information that must be disclosed is expanded to extend to all "disclosable economic interests," a term that is broadly defined in subsection (a) to include, not just claims or interests, but all economic rights and interests that could affect the legal and strategic positions that a stakeholder takes in a case. The rule is amended to require the disclosure of the amounts paid for such economic interests only when directed by the court.

Stylistic and organizational changes are made throughout the rule, resulting in new subsections (c), (d), and (e).

Rule 3001 is amended to prescribe in greater detail the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the consequences of failing to provide the required information. Existing subdivision (c) is redesignated as (c)(1) and requires that when a claim is based on an open-end or revolving consumer credit agreement, the proof of claim be accompanied by the last account statement sent to the debtor prior to the filing of the bankruptcy petition.

New subdivision (c)(2) requires additional information to be filed with a proof of claim in a case in which the debtor is an individual. This additional information includes an itemization of interest, fees, expenses, and other charges incurred prior to the petition and included in a claim; a statement of the amount necessary to cure any prepetition default on a claim secured by property of the debtor; and, for a claim secured by the debtor's principal residence, an escrow account statement as of the petition date if an escrow account has been established. Subdivision (c)(2) also provides sanctions for the failure of a creditor to provide the information required by this subdivision.

Rule 3002.1 is new. It assists in the implementation of § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan. Subdivision (a) requires the holder of a claim secured by the debtor's principal residence to provide at least 30 days' notice to the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. Subdivision (b) prescribes the procedure for giving that notice. Subdivision (c) requires the holder of a home mortgage claim to give an itemized notice of any postpetition fees, expenses, or charges within 180 days after they are incurred, and it allows the debtor or trustee to challenge those additional charges within a year after notice is given.

Subdivisions (d)-(f) establish a procedure for determining whether the debtor has cured any default and is otherwise current on the debtor's mortgage payments at the close of a chapter 13 case. Subdivision (g) specifies sanctions that may be imposed if the holder of a claim secured by the debtor's principal residence fails to provide any of the information required by this rule.

Rule 4004 is amended to permit a party under limited circumstances to seek an extension of time to object to a debtor's discharge after the time for objecting has expired. In some cases the discharge is not entered immediately upon expiration of the objection period specified in subdivision (a) of this rule. That situation gives rise to the possibility during that gap period that a party may discover information that would have provided a basis for objecting to discharge, had it been known before the objection period expired, and would have provided a basis for revocation of the discharge, had it been learned after the discharge was entered. Subdivision (b) is amended to allow a party in that circumstance to file a motion for extension of time to object to the debtor's discharge even though the objection period has already expired..

Official Forms 22A, 22B, and 22C. Form 22A is amended in three respects. The other two forms are amended in similar respects as indicated below.

(1) Form 22A is amended on lines 19A, 19B, 20A, and 20B to delete references to "household" and "household size" and to replace them with "number of persons" or "family size." These amendments implement more accurately the provisions of § 707(b)(2)(A)(ii)(I) of the Bankruptcy Code that allow means test deductions to be taken from current monthly income based on IRS National and Local Standards.

Allowing the specified deductions to be based on household size leads to results that are both over-inclusive and under-inclusive. If a debtor has dependents who are not members of the debtor's household, an instruction that the debtor's deduction take into account only household members results in a smaller deduction than IRS standards allow. On the other hand, if a debtor lives in a household with persons the debtor does not support, allowing deductions to be based on household size results in a greater deduction than the IRS standards permit.

The amended form instructs debtors to base the deduction on the number of persons allowed as exemptions on their federal income tax returns, plus additional dependents they support. This instruction takes into account the IRS practice of including certain additional dependents, such as foster children and children for whom adoption is pending, in the number of persons taken into account for purposes of the National and Local Standards. Form 22C is amended in a similar fashion on lines 24A, 24B, 25A, and 25B.

(2) Form 22A is amended to add an instruction to line 8 to clarify that only one joint filer should report regular payments by another person for household expenses. Reporting of this figure by both spouses results in an erroneous double-counting of this source of income. Forms 22 B and 22C are similarly amended on line 7 of each form.

(3) The introductory instruction to Part I of Form 22A is amended to reflect the Bankruptcy Code's ambiguities regarding application of means test exemptions in joint cases in which only one debtor is exempt. The amended instructions give debtors the choice of filing separate forms if they believe this is required by § 707(b)(2)(C) of the Bankruptcy Code. The amendment therefore follows the Committee's general policy regarding the means test forms – allowing courts to resolve ambiguities rather than determining the outcome in forms.

III. Information Items

A. Special Open Subcommittee Meeting on Bankruptcy Appellate Rules

The Advisory Committee's Subcommittee on Privacy, Public Access and Appeals held a special open meeting in San Diego on March 25, 2009, to discuss and receive input about whether a major revision of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules) should be undertaken. In addition to Advisory Committee members, those in attendance included judges from the Sixth, Ninth, and Tenth Circuits Bankruptcy Appellate Panels, clerks of court and other court personnel, bankruptcy practitioners and academics, and local bar members. Participants presented their views about the effectiveness of the existing appellate rules and areas in which improvements are needed. They also provided specific feedback on a working draft of a revision of the Part VIII rules that was prepared by former Advisory Committee member Eric Brunstad, Esq. The draft attempts to make the bankruptcy appellate rules more comprehensive, easier to read, and more closely aligned with the Federal Rules of Appellate Procedure.

There was significant support for the view that the Part VIII rules are in need of revision and that the use of electronic filing should be taken into account in proposing changes. It was also suggested that coordination with other rules advisory committees, particularly the Appellate Rules Committee, would be desirable. The Chairs and Reporters of the Bankruptcy and Appellate Rules Committees have initiated consultations on this issue. The Reporter to the Appellate Rules Committee will review revisions to the initial draft and will attend the second open subcommittee meeting on the bankruptcy appellate rules, which will be held at Harvard Law School prior to the Bankruptcy Rules Advisory Committee's fall meeting.

B. Forms Modernization Project

The Forms Subcommittee's Forms Modernization Project has retained Carolyn Bagin, a forms expert, to help it streamline its evaluation of the existing bankruptcy forms, develop recommendations for making the forms more user-friendly and less error-prone, and take advantage of modern technology. The Project's technology subgroup became convinced that a forms revision expert would be very helpful after meeting last fall with representatives of the IRS and the U.S. Census Bureau who have utilized such experts. The Administrative Office solicited bids from three forms experts on behalf of the Project, and Ms. Bagin was selected. She will participate in the Project's next group meeting at the end of June in Washington D.C.

The Project's analytical subgroup continues to move forward with its evaluation of the data requested by the current official forms. The subgroup has broken down Official Bankruptcy Form 1 (the petition), Official Form 6 (the schedules), Official Form 7 (the statement of financial affairs), and Official Forms 22A-C (the means test), into their constituent elements, classified each element into certain categories (i.e., income, expenses, assets, etc.), and put the elements in a large spreadsheet so that they can be sorted by category. This process will make it easier to identify information duplication or overlap and to aid in eventual restructuring of the forms so that information is requested in a more structured and understandable fashion.

The Project is working in coordination with the CM/ECF NextGen Working Group, which has begun the process of developing a new CM/ECF system for the bankruptcy courts.

The chair of the Forms Modernization Project, Bankruptcy Judge Elizabeth Perris, serves on the steering committee of the NextGen Working Group.

C. Discharge in Bankruptcy as an Affirmative Defense

The Committee received a request from the Advisory Committee on Civil Rules for a recommendation on whether discharge in bankruptcy should be removed from the list of affirmative defenses under Civil Rule 8(c). In response to this request, the Committee engaged in a thorough discussion of the issue at its March 2009 meeting. The Committee was aided in its discussions by substantial memoranda prepared by Christopher Kohn, Esq., on behalf of the Department of Justice, opposing the change, and Bankruptcy Judge Eugene Wedoff (N.D. Ill.), the Committee liaison to the Civil Rules Committee, supporting the change. At the conclusion of the discussion, the Committee voted to recommend that discharge in bankruptcy be eliminated as an affirmative defense under Rule 8(c), and it communicated that recommendation to the Civil Rules Committee by memorandum dated March 27, 2009.

The Committee's position is based on the view that treating discharge as an affirmative defense that is subject to waiver if not raised in a timely manner by a debtor/defendant is inconsistent with the statutory command of § 524(a) of the Bankruptcy Code. That provision voids a judgment "at any time obtained" that is based on a discharged debt, "whether or not discharge of such debt is waived." Continuing to include discharge in the list of affirmative defenses, despite § 524's voiding of judgments and prohibition of waivers, has misled some courts into finding that debtors have waived their defense of discharge by failing to plead it affirmatively in post-bankruptcy collection actions. The effect of the proposed rule change would be to eliminate the inconsistency between Rule 8(c) and § 524 of the Bankruptcy Code and to prevent a debtor from losing the benefit of a discharge because of failure to plead it affirmatively.

Appendix A - Proposed Amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, New Rule 5012, and Official Form 23 for transmission to Judicial Conference.

Appendix B - Proposed Amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, New Rules 1004.2 and 3002.1, and Official Forms 22A, 22B, and 22C.

TAB 7A

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11 (c) TIME LIMITS. In an involuntary case, the
12 schedules, statements, and other documents required by
13 subdivision (b)(1), (4), (5), and (6) shall be filed with the
14 petition or within 14 days thereafter, except as otherwise
15 provided in subdivisions (d), (e), (f), and (h) of this rule. In
16 an involuntary case, the list in subdivision (a)(2), and the
17 schedules, statements, and other documents required by
18 subdivision (b)(1) shall be filed by the debtor within 14 days
19 of the entry of the order for relief. In a voluntary case, the
20 documents required by paragraphs (A), (C), and (D) of
21 subdivision (b)(3) shall be filed with the petition. Unless the
22 court orders otherwise, a debtor who has filed a statement
23 under subdivision (b)(3)(B), shall file the documents required
24 by subdivision (b)(3)(A) within 14 days of the order for
25 relief. In a chapter 7 case, the debtor shall file the statement
26 required by subdivision (b)(7) within ~~45~~ 60 days after the
27 first date set for the meeting of creditors under §341 of the

28 Code, and in a chapter 11 or 13 case no later than the date
29 when the last payment was made by the debtor as required by
30 the plan or the filing of a motion for a discharge under
31 § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at
32 any time and in its discretion, enlarge the time to file the
33 statement required by subdivision (b)(7). The debtor shall
34 file the statement required by subdivision (b)(8) no earlier
35 than the date of the last payment made under the plan or the
36 date of the filing of a motion for discharge under
37 §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists,
38 schedules, statements, and other documents filed prior to the
39 conversion of a case to another chapter shall be deemed filed
40 in the converted case unless the court directs otherwise.
41 Except as provided in § 1116(3), any extension of time to file
42 schedules, statements, and other documents required under
43 this rule may be granted only on motion for cause shown and
44 on notice to the United States trustee, any committee elected

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45 under § 705 or appointed under § 1102 of the Code, trustee,
46 examiner, or other party as the court may direct. Notice of an
47 extension shall be given to the United States trustee and to
48 any committee, trustee, or other party as the court may direct.

49 * * * * *

COMMITTEE NOTE

Subdivision (a)(2). Subdivision (a)(2) is amended to shorten the time for a debtor to file a list of the creditors included on the various schedules filed or to be filed in the case. This list provides the information necessary for the clerk to provide notice of the § 341 meeting of creditors in a timely manner.

Subdivision (c). Subdivision (c) is amended to provide additional time for individual debtors in chapter 7 to file the statement of completion of a course in personal financial management. This change is made in conjunction with an amendment to Rule 5009 requiring the clerk to provide notice to debtors of the consequences of not filing the statement in a timely manner.

Public Comment on Proposed Amendments to Rule 1007:

No comments were received on these proposed amendments.

Changes Made After Publication:

No changes since publication.

Rule 1014. Dismissal and Change of Venue

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* * * * *

(b) PROCEDURE WHEN PETITIONS INVOLVING THE SAME DEBTOR OR RELATED DEBTORS ARE FILED IN DIFFERENT COURTS. If petitions commencing cases under the Code or seeking recognition under chapter 15 are filed in different districts by, regarding, or against (1) the same debtor, ~~or~~ (2) a partnership and one or more of its general partners, ~~or~~ (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the court may determine, in the interest of justice or for the convenience of the parties, the

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14 district or districts in which the case or cases should proceed.
15 Except as otherwise ordered by the court in the district in
16 which the petition filed first is pending, the proceedings on
17 the other petitions shall be stayed by the courts in which they
18 have been filed until the determination is made.

COMMITTEE NOTE

Subdivision (b). Subdivision (b) of the rule is amended to provide that petitions for recognition of a foreign proceeding are included among those that are governed by the procedure for determining where cases should go forward when multiple petitions involving the same debtor are filed. The amendment adds a specific reference to chapter 15 petitions and also provides that the rule governs proceedings regarding a debtor as well as those that are filed by or against a debtor.

Other changes are stylistic.

Public Comment on Proposed Amendments to Rule 1014:

No comments were received on these proposed amendments.

Public Comment on Proposed Amendments to Rule 1015:

No comments were received on these proposed amendments.

Changes Made After Publication:

No changes since publication.

Rule 1018. Contested Involuntary Petitions; Contested Petitions Commencing Ancillary Chapter 15 Cases; Proceedings to Vacate Order for Relief; Applicability of Rules in Part VII Governing Adversary Proceedings

1 Unless the court otherwise directs and except as
2 otherwise prescribed in Part I of these rules, the ~~The~~
3 following rules in Part VII apply to all proceedings ~~relating~~
4 ~~to a contested~~ contesting an involuntary petition, ~~to~~
5 ~~proceedings relating to a contested~~ petition or a chapter 15
6 petition for recognition ~~commencing a case ancillary to a~~
7 ~~foreign proceeding~~, and to all proceedings to vacate an order
8 for relief: Rules 7005, 7008-7010, 7015, 7016, 7024-7026,
9 7028-7037, 7052, 7054, 7056, and 7062, ~~except as otherwise~~
10 ~~provided in Part I of these rules and unless the court~~

11 ~~otherwise directs.~~ The court may direct that other rules in
 12 Part VII shall also apply. For the purposes of this rule a
 13 reference in the Part VII rules to adversary proceedings shall
 14 be read as a reference to proceedings ~~relating to a contested~~
 15 contesting an involuntary petition, or contested ancillary
 16 petition or a chapter 15 petition for recognition, or
 17 proceedings to vacate an order for relief. Reference in the
 18 Federal Rules of Civil Procedure to the complaint shall be
 19 read as a reference to the petition.

COMMITTEE NOTE

The rule is amended to reflect the enactment of chapter 15 of the Code in 2005. As to chapter 15 cases, the rule applies to contests over the petition for recognition and not to all matters that arise in the case. Thus, proceedings governed by § 1519(e) and § 1521(e) of the Code must comply with Rules 7001(7) and 7065, which provide that actions for injunctive relief are adversary proceedings governed by Part VII of the rules. The rule is also amended to clarify that it applies to contests over an involuntary petition, and not to matters merely “relating to” a contested involuntary petition. Matters that may arise in a chapter 15 case or an involuntary case, other than contests over the petition itself, are governed by the otherwise applicable rules.

Other changes are stylistic.

9 4007, but a new time period shall not commence if a chapter
10 7 case had been converted to a chapter 11, 12, or 13 case and
11 thereafter reconverted to a chapter 7 case and the time for
12 filing a motion under § 707(b) or (c), a claim, a complaint
13 objecting to discharge, or a complaint to obtain a
14 determination of the dischargeability of any debt, or any
15 extension thereof, expired in the original chapter 7 case.

16 (B) A new time period for filing an objection to a
17 claim of exemptions shall commence under Rule 4003(b)
18 after conversion of a case to chapter 7 unless:

19 (i) the case was converted to chapter 7 more
20 than one year after the entry of the first order confirming a
21 plan under chapter 11, 12, or 13; or

22 (ii) the case was previously pending in
23 chapter 7 and the time to object to a claimed exemption had
24 expired in the original chapter 7 case.

25 * * * * *

COMMITTEE NOTE

Subdivision (2). Subdivision (2) is redesignated as subdivision (2)(A), and a new subdivision (2)(B) is added to the rule. Subdivision (2)(B) provides that a new time period to object to a claim of exemption arises when a case is converted to chapter 7 from chapter 11, 12, or 13. The new time period does not arise, however, if the conversion occurs more than one year after the first order confirming a plan, even if the plan was subsequently modified. A new objection period also does not arise if the case was previously pending under chapter 7 and the objection period had expired in the prior chapter 7 case.

Public Comment on Proposed Amendments to Rule 1019:

Comment 08-BK-005 Mr. Martin P. Sheehan (on behalf of himself and the National Association of Bankruptcy Trustees).

Mr. Sheehan expressed support for allowing a new objection period after a case is converted to chapter 7, but he opposed providing an exception for cases converted more than a year after the plan in chapter 11, 12, or 13 was confirmed.

Changes Made After Publication:

No changes since publication.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

* * * * *

1 (d) AGREEMENT RELATING TO RELIEF FROM
2 THE AUTOMATIC STAY, PROHIBITING OR
3 CONDITIONING THE USE, SALE, OR LEASE OF
4 PROPERTY, PROVIDING ADEQUATE PROTECTION,
5 USE OF CASH COLLATERAL, AND OBTAINING
6 CREDIT.

7 * * * * *

8 (2) *Objection.* Notice of the motion and the time
9 within which objections may be filed and served on the
10 debtor in possession or trustee shall be mailed to the parties
11 on whom service is required by paragraph (1) of this
12 subdivision and to such other entities as the court may direct.
13 Unless the court fixes a different time, objections may be
14 filed within ~~15~~ 14 days of the mailing of the notice.

15 (3) *Disposition; hearing.* If no objection is filed,
16 the court may enter an order approving or disapproving the
17 agreement without conducting a hearing. If an objection is

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18 filed or if the court determines a hearing is appropriate, the
19 court shall hold a hearing on no less than ~~five~~ seven days'
20 notice to the objector, the movant, the parties on whom
21 service is required by paragraph (1) of this subdivision and
22 such other entities as the court may direct.

23 * * * * *

COMMITTEE NOTE

Subdivision (d) is amended to implement changes in connection with the 2009 amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadlines in subdivision (d)(2) and (d)(3) are amended to substitute deadlines that are multiples of seven days. Throughout the rules, deadlines have been amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Final approval of the amendments to this rule is sought without publication.

Rule 4004. Grant or Denial of Discharge^{*}**

1 (a) TIME FOR ~~FILING COMPLAINT~~ OBJECTING
2 TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter
3 ~~7 liquidation~~ case, a complaint, or a motion under § 727(a)(8)
4 or (a)(9) of the Code, objecting to the debtor's discharge
5 ~~under § 727 of the Code~~ shall be filed no later than 60 days
6 after the first date set for the meeting of creditors under §
7 341(a). In a chapter 11 ~~reorganization~~ case, the complaint
8 shall be filed no later than the first date set for the hearing on
9 confirmation. In a chapter 13 case, a motion objecting to the
10 debtor's discharge under § 1328(f) shall be filed no later than
11 60 days after the first date set for the meeting of creditors
12 under § 341(a). At least 28 days' notice of the time so fixed
13 shall be given to the United States trustee and all creditors as

^{***} Incorporates amendments approved by the Supreme Court and scheduled to take effect on December 1, 2009, if Congress takes no action to the contrary.

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14 provided in Rule 2002(f) and (k), and to the trustee and the
15 trustee's attorney.

16 * * * * *

17 (c) GRANT OF DISCHARGE.

18 (1) In a chapter 7 case, on expiration of the ~~time~~
19 times fixed for ~~filing a complaint~~ objecting to discharge and
20 ~~the times fixed~~ for filing a motion to dismiss the case under
21 Rule 1017(e), the court shall forthwith grant the discharge
22 unless:

23 (A) the debtor is not an individual;

24 (B) a complaint, or a motion under §
25 727(a)(8) or (a)(9), objecting to the discharge has been filed
26 and not decided in the debtor's favor;

27 * * * * *

28 (4) In a chapter 11 case in which the debtor is an
29 individual, or a chapter 13 case, the court shall not grant a

30 discharge if the debtor has not filed any statement required by
31 Rule 1007(b)(7).

32 (d) APPLICABILITY OF RULES IN PART VII AND
33 RULE 9014. An objection to discharge ~~A proceeding~~
34 ~~commenced by a complaint objecting to discharge~~ is
35 governed by Part VII of these rules, except that an objection
36 to discharge under §§ 727(a)(8), (a)(9), or 1328(f) is
37 commenced by motion and governed by Rule 9014.

* * * * *

COMMITTEE NOTE

Subdivision (a). Subdivision (a) is amended to include a deadline for filing a motion objecting to a debtor's discharge under §§ 727(a)(8), (a)(9), or 1328(f) of the Code. These sections establish time limits on the issuance of discharges in successive bankruptcy cases by the same debtor.

Subdivision (c). Subdivision (c)(1) is amended because a corresponding amendment to subdivision (d) directs certain objections to discharge to be brought by motion rather than by complaint. Subparagraph (c)(1)(B) directs the court not to grant a discharge if a motion or complaint objecting to discharge has been filed unless the objection has been decided in the debtor's favor.

Subdivision (c)(4) is new. It directs the court in chapter 11 and 13 cases to withhold the entry of the discharge if an individual debtor has not filed a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7).

Subdivision (d). Subdivision (d) is amended to direct that objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) be commenced by motion rather than by complaint. Objections under the specified provisions are contested matters governed by Rule 9014. The title of the subdivision is also amended to reflect this change.

Public Comment on Proposed Amendments to Rule 4004:

Comment 08-BK-001 Bankruptcy Judge Robert Kressel (D. Minn.). Judge Kressel suggested that the authorization for raising objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) by motion should be located in this rule rather than in Rule 7001. He noted that the latter rule addresses adversary proceedings and that contested matters, such as objections to discharge raised by motion, are better addressed elsewhere.

Comment 08-BK-003 Bankruptcy Judge Robert Grant (N.D. Ind.). Judge Grant concurred in the point raised by Judge Kressel and also expressed concern that treating only three of the grounds for objecting to discharge as contested matters, rather than as adversary proceedings, will create confusion among creditors and their lawyers.

Changes Made After Publication:

Subdivision (d) was amended to provide that objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) are commenced

by motion rather than by complaint and are governed by Rule 9014. Because of the relocation of this provision from the previously proposed Rule 7001(b), subdivisions (a) and (c)(1) of this rule were revised to change references to “motion under Rule 7001(b)” to “motion under § 727(a)(8) or (a)(9).” Other stylistic changes were made to the rule, and the Committee Note was revised to reflect these changes.

Rule 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer’s Debt Adjustment, and Chapter 13 Individual’s Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

1 (a) CASES UNDER CHAPTERS 7, 12, AND 13. If
 2 in a chapter 7, chapter 12, or chapter 13 case the trustee has
 3 filed a final report and final account and has certified that the
 4 estate has been fully administered, and if within 30 days no
 5 objection has been filed by the United States trustee or a party
 6 in interest, there shall be a presumption that the estate has
 7 been fully administered.

8 (b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7)
 9 STATEMENT. If an individual debtor in a chapter 7 or 13

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10 case has not filed the statement required by Rule 1007(b)(7)
11 within 45 days after the first date set for the meeting of
12 creditors under § 341(a) of the Code, the clerk shall promptly
13 notify the debtor that the case will be closed without entry of
14 a discharge unless the statement is filed within the applicable
15 time limit under Rule 1007(c).

16 (c) CASES UNDER CHAPTER 15. A foreign
17 representative in a proceeding recognized under § 1517 of the
18 Code shall file a final report when the purpose of the
19 representative's appearance in the court is completed. The
20 report shall describe the nature and results of the
21 representative's activities in the court. The foreign
22 representative shall transmit the report to the United States
23 trustee, and give notice of its filing to the debtor, all persons
24 or bodies authorized to administer foreign proceedings of the
25 debtor, all parties to litigation pending in the United States in
26 which the debtor was a party at the time of the filing of the

27 petition, and such other entities as the court may direct. The
 28 foreign representative shall file a certificate with the court
 29 that notice has been given. If no objection has been filed by
 30 the United States trustee or a party in interest within 30 days
 31 after the certificate is filed, there shall be a presumption that
 32 the case has been fully administered.

COMMITTEE NOTE

Subdivisions (a) and (b). The rule is amended to redesignate the former rule as subdivision (a) and to add new subdivisions (b) and (c) to the rule. Subdivision (b) requires the clerk to provide notice to an individual debtor in a chapter 7 or 13 case that the case may be closed without the entry of a discharge due to the failure of the debtor to file a timely statement of completion of a personal financial management course. The purpose of the notice is to provide the debtor with an opportunity to complete the course and file the appropriate document prior to the filing deadline. Timely filing of the document avoids the need for a motion to extend the time retroactively. It also avoids the potential for closing the case without discharge, and the possible need to pay an additional fee in connection with reopening. Timely filing also benefits the clerk's office by reducing the number of instances in which cases must be reopened.

Subdivision (c). Subdivision (c) requires a foreign representative in a chapter 15 case to file a final report setting out the foreign representative's actions and results obtained in the United States court. It also requires the foreign representative to give notice

of the filing of the report, and provides interested parties with 30 days to object to the report after the foreign representative has certified that notice has been given. In the absence of a timely objection, a presumption arises that the case is fully administered, and the case may be closed.

Public Comment on Proposed Amendments to Rule 5009:

Comment 08-BK-003 Bankruptcy Judge Robert Grant (N.D. Ind.). Judge Grant expressed concern that the notification requirement in new subdivision (b) places an unnecessary burden on the clerk's office and might appear to be overly solicitous of debtors. He suggested that the reminder of the deadline be included in the notice of the meeting of creditors.

Comment 08-BK-006 Bankruptcy Judge Samuel Bufford (C.D. Cal.). Judge Bufford suggested that the service list under subdivision (c) be expanded to include all secured and major unsecured creditors in the United States and abroad.

Changes Made After Publication:

No changes since publication.

Rule 5012. Agreements Concerning Coordination of Proceedings in Chapter 15 Cases

- 1 Approval of an agreement under § 1527(4) of the Code
- 2 shall be sought by motion. The movant shall attach to the
- 3 motion a copy of the proposed agreement or protocol and,

4 unless the court directs otherwise, give at least 30 days'
 5 notice of any hearing on the motion by transmitting the
 6 motion to the United States trustee, and serving it on the
 7 debtor, all persons or bodies authorized to administer foreign
 8 proceedings of the debtor, all entities against whom
 9 provisional relief is being sought under § 1519, all parties to
 10 litigation pending in the United States in which the debtor
 11 was a party at the time of the filing of the petition, and such
 12 other entities as the court may direct.

COMMITTEE NOTE

This rule is new. In chapter 15 cases, any party in interest may seek approval of an agreement, frequently referred to as a “protocol,” that will assist with the conduct of the case. Because the needs of the courts and the parties may vary greatly from case to case, the rule does not attempt to limit the form or scope of a protocol. Rather, the rule simply requires that approval of a particular protocol be sought by motion, and designates the persons entitled to notice of the hearing on the motion. These agreements, or protocols, drafted entirely by parties in interest in the case, are intended to provide valuable assistance to the court in the management of the case. Interested parties may find guidelines published by organizations, such as the American Law Institute and the International Insolvency Institute, helpful in crafting agreements or protocols to apply in a particular case.

COMMITTEE NOTE

Paragraph (4) of the rule is amended to create an exception for objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) of the Code. Because objections to discharge on these grounds typically present issues more easily resolved than other objections to discharge, the more formal procedures applicable to adversary proceedings, such as commencement by a complaint, are not required. Instead, objections on these three grounds are governed by Rule 4004(d). In an appropriate case, however, Rule 9014(c), allows the court to order that additional provisions of Part VII of the rules apply to these matters.

Public Comment on Proposed Amendments to Rule 7001:

Comment 08-BK-001 Bankruptcy Judge Robert Kressel (D. Minn.). Judge Kressel suggested that the authorization for raising objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) by motion should be located in Rule 4004 rather than in Rule 7001. He noted that the latter rule addresses adversary proceedings and that contested matters, such as objections to discharge raised by motion, are better addressed elsewhere.

Comment 08-BK-003 Bankruptcy Judge Robert Grant (N.D. Ind.). Judge Grant concurred in the point raised by Judge Kressel and also expressed concern that treating only three of the grounds for objecting to discharge as contested matters, rather than as adversary proceedings, will create confusion among creditors and their lawyers.

Public Comment on Proposed Amendments to Rule 9001:

No comments were received on these proposed amendments.

Changes Made After Publication:

No changes since publication.

**Official Form 23. Debtor's Certification of Completion of
Postpetition Instructional Course Concerning Personal
Financial Management**

The form, which follows on the next page, is amended as indicated to conform to the amendment of the filing deadline under Rule 1007(c). Final approval is sought without publication. The amendment to the form is to become effective upon the effective date of the amendment to Rule 1007(c) – December 1, 2010.

UNITED STATES BANKRUPTCY COURT

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter _____

DEBTOR'S CERTIFICATION OF COMPLETION OF POSTPETITION INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT

Every individual debtor in a chapter 7, chapter 11 in which § 1141(d)(3) applies, or chapter 13 case must file this certification. If a joint petition is filed, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below:

I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that on _____ (Date), I completed an instructional course in personal financial management
provided by _____, an approved personal financial
(Name of Provider)
management provider.

Certificate No. (if any): _____.

I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that no personal financial management course is required because of [Check the appropriate box]:
 Incapacity or disability, as defined in 11 U.S.C. § 109(h);
 Active military duty in a military combat zone; or
 Residence in a district in which the United States trustee (or bankruptcy administrator) has determined that
the approved instructional courses are not adequate at this time to serve the additional individuals who would otherwise
be required to complete such courses.

Signature of Debtor: _____

Date: _____

Instructions: Use this form only to certify whether you completed a course in personal financial management. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT include with the petition when filing your case.

Filing Deadlines: In a chapter 7 case, file within **45-60 days** of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 11 or 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

COMMITTEE NOTE

The statement of the deadline for filing the form in a chapter 7 case is amended to conform to amended Rule 1007(c).

TAB 7B

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE***

Rule 1004.2. Petition in Chapter 15 Cases**

1 (a) DESIGNATING CENTER OF MAIN
2 INTERESTS. A petition for recognition of a foreign
3 proceeding under chapter 15 of the Code shall state the
4 country where the debtor has the center of its main interests.
5 The petition shall also identify each country in which a
6 foreign proceeding by, regarding, or against the debtor is
7 pending.

8 (b) CHALLENGING DESIGNATION. The United
9 States trustee or a party in interest may file a motion for a
10 determination that the debtor's center of main interests is
11 other than as stated in the petition for recognition

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

**In addition to the adoption of Rule 1004.2, Official Form 1 would be amended to include a line on the form where the foreign representative indicates the country of the debtor's center of main interests. The Official Form would also be amended to include a line or lines on which the filer would set out the countries in which cases are pending.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

12 commencing the chapter 15 case. Unless the court orders
13 otherwise, the motion shall be filed no later than seven days
14 before the date set for the hearing on the petition for
15 recognition. The motion shall be transmitted to the United
16 States trustee and served on the debtor, all persons or bodies
17 authorized to administer foreign proceedings of the debtor, all
18 entities against whom provisional relief is being sought under
19 § 1519 of the Code, all parties to litigation pending in the
20 United States in which the debtor was a party at the time of
21 the filing of the petition, and such other entities as the court
22 may direct.

COMMITTEE NOTE

This rule is new. Subdivision (a) directs any entity that files a petition for recognition of a foreign proceeding under chapter 15 of the Code to state in the petition the center of the debtor's main interests. The petition must also list each country in which a foreign proceeding involving the debtor is pending. This information will assist the court and parties in interest in determining whether the foreign proceeding is a foreign main or nonmain proceeding.

Subdivision (b) sets a deadline of seven days before the date set for the hearing on the petition for recognition for filing a motion

challenging the statement in the petition as to the country in which the debtor's center of main interests is located.

Rule 2003. Meeting of Creditors or Equity Security Holders

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(e) ADJOURNMENT. The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time ~~without further written notice.~~
The presiding official shall promptly file a statement specifying the date and time to which the meeting is adjourned.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended to require the presiding official to file a statement after the adjournment of a meeting of creditors or equity security holders designating the period of the adjournment. The presiding official is the United States trustee or the United States trustee's designee. This requirement will provide notice to parties in interest not present at the initial meeting of the date and time to which the meeting has been continued. When a meeting is adjourned or "held open" as permitted by § 1308(b)(1) of the Code in order to allow a debtor additional time in which to file a tax return with taxing

authorities, the filing of this statement will also discourage premature motions to dismiss or convert the case under § 1307(e).

~~Rule 2019. Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases~~

1 ~~—(a) DATA REQUIRED. In a chapter 9 municipality or~~
2 ~~chapter 11 reorganization case, except with respect to a~~
3 ~~committee appointed pursuant to § 1102 or 1114 of the Code,~~
4 ~~every entity or committee representing more than one creditor~~
5 ~~or equity security holder and, unless otherwise directed by the~~
6 ~~court, every indenture trustee, shall file a verified statement~~
7 ~~setting forth (1) the name and address of the creditor or equity~~
8 ~~security holder; (2) the nature and amount of the claim or~~
9 ~~interest and the time of acquisition thereof unless it is alleged~~
10 ~~to have been acquired more than one year prior to the filing~~
11 ~~of the petition; (3) a recital of the pertinent facts and~~
12 ~~circumstances in connection with the employment of the~~
13 ~~entity or indenture trustee, and, in the case of a committee,~~

14 ~~the name or names of the entity or entities at whose instance;~~
15 ~~directly or indirectly, the employment was arranged or the~~
16 ~~committee was organized or agreed to act; and (4) with~~
17 ~~reference to the time of the employment of the entity, the~~
18 ~~organization or formation of the committee, or the appearance~~
19 ~~in the case of any indenture trustee, the amounts of claims or~~
20 ~~interests owned by the entity, the members of the committee~~
21 ~~or the indenture trustee, the times when acquired, the amounts~~
22 ~~paid therefor, and any sales or other disposition thereof. The~~
23 ~~statement shall include a copy of the instrument, if any,~~
24 ~~whereby the entity, committee, or indenture trustee is~~
25 ~~empowered to act on behalf of creditors or equity security~~
26 ~~holders. A supplemental statement shall be filed promptly,~~
27 ~~setting forth any material changes in the facts contained in the~~
28 ~~statement filed pursuant to this subdivision.~~

29 ~~—(b) FAILURE TO COMPLY; EFFECT. On motion of~~
30 ~~any party in interest or on its own initiative, the court may (1)~~

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31 ~~determine whether there has been a failure to comply with the~~
32 ~~provisions of subdivision (a) of this rule or with any other~~
33 ~~applicable law regulating the activities and personnel of any~~
34 ~~entity, committee, or indenture trustee or any other~~
35 ~~impropriety in connection with any solicitation and, if it so~~
36 ~~determines, the court may refuse to permit that entity,~~
37 ~~committee, or indenture trustee to be heard further or to~~
38 ~~intervene in the case; (2) examine any representation~~
39 ~~provision of a deposit agreement, proxy, trust mortgage, trust~~
40 ~~indenture, or deed of trust, or committee or other~~
41 ~~authorization, and any claim or interest acquired by any entity~~
42 ~~or committee in contemplation or in the course of a case~~
43 ~~under the Code and grant appropriate relief; and (3) hold~~
44 ~~invalid any authority, acceptance, rejection, or objection~~
45 ~~given, procured, or received by an entity or committee who~~
46 ~~has not complied with this rule or with § 1125(b) of the Code.~~

Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases

1 (a) DEFINITION. In this rule, “disclosable economic
2 interest” means any claim, interest, pledge, lien, option,
3 participation, derivative instrument, or any other right or
4 derivative right that grants the holder an economic interest
5 that is affected by the value, acquisition, or disposition of a
6 claim or interest.

7 (b) DISCLOSURE BY ENTITIES, GROUPS,
8 COMMITTEES, INDENTURE TRUSTEES, AND OTHER
9 PARTIES IN INTEREST. In a chapter 9 or 11 case, every
10 entity, group, or committee that consists of or represents more
11 than one creditor or equity security holder and, unless the
12 court directs otherwise, every indenture trustee, shall file a
13 verified statement setting forth the information specified in
14 subdivision (c) of this rule. On motion of a party in interest,
15 or on its own motion, the court may also require disclosure of

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16 some or all of the information specified in subdivision (c)(2)
17 by an entity that seeks or opposes the granting of relief.

18 (c) INFORMATION REQUIRED. The verified
19 statement shall include:

20 (1) the pertinent facts and circumstances
21 concerning:

22 (A) the employment of the entity or indenture
23 trustee, including the name of each entity at whose instance
24 the employment was arranged; or

25 (B) in the case of a group or committee, other
26 than a committee appointed pursuant to §§ 1102 or 1114 of
27 the Code, the formation of the group or committee, including
28 the name of each entity at whose instance the group or
29 committee was formed or for whom the group or committee
30 has agreed to act;

31 (2) if not disclosed under subdivision (c)(1), with
32 respect to the entity or indenture trustee, and with respect to
33 each member of the group or committee:

34 (A) name and address;

35 (B) the nature and amount of, and if directed
36 by the court, the amount paid for, each disclosable economic
37 interest held in relation to the debtor as of the date the entity
38 was employed, the group or committee was formed, or the
39 indenture trustee appeared in the case; and

40 (C) the date when each disclosable economic
41 interest was acquired, unless acquired more than one year
42 before the petition was filed;

43 (3) if not disclosed under subdivision (c)(1) or
44 (c)(2), with respect to each creditor or equity security holder
45 represented by the entity, group, or committee, other than a
46 committee appointed pursuant to §§ 1102 or 1114 of the
47 Code, or by the indenture trustee:

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- 48 (A) name and address;
- 49 (B) the nature and amount of, and if directed
50 by the court, the amount paid for, each disclosable economic
51 interest held in relation to the debtor as of the date of the
52 statement; and
- 53 (C) the date each disclosable economic
54 interest was acquired, unless acquired more than one year
55 before the petition was filed; and
- 56 (4) a copy of the instrument, if any, authorizing the
57 entity, group, committee, or indenture trustee to act on behalf
58 of creditors or equity security holders.
- 59 (d) SUPPLEMENTAL STATEMENTS. A
60 supplemental verified statement shall be filed monthly, or as
61 the court otherwise orders, setting forth any material change
62 in facts contained in a statement previously filed under this
63 rule, including information about any acquisition, sale, or
64 other disposition of a disclosable economic interest by the

65 entity, members of the group or committee, or the indenture
66 trustee.

67 (e) DETERMINATION OF FAILURE TO COMPLY;
68 SANCTIONS

69 (1) On motion of any party in interest, or on its
70 own motion, the court may determine:

71 (A) whether there has been any failure to
72 comply with the provisions of this rule;

73 (B) whether there has been any failure to
74 comply with any other applicable law regulating the activities
75 and personnel of any entity, group, committee, or indenture
76 trustee; or

77 (C) whether there has been any impropriety
78 in connection with any solicitation.

79 (2) In making a determination under subdivision

80 (e) (1), the court may examine:

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81 (A) any representation provision of a deposit
82 agreement, proxy, trust mortgage, trust indenture, deed of
83 trust, or authorization to act as a representative; and

84 (B) any disclosable economic interest
85 acquired by any entity, group, committee, or indenture trustee
86 in contemplation of or in the course of a case.

87 (3) If, under subdivision (e)(1), the court
88 determines that a failure to comply or an impropriety has
89 occurred, it may:

90 (A) refuse to permit the entity, group,
91 committee, or indenture trustee to be heard or to intervene in
92 the case;

93 (B) hold invalid any authority, acceptance,
94 rejection, or objection given, procured, or received by the
95 entity, group, committee, or indenture trustee; or

96 (C) grant other appropriate relief.

COMMITTEE NOTE

The rule is substantially amended to expand the scope of its coverage and the content of its disclosure requirements. Stylistic and organizational changes are also made in order to provide greater clarity. Because the rule no longer applies only to representatives of creditors and equity security holders, the title of the rule has been changed to reflect its broadened focus on disclosure of financial information in chapter 9 and chapter 11 cases.

The content of subdivision (a) is new. It sets forth a definition of the term “disclosable economic interest,” which is used in subdivisions (c)(2), (c)(3), (d), and (e). The definition of the term is intended to be sufficiently broad to cover any economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case. A disclosable economic interest extends beyond claims and interests owned by a stakeholder.

Subdivision (b) specifies who is covered by the rule’s disclosure requirements. In addition to an entity or committee that represents more than one creditor or equity security holder, the amendment extends the rule’s coverage to committees that consist of more than one creditor or equity security holder. It also applies to a group of creditors or equity security holders that act in concert to advance common interests, even if the group does not call itself a committee. The rule continues to apply to indenture trustees, unless the court directs otherwise.

As amended, the rule authorizes a court, on motion of a party in interest or *sua sponte*, to require disclosure of some or all of the information specified in subdivision (c)(2) by any other entity that seeks or opposes the granting of relief. Although the rule does not automatically require disclosure by parties that act individually and on their own behalf, it allows for such disclosure when a court

believes that knowledge of the party's economic stake in the debtor will assist it in evaluating that party's arguments.

Subdivision (c) sets forth the information that must be included in a verified statement required to be filed under this rule. Subdivision (c)(1) continues to require disclosure concerning the employment of an entity or indenture trustee and the formation of a committee or group, other than an official committee.

Subdivision (c)(2) specifies information that must be disclosed with respect to the entity, indenture trustee, and each member of the committee and group filing the statement. In the case of a committee or group, the information about the nature and amount of a disclosable economic interest must be specifically provided on a member-by-member basis, and not in the aggregate. The date of acquisition of each disclosable economic interest must also be specifically provided, except for a disclosable economic interest acquired more than a year before the filing of the petition. The amendment leaves to the court's discretion whether to require the disclosure of the amount paid for each disclosable economic interest.

Subdivision (c)(3) specifies information that must be disclosed with respect to creditors or equity security holders that are represented by an entity, group, committee, or indenture trustee. This provision does not apply with respect to those represented by official committees. The information required to be disclosed under subdivision (c)(3) parallels that required to be disclosed under (c)(2). The amendment also clarifies that under (c)(3) the nature and amount of each disclosable economic interest of represented creditors and shareholders must be stated as of the date of the verified statement.

Subdivision (c)(4) requires the attachment of any instrument authorizing the filer of the verified statement to act on behalf of creditors or equity security holders.

Subdivision (d) requires the monthly filing of a supplemental statement if there are material changes in facts contained in an earlier filed verified statement. The required supplementation is not cumulative; changes already disclosed need not be repeated. Supplemental statements may be filed on a different schedule if the court directs.

Subdivision (e) addresses the court’s authority to determine whether there has been a violation of this rule, any solicitation requirement, or other applicable law, and to impose a sanction for any violation. It also specifies some of the information the court may examine in making its determination. The sanction set forth in subparagraph (3)(B) may now be imposed not only for a failure to comply with this rule or § 1125(b) of the Code, but also for a violation of other applicable law.

Rule 3001. Proof of Claim

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(c) SUPPORTING INFORMATION.

(1) Claim Based on a Writing. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim. When a claim is based on an open-

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9 end or revolving consumer credit agreement, the last account
10 statement sent to the debtor prior to the filing of the petition
11 shall also be filed with the proof of claim.

12 (2) Additional Requirements in an Individual
13 Debtor Case; Sanctions for Failure to Comply. In a case in
14 which the debtor is an individual:

15 (A) If, in addition to its principal amount, a
16 claim includes interest, fees, expenses, or other charges
17 incurred before the petition was filed, an itemized statement
18 of the interest, fees, expenses, or charges shall be filed with
19 the proof of claim.

20 (B) If a security interest is claimed in
21 property of the debtor, the proof of claim shall include a
22 statement of the amount necessary to cure any default as of
23 the date of the petition.

24 (C) If a security interest is claimed in property
25 that is the debtor's principal residence and an escrow account

26 has been established in connection with the claim, the proof of
27 claim shall be accompanied by an escrow account statement
28 prepared as of the date the petition was filed and in a form
29 consistent with applicable nonbankruptcy law.

30 (D) If the holder of a claim fails to provide
31 any information required by this subdivision (c), the holder
32 shall be precluded from presenting the omitted information,
33 in any form, as evidence in any hearing or submission in any
34 contested matter or adversary proceeding in the case, unless
35 the court determines that the failure was substantially justified
36 or is harmless. In addition to or in lieu of this sanction, the
37 court may, after notice and hearing, award other appropriate
38 relief, including reasonable expenses and attorney's fees
39 caused by the failure.

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* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the consequences of failing to provide the required information.

Existing subdivision (c) is redesignated as (c)(1). It is amended to require that a proof of claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card) be accompanied by the last account statement sent to the debtor prior to the filing of the bankruptcy petition. This requirement applies whether the statement was sent by the entity filing the proof of claim or by a prior holder of the claim.

Subdivision (c)(2) is added to require additional information to accompany proofs of claim filed in cases in which the debtor is an individual. When the holder of a claim seeks to recover – in addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement itemizing these additional amounts with sufficient specificity to make clear the basis for the claimed amount.

If a claim is secured by property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim must be accompanied by a statement of the amount required to cure the prepetition default. If the claim is secured by the debtor's principal residence and an escrow account has been established in connection with the claim, the proof of claim must also be accompanied by an escrow account statement showing the account balance, and any amount owed, as of the date the petition was filed. The statement shall be prepared in a form consistent with the

requirements of nonbankruptcy law. *See, e.g.*, 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act).

Paragraph (D) of subdivision (c)(2) sets forth the sanctions that apply to, or that may be imposed by the court against, a creditor in an individual debtor case that fails to provide information required by subdivision (c).

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

1 (a) NOTICE OF PAYMENT CHANGES. In a chapter
2 13 case, if a claim secured by a security interest in the
3 debtor's principal residence is provided for under the debtor's
4 plan pursuant to § 1322(b)(5) of the Code, the holder of the
5 claim shall file and serve on the debtor, debtor's counsel, and
6 the trustee notice of any change in the payment amount,
7 including any change that results from an interest rate or
8 escrow account adjustment, no later than 30 days before a
9 payment at a new amount is due.

10 (b) FORM AND CONTENT. A notice filed and served
11 pursuant to subdivision (a) of this rule shall: (1) conform

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12 substantially to the form of notice under applicable
13 nonbankruptcy law and the underlying agreement that would
14 be given if the debtor were not a debtor in bankruptcy, (2) be
15 filed as a supplement to the holder's proof of claim, and (3)
16 not be subject to Rule 3001(f).

17 (c) NOTICE OF FEES, EXPENSES, AND CHARGES.

18 In a chapter 13 case, if a claim secured by a security interest
19 in the debtor's principal residence is provided for under the
20 debtor's plan pursuant to § 1322(b)(5) of the Code, the holder
21 of the claim shall file and serve on the debtor, debtor's
22 counsel, and the trustee a notice that itemizes all fees,
23 expenses, or charges incurred in connection with the claim
24 after the bankruptcy case was filed, and that the holder asserts
25 are recoverable against the debtor or against the debtor's
26 principal residence. The notice shall be filed as a supplement
27 to the holder's proof of claim and served no later than 180
28 days after the date when the fees, expenses, or charges are

29 incurred. The notice shall not be subject to Rule 3001(f). On
30 motion of the debtor or trustee filed no later than one year
31 after service of the notice, the court shall, after notice and
32 hearing, determine whether payment of the fees, expenses, or
33 charges is required by the underlying agreement and
34 applicable nonbankruptcy law to cure a default or maintain
35 payments in accordance with § 1322(b)(5) of the Code.

36 (d) NOTICE OF FINAL CURE PAYMENT. No later
37 than 30 days after making final payment of any cure amount
38 on a claim secured by a security interest in the debtor's
39 principal residence, the trustee in a chapter 13 case shall file
40 and serve upon the holder of the claim, the debtor, and
41 debtor's counsel a notice stating that the amount required to
42 cure the default has been paid in full. If the debtor contends
43 that final cure payment has been made and the trustee does
44 not timely file and serve the notice required by this
45 subdivision, the debtor may file and serve upon the holder of

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46 the claim and the trustee a notice stating that the amount
47 required to cure the default has been paid in full.

48 (e) RESPONSE TO NOTICE OF FINAL CURE
49 PAYMENT. No later than 21 days after service of the notice
50 under subdivision (d) of this rule, the holder of a claim
51 secured by a security interest in the debtor's principal
52 residence shall file and serve on the debtor, debtor's counsel,
53 and the trustee a statement indicating (1) whether it agrees
54 that the debtor has paid in full the amount required to cure the
55 default, and (2) whether, consistent with § 1322(b)(5) of the
56 Code, the debtor is otherwise current on all payments. If
57 applicable, the statement shall itemize any required cure or
58 postpetition amounts that the holder contends remain unpaid
59 as of the date of the statement. The statement shall be filed
60 as a supplement to the holder's proof of claim and shall not
61 be subject to Rule 3001(f).

62 (f) MOTION AND HEARING. On motion of the
63 debtor or trustee filed no later than 21 days after service of
64 the statement under subdivision (e) of this rule, the court
65 shall, after notice and hearing, determine whether the debtor
66 has cured the default and paid all required postpetition
67 amounts in full.

68 (g) FAILURE TO NOTIFY. If the holder of a claim
69 secured by a security interest in the debtor's principal
70 residence fails to provide any information required by
71 subdivision (a), (c), or (e) of this rule, the holder shall be
72 precluded from presenting the omitted information, in any
73 form, as evidence in any hearing or submission in any
74 contested matter or adversary proceeding in the case, unless
75 the court determines that the failure was substantially justified
76 or is harmless. In addition to or in lieu of this sanction, the
77 court may, after notice and hearing, award other appropriate

24 FEDERAL RULES OF BANKRUPTCY PROCEDURE

- 78 relief, including reasonable expenses and attorney's fees
79 caused by the failure.

COMMITTEE NOTE

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee must be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if necessary, and to adjust postpetition mortgage payments to cover any properly claimed adjustment. Compliance with the notice provision of the rule should also eliminate any concern on the part of the holder of the claim that informing a debtor of a change in postpetition payment obligations might violate the automatic stay.

Subdivision (a) requires the holder of a claim secured by the debtor's principal residence to notify the debtor, debtor's counsel, and the trustee of any postpetition change in the mortgage payment amount. Notice must be provided at least 30 days before the new payment amount is due.

Subdivision (b) provides the method of giving the notice of a payment change. The holder of the claim must give notice of the change in substantially the same form that would be used according to the underlying agreement and nonbankruptcy law if the debtor were not a debtor in bankruptcy. In addition to serving the debtor, debtor's counsel, and the trustee, as required by subdivision (a), the holder of the claim must also file the notice of payment change on the claims register in the case as a supplement to its proof of claim. Rule 3001(f) does not apply to this notice, and therefore it will not constitute prima facie evidence of the validity and amount of the payment change.

Subdivision (c) requires an itemized notice to be given, within 180 of incurrance, of any postpetition fees, expenses, or charges that the holder of the claim asserts are recoverable in connection with a claim secured by the debtor's principal residence. This amount might include, for example, inspection fees, late charges, or attorney's fees. Filing and service requirements for this notice are the same as for the notice required under subdivision (a).

Within a year after service of a notice under subdivision (c), the debtor or trustee may move for a court determination of whether the fees, expenses, or charges set forth in the notice are required by the underlying agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (d) requires the trustee to issue notice within 30 days after making the last payment to cure a prepetition default on a claim secured by the debtor's principal residence. If the trustee fails to file this notice within the required time, this subdivision also permits a debtor who contends that the prepetition default has been cured to file and serve the notice.

Subdivision (e) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (d). Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured and also whether the debtor is current on all payments in accordance with § 1322(b)(5) of the Code. If the holder of the claim contends that final cure payment has not been made or that the debtor is not current on other payments required by § 1325(b)(5), the response must itemize all missed amounts the holder contends are still due.

Subdivision (f) provides the procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence. The trustee or debtor may move no later than 21 days after the service of the statement under (e) for a determination by the court of whether the prepetition default has been cured and whether all postpetition obligations have been fully paid.

Subdivision (g) specifies sanctions that may be imposed if the holder of a claim secured by the debtor's principal residence fails to provide any of the information required by subdivisions (a), (c), or (e).

If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (g).

Rule 4004. Grant or Denial of Discharge

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* * * * *

2

(b) EXTENSION OF TIME.

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(1) On motion of any party in interest, after notice and
hearing on notice, the court may for cause extend the time to
file a complaint objecting to discharge. Except as provided
in subdivision (b)(2), the motion shall be filed before the
time has expired.

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(2) A motion to extend the time to object to discharge
may be filed after the time for objection has expired and
before discharge is granted if the objection is based on facts
that, if learned after the discharge, would provide a basis for
revocation under § 727(d) of the Code, provided that the
movant did not have knowledge of those facts in time to
permit a timely filed objection. The motion shall be filed

28 FEDERAL RULES OF BANKRUPTCY PROCEDURE

15 promptly after the movant discovers the facts on which the
16 objection is based.

17 * * * * *

COMMITTEE NOTE

Subdivision (b) is amended to allow, under certain specified circumstances, a party to seek an extension of time to object to discharge after the time for filing has expired. This amendment addresses the situation in which there is a gap between the expiration of the time for objecting to discharge and the entry of the discharge order. If, during that period, a party discovers facts that would provide grounds for revocation of discharge, it may not be able to seek revocation under § 727(d) of the Code because the facts would have been known prior to the granting of the discharge. In that situation, subdivision (b)(2) allows a party to file a motion for an extension of time to object to discharge based on those facts so long as they were not known to the party before expiration of the deadline for objecting. The motion must be filed promptly after discovery of those facts.

**Official Form 22A. Chapter 7 Statement of Current Monthly
Income and Means-Test Calculation**

The form is amended in several respects:

- (1) On lines 19A, 19B, 20A, and 20B, references to “household” and “household size” are replaced with “numbers of persons” or “family size”;
- (2) An instruction is added to line 8 to clarify that only one joint filer should report regular payments by another person for household expenses;
- (3) The introductory instruction to Part I is amended to direct debtors in joint cases to file separate forms if only one of the debtors is entitled to an exemption under Part I and the debtors believe that the filing of separate forms is required by § 707(b)(2)(C) of the Bankruptcy Code.

**Official Form 22B. Chapter 11 Statement of Current Monthly
Income**

The form is amended to add an instruction to line 7 to clarify that only one joint filer should report regular payments by another person for household expenses.

**Official Form 22C. Chapter 13 Statement of Current Monthly
Income and Calculation of Commitment Period and Disposable
Income**

The form is amended (1) on lines 24A, 24B, 25A, and 25B to replace references to “household” and “household size” with “numbers of persons” or “family size”; and (2) to add an instruction to line 7 to clarify that only one joint filer should report regular payments by another person for household expenses.

Excerpts of the forms, with amendments indicated by highlighting, follow.

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the information required to be entered on this statement (check one box as directed in Part I, III, or VI of this statement):

- The presumption arises.**
- The presumption does not arise.**
- The presumption is temporarily inapplicable.**

**CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME
AND MEANS-TEST CALCULATION**

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor. If none of the exclusions in Part I applies, joint debtors may complete one statement only. If any of the exclusions in Part I applies, joint debtors should complete separate statements if they believe this is required by § 707(b)(2)(C).

Part I. MILITARY AND NON-CONSUMER DEBTORS

1A	<p>Disabled Veterans. If you are a disabled veteran described in the Declaration in this Part IA, (1) check the box at the beginning of the Declaration, (2) check the box for “The presumption does not arise” at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.</p> <p><input type="checkbox"/> Declaration of Disabled Veteran. By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).</p>
1B	<p>Non-consumer Debtors. If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.</p> <p><input type="checkbox"/> Declaration of non-consumer debts. By checking this box, I declare that my debts are not primarily consumer debts.</p>
1C	<p>Reservists and National Guard Members; active duty or homeland defense activity. Members of a reserve component of the Armed Forces and members of the National Guard who were called to active duty (as defined in 10 U.S.C. § 101(d)(1)) after September 11, 2001, for a period of at least 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the “exclusion period”). If you qualify for this temporary exclusion, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for “The presumption is temporarily inapplicable” at the top of this statement, and (3) complete the verification in Part VIII. During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.</p> <p><input type="checkbox"/> Declaration of Reservists and National Guard Members. By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing because, as a member of a reserve component of the Armed Forces or the National Guard</p> <p style="margin-left: 40px;">a. <input type="checkbox"/> I was called to active duty after September 11, 2001, for a period of at least 90 days and <input type="checkbox"/> I remain on active duty /or/ <input type="checkbox"/> I was released from active duty on _____, which is less than 540 days before this bankruptcy case was filed;</p> <p style="margin-left: 80px;">OR</p> <p style="margin-left: 40px;">b. <input type="checkbox"/> I am performing homeland defense activity for a period of at least 90 days /or/ <input type="checkbox"/> I performed homeland defense activity for a period of at least 90 days, terminating on _____, which is less than 540 days before this bankruptcy case was filed.</p>

Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION														
2	<p>Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed.</p> <p>a. <input type="checkbox"/> Unmarried. Complete only Column A (“Debtor’s Income”) for Lines 3-11.</p> <p>b. <input type="checkbox"/> Married, not filing jointly, with declaration of separate households. By checking this box, debtor declares under penalty of perjury: “My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code.” Complete only Column A (“Debtor’s Income”) for Lines 3-11.</p> <p>c. <input type="checkbox"/> Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. Complete both Column A (“Debtor’s Income”) and Column B (“Spouse’s Income”) for Lines 3-11.</p> <p>d. <input type="checkbox"/> Married, filing jointly. Complete both Column A (“Debtor’s Income”) and Column B (“Spouse’s Income”) for Lines 3-11.</p>			Column A	Column B									
	<p>All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.</p>			Debtor’s Income	Spouse’s Income									
3	Gross wages, salary, tips, bonuses, overtime, commissions.			\$	\$									
4	<p>Income from the operation of a business, profession or farm. Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. Do not include any part of the business expenses entered on Line b as a deduction in Part V.</p> <table border="1" style="width:100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 30px;">a.</td> <td style="width: 40%;">Gross receipts</td> <td style="width: 30%;">\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary business expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Business income</td> <td>Subtract Line b from Line a</td> </tr> </table>			a.	Gross receipts	\$	b.	Ordinary and necessary business expenses	\$	c.	Business income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$												
b.	Ordinary and necessary business expenses	\$												
c.	Business income	Subtract Line b from Line a												
5	<p>Rent and other real property income. Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 5. Do not enter a number less than zero. Do not include any part of the operating expenses entered on Line b as a deduction in Part V.</p> <table border="1" style="width:100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 30px;">a.</td> <td style="width: 40%;">Gross receipts</td> <td style="width: 30%;">\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary operating expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Rent and other real property income</td> <td>Subtract Line b from Line a</td> </tr> </table>			a.	Gross receipts	\$	b.	Ordinary and necessary operating expenses	\$	c.	Rent and other real property income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$												
b.	Ordinary and necessary operating expenses	\$												
c.	Rent and other real property income	Subtract Line b from Line a												
6	Interest, dividends and royalties.			\$	\$									
7	Pension and retirement income.			\$	\$									
8	<p>Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor’s dependents, including child support paid for that purpose. Do not include alimony or separate maintenance payments or amounts paid by your spouse if Column B is completed. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.</p>			\$	\$									
9	<p>Unemployment compensation. Enter the amount in the appropriate column(s) of Line 9. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:</p> <table border="1" style="width:100%; border-collapse: collapse; margin-top: 5px;"> <tr> <td style="width: 40%;">Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td style="width: 20%;">Debtor \$ _____</td> <td style="width: 20%;">Spouse \$ _____</td> </tr> </table>			Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$						
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____												

19A	<p>National Standards: food, clothing and other items. Enter in Line 19A the “Total” amount from IRS National Standards for Food, Clothing and Other Items for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.</p>	\$																								
19B	<p>National Standards: health care. Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 19B.</p> <table border="1" style="width:100%; border-collapse: collapse; margin-top: 10px;"> <thead> <tr> <th colspan="3" style="text-align:left; padding: 2px;">Persons under 65 years of age</th> <th colspan="3" style="text-align:left; padding: 2px;">Persons 65 years of age or older</th> </tr> </thead> <tbody> <tr> <td style="width:5%; padding: 2px;">a1.</td> <td style="width:45%; padding: 2px;">Allowance per person</td> <td style="width:10%;"></td> <td style="width:5%; padding: 2px;">a2.</td> <td style="width:45%; padding: 2px;">Allowance per person</td> <td style="width:10%;"></td> </tr> <tr> <td style="padding: 2px;">b1.</td> <td style="padding: 2px;">Number of persons</td> <td></td> <td style="padding: 2px;">b2.</td> <td style="padding: 2px;">Number of persons</td> <td></td> </tr> <tr> <td style="padding: 2px;">c1.</td> <td style="padding: 2px;">Subtotal</td> <td></td> <td style="padding: 2px;">c2.</td> <td style="padding: 2px;">Subtotal</td> <td></td> </tr> </tbody> </table>	Persons under 65 years of age			Persons 65 years of age or older			a1.	Allowance per person		a2.	Allowance per person		b1.	Number of persons		b2.	Number of persons		c1.	Subtotal		c2.	Subtotal		\$
Persons under 65 years of age			Persons 65 years of age or older																							
a1.	Allowance per person		a2.	Allowance per person																						
b1.	Number of persons		b2.	Number of persons																						
c1.	Subtotal		c2.	Subtotal																						
20A	<p>Local Standards: housing and utilities; non-mortgage expenses. Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.</p>	\$																								
20B	<p>Local Standards: housing and utilities; mortgage/rent expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. Do not enter an amount less than zero.</p> <table border="1" style="width:100%; border-collapse: collapse; margin-top: 10px;"> <tbody> <tr> <td style="width:5%; padding: 2px;">a.</td> <td style="width:60%; padding: 2px;">IRS Housing and Utilities Standards; mortgage/rental expense</td> <td style="width:35%; padding: 2px;">\$</td> </tr> <tr> <td style="padding: 2px;">b.</td> <td style="padding: 2px;">Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42</td> <td style="padding: 2px;">\$</td> </tr> <tr> <td style="padding: 2px;">c.</td> <td style="padding: 2px;">Net mortgage/rental expense</td> <td style="padding: 2px;">Subtract Line b from Line a.</td> </tr> </tbody> </table>	a.	IRS Housing and Utilities Standards; mortgage/rental expense	\$	b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42	\$	c.	Net mortgage/rental expense	Subtract Line b from Line a.	\$															
a.	IRS Housing and Utilities Standards; mortgage/rental expense	\$																								
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42	\$																								
c.	Net mortgage/rental expense	Subtract Line b from Line a.																								
21	<p>Local Standards: housing and utilities; adjustment. If you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:</p> <p>_____</p> <p>_____</p> <p>_____</p>	\$																								

In re _____
Debtor(s)

Case Number: _____
(If known)

CHAPTER 11 STATEMENT OF CURRENT MONTHLY INCOME

In addition to Schedules I and J, this statement must be completed by every individual Chapter 11 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. CALCULATION OF CURRENT MONTHLY INCOME														
1	<p>Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed.</p> <p>a. <input type="checkbox"/> Unmarried. Complete only Column A ("Debtor's Income") for Lines 2-10.</p> <p>b. <input type="checkbox"/> Married, not filing jointly. Complete only Column A ("Debtor's Income") for Lines 2-10.</p> <p>c. <input type="checkbox"/> Married, filing jointly. Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.</p>													
<p>All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.</p>			Column A Debtor's Income	Column B Spouse's Income										
2	Gross wages, salary, tips, bonuses, overtime, commissions.			\$	\$									
3	<p>Net income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. Do not enter a number less than zero.</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width: 30px;">a.</td> <td style="width: 40%;">Gross receipts</td> <td style="width: 30%;">\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary business expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Business income</td> <td>Subtract Line b from Line a</td> </tr> </table>			a.	Gross receipts	\$	b.	Ordinary and necessary business expenses	\$	c.	Business income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$												
b.	Ordinary and necessary business expenses	\$												
c.	Business income	Subtract Line b from Line a												
4	<p>Net rental and other real property income. Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero.</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width: 30px;">a.</td> <td style="width: 40%;">Gross receipts</td> <td style="width: 30%;">\$</td> </tr> <tr> <td>b.</td> <td>Ordinary and necessary operating expenses</td> <td>\$</td> </tr> <tr> <td>c.</td> <td>Rent and other real property income</td> <td>Subtract Line b from Line a</td> </tr> </table>			a.	Gross receipts	\$	b.	Ordinary and necessary operating expenses	\$	c.	Rent and other real property income	Subtract Line b from Line a	\$	\$
a.	Gross receipts	\$												
b.	Ordinary and necessary operating expenses	\$												
c.	Rent and other real property income	Subtract Line b from Line a												
5	Interest, dividends, and royalties.			\$	\$									
6	Pension and retirement income.			\$	\$									
7	<p>Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support. Do not include contributions from the debtor's spouse if Column B is completed. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.</p>			\$	\$									
8	<p>Unemployment compensation. Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width: 40%;">Unemployment compensation claimed to be a benefit under the Social Security Act</td> <td style="width: 30%;">Debtor \$ _____</td> <td style="width: 30%;">Spouse \$ _____</td> </tr> </table>			Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____	\$	\$						
Unemployment compensation claimed to be a benefit under the Social Security Act	Debtor \$ _____	Spouse \$ _____												
9	<p>Income from all other sources. If necessary, list additional sources on a separate page. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount.</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width: 30px;">a.</td> <td style="width: 40%;"></td> <td style="width: 30%;">\$</td> </tr> <tr> <td>b.</td> <td></td> <td>\$</td> </tr> </table> <p>Total and enter on Line 9</p>			a.		\$	b.		\$	\$	\$			
a.		\$												
b.		\$												
10	Subtotal of current monthly income. Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).			\$	\$									

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
 The applicable commitment period is 3 years.
 The applicable commitment period is 5 years.
 Disposable income is determined under § 1325(b)(3).
 Disposable income is not determined under § 1325(b)(3).
 (Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME					
1	Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed. a. <input type="checkbox"/> Unmarried. Complete only Column A (“Debtor’s Income”) for Lines 2-10. b. <input type="checkbox"/> Married. Complete both Column A (“Debtor’s Income”) and Column B (“Spouse’s Income”) for Lines 2-10.				
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.			Column A Debtor’s Income	Column B Spouse’s Income
2	Gross wages, salary, tips, bonuses, overtime, commissions.			\$	\$
3	Income from the operation of a business, profession, or farm. Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. Do not include any part of the business expenses entered on Line b as a deduction in Part IV.				
	a.	Gross receipts	\$		
	b.	Ordinary and necessary business expenses	\$		
	c.	Business income	Subtract Line b from Line a	\$	\$
4	Rent and other real property income. Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.				
	a.	Gross receipts	\$		
	b.	Ordinary and necessary operating expenses	\$		
	c.	Rent and other real property income	Subtract Line b from Line a	\$	\$
5	Interest, dividends, and royalties.			\$	\$
6	Pension and retirement income.			\$	\$
7	Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor’s dependents, including child support paid for that purpose. Do not include alimony or separate maintenance payments or amounts paid by the debtor’s spouse. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.			\$	\$

19		<p>Marital adjustment. If you are married, but are not filing jointly with your spouse, enter on Line 19 the total of any income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor’s dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse’s tax liability or the spouse’s support of persons other than the debtor or the debtor’s dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero.</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:5%; text-align:center;">a.</td> <td style="width:60%;"></td> <td style="width:5%; text-align:center;">\$</td> <td style="width:30%;"></td> </tr> <tr> <td style="text-align:center;">b.</td> <td></td> <td style="text-align:center;">\$</td> <td></td> </tr> <tr> <td style="text-align:center;">c.</td> <td></td> <td style="text-align:center;">\$</td> <td></td> </tr> </table> <p>Total and enter on Line 19.</p>	a.		\$		b.		\$		c.		\$		\$												
a.		\$																									
b.		\$																									
c.		\$																									
20		<p>Current monthly income for § 1325(b)(3). Subtract Line 19 from Line 18 and enter the result.</p>																									
21		<p>Annualized current monthly income for § 1325(b)(3). Multiply the amount from Line 20 by the number 12 and enter the result.</p>	\$																								
22		<p>Applicable median family income. Enter the amount from Line 16.</p>	\$																								
23		<p>Application of § 1325(b)(3). Check the applicable box and proceed as directed.</p> <p><input type="checkbox"/> The amount on Line 21 is more than the amount on Line 22. Check the box for “Disposable income is determined under § 1325(b)(3)” at the top of page 1 of this statement and complete the remaining parts of this statement.</p> <p><input type="checkbox"/> The amount on Line 21 is not more than the amount on Line 22. Check the box for “Disposable income is not determined under § 1325(b)(3)” at the top of page 1 of this statement and complete Part VII of this statement. Do not complete Parts IV, V, or VI.</p>																									
Part IV. CALCULATION OF DEDUCTIONS FROM INCOME																											
Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)																											
24A		<p>National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous. Enter in Line 24A the “Total” amount from IRS National Standards for Allowable Living Expenses for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.</p>	\$																								
24B		<p>National Standards: health care. Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 24B.</p> <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th colspan="3" style="text-align:left;">Persons under 65 years of age</th> <th colspan="3" style="text-align:left;">Persons 65 years of age or older</th> </tr> </thead> <tbody> <tr> <td style="width:5%; text-align:center;">a1.</td> <td style="width:40%;">Allowance per person</td> <td style="width:15%;"></td> <td style="width:5%; text-align:center;">a2.</td> <td style="width:40%;">Allowance per person</td> <td style="width:15%;"></td> </tr> <tr> <td style="text-align:center;">b1.</td> <td>Number of persons</td> <td></td> <td style="text-align:center;">b2.</td> <td>Number of persons</td> <td></td> </tr> <tr> <td style="text-align:center;">c1.</td> <td>Subtotal</td> <td></td> <td style="text-align:center;">c2.</td> <td>Subtotal</td> <td></td> </tr> </tbody> </table>	Persons under 65 years of age			Persons 65 years of age or older			a1.	Allowance per person		a2.	Allowance per person		b1.	Number of persons		b2.	Number of persons		c1.	Subtotal		c2.	Subtotal		\$
Persons under 65 years of age			Persons 65 years of age or older																								
a1.	Allowance per person		a2.	Allowance per person																							
b1.	Number of persons		b2.	Number of persons																							
c1.	Subtotal		c2.	Subtotal																							
25A		<p>Local Standards: housing and utilities; non-mortgage expenses. Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.</p>	\$																								

25B	<p>Local Standards: housing and utilities; mortgage/rent expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. Do not enter an amount less than zero.</p> <table border="1" style="width:100%; border-collapse: collapse; margin-top: 10px;"> <tr> <td style="width:5%; text-align: center;">a.</td> <td style="width:65%;">IRS Housing and Utilities Standards; mortgage/rent expense</td> <td style="width:30%; text-align: right;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47</td> <td style="text-align: right;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Net mortgage/rental expense</td> <td style="text-align: right;">Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Housing and Utilities Standards; mortgage/rent expense	\$	b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	\$	c.	Net mortgage/rental expense	Subtract Line b from Line a.	\$
a.	IRS Housing and Utilities Standards; mortgage/rent expense	\$									
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	\$									
c.	Net mortgage/rental expense	Subtract Line b from Line a.									
26	<p>Local Standards: housing and utilities; adjustment. If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:</p> <hr style="border: 0; border-top: 1px solid black; margin: 5px 0;"/> <hr style="border: 0; border-top: 1px solid black; margin: 5px 0;"/> <hr style="border: 0; border-top: 1px solid black; margin: 5px 0;"/>	\$									
27A	<p>Local Standards: transportation; vehicle operation/public transportation expense. You 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.</p> <p>Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. <input type="checkbox"/> 0 <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more.</p> <p>If you checked 0, enter on Line 27A the “Public Transportation” amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 27A the “Operating Costs” amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</p>	\$									
27B	<p>Local Standards: transportation; additional public transportation expense. If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 27B the “Public Transportation” amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</p>	\$									
28	<p>Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) <input type="checkbox"/> 1 <input type="checkbox"/> 2 or more.</p> <p>Enter, in Line a below, the “Ownership Costs” for “One Car” from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. Do not enter an amount less than zero.</p> <table border="1" style="width:100%; border-collapse: collapse; margin-top: 10px;"> <tr> <td style="width:5%; text-align: center;">a.</td> <td style="width:65%;">IRS Transportation Standards, Ownership Costs</td> <td style="width:30%; text-align: right;">\$</td> </tr> <tr> <td style="text-align: center;">b.</td> <td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47</td> <td style="text-align: right;">\$</td> </tr> <tr> <td style="text-align: center;">c.</td> <td>Net ownership/lease expense for Vehicle 1</td> <td style="text-align: right;">Subtract Line b from Line a.</td> </tr> </table>	a.	IRS Transportation Standards, Ownership Costs	\$	b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47	\$	c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.	\$
a.	IRS Transportation Standards, Ownership Costs	\$									
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47	\$									
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.									

COMMITTEE NOTE

Form 22A, lines 19A, 19B, 20A, and 20B, and Form 22C, lines 24A, 24B, 25A, and 25B, are amended to delete the terms “household” and “household size” and to replace them with “number of persons” or “family size.” Under § 707(b)(2)(A)(ii)(I) means test deductions for food, clothing, and other items and for health care are permitted to be taken in the amounts specified in the IRS National Standards. The IRS National Standards are based on numbers of persons, not household size. Similarly, the IRS Local Standards are based on family, not household, size. The IRS itself generally determines the applicable number of persons or family size for these purposes according to the number of dependents that the debtor claims for federal income tax purposes.

In order for Forms 22A and 22C to reflect more accurately the manner in which the specified National and Local Standards are applied by the IRS, the references to “household” and “household size” are deleted, and the substituted terms – “number of persons” and “family size” – are defined in terms of exemptions on the debtor’s federal income tax return and other dependents.

Form 22A, line 8, Form 22B, line 7, and Form 22C, line 7, are amended to add an instruction that only one joint filer should report regular payments by another person for household expenses. Reporting of the figure by both spouses results in an erroneous double-counting of this source of income.

The introductory instruction to Part I of Form 22A is amended to direct debtors in joint cases to file separate forms if only one of the debtors is entitled to an exemption under Part I and the debtors believe that the filing of separate forms is required by § 707(b)(2)(C) of the Code. The language of § 707(b) is ambiguous about how the exclusions from means testing authorized by § 707(b)(1) (for debtors whose debts are not primarily consumer debts) and (b)(2)(D) (for certain disabled veterans, National Guard members, and Armed Forces reservists) are to be applied in joint cases. The form does not impose a particular interpretation of these provisions. It leaves up to joint debtors the initial determination of whether the exclusion of one spouse from means testing relieves the other spouse from the obligation to complete the form, and allows any dispute over this matter to be resolved by the courts.

TAB 8

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Robert L. Hinkle, Chair
Advisory Committee on Evidence Rules

DATE: May 6, 2009

RE: Report of the Advisory Committee on Evidence Rules

Introduction

The Advisory Committee on Evidence Rules met on April 23-24 in Washington, D.C. The meeting produced two action items for Standing Committee consideration at the June 2009 meeting.

First, as the Standing Committee knows, the Advisory Committee has been restyling the Evidence Rules. The Advisory Committee divided the rules into three groups for this purpose. At its last two meetings, the Standing Committee approved the first two groups but delayed publication until after all three groups had been approved. The Standing Committee did this with the understanding that at the end of the process there would be a top-to-bottom review of all the restyled rules for consistency and to address “global” issues that had been deferred during the initial restyling.

At the April 2009 meeting, the Advisory Committee completed its work on the restyling project. First, the Committee restyled the third (and last) group of

rules, consisting of Rules 801 to 1103. Second, the Committee undertook the promised top-to-bottom review of all the restyled rules. This resulted in limited changes to the first two groups of restyled rules. Third, the Committee approved a set of proposed committee notes to the restyled rules. The entire set of restyled rules is attached to this Report as Appendix A. The Committee now asks the Standing Committee to approve the entire set for release at this time for public comment.

The second action item involves Rule 804(b)(3), the hearsay exception for an unavailable declarant's statement against interest. As the Standing Committee will recall, a year ago the Advisory Committee proposed, and the Standing Committee approved, releasing for public comment a proposed amendment to this rule. The current rule requires a criminal-case defendant—but not the government—to show corroborating circumstances as a condition to admission of an unavailable declarant's statement against penal interest. The amendment would extend the corroborating-circumstances requirement to the government, as some courts have done anyway. The Justice Department does not oppose the amendment. The proposed amendment makes no change for civil cases or for statements against pecuniary interest.

At the April 2009 meeting, the Advisory Committee considered the few public comments received on the proposal. The comments were generally favorable. The Advisory Committee made no changes of substance to the proposal as released for public comment, but the Committee made stylistic changes consistent with some of the public comments and with the ongoing restyling project. The Advisory Committee now asks the Standing Committee to approve the proposed amendment to Rule 804(b)(3) for submission to the Judicial Conference. The text of the proposed rule in black-line form and a summary of the public comments are attached to this Report as Appendix B.

A complete discussion of these items is in the draft minutes attached to this Report as Appendix C.

I. Action Item — Restyled Evidence Rules 101–1103

Beginning in the early 1990s, Judge Robert Keeton, who was chair of the Standing Committee, and a committee member, University of Texas Professor

Charles Alan Wright, led an effort to adopt clear and consistent style conventions for all of the rules. Without consistent style conventions, there were differences from one set of rules to another, and even from one rule to another within the same set. Style varied because a committee seeking to amend a rule did not always consider how another rule expressed the same concept. Style varied based on the membership of a particular advisory committee. Style varied as the membership of a particular advisory committee changed over time. And style varied as the membership of the Standing Committee changed over time. Different rules expressed the same thought in different ways, leading to a risk that they would be interpreted differently. Different rules sometimes used the same word or phrase to mean different things, again leading to a risk of misinterpretation. And in other respects, too, rules drafters who were experts in the relevant substantive and procedural areas sometimes did not express themselves as clearly as they might have.

Judge Keeton appointed Professor Wright to chair a newly formed Style Subcommittee of the Standing Committee. At Professor Wright's suggestion, the Standing Committee retained a legal-writing authority, Bryan Garner, as its style consultant. Mr. Garner is the author of such books as *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*. These are generally regarded as the leading authorities on these subjects. Mr. Garner also is the current editor of *Black's Law Dictionary* and the co-author, with Justice Scalia, of *Making Your Case: The Art of Persuading Judges*.

In conjunction with his work for the Standing Committee, Mr. Garner wrote *Guidelines for Drafting and Editing Court Rules*. First published in 1996, the *Guidelines* manual is now in its fifth printing. It has guided all rules amendments since it was written—whether or not they related to a restyling project. And the *Guidelines* manual has guided successful restylings of the Federal Rules of Appellate, Criminal, and Civil Rules, which took effect in 1998, 2002, and 2007, respectively. For matters not addressed in the *Guidelines*, the restylings have followed Garner's *A Dictionary of Modern Legal Usage*. Professor Daniel R. Coquillette has been the Standing Committee's reporter through all of these projects.

Mr. Garner was himself the style consultant for the restyled Appellate and Criminal Rules. Professor Joseph Kimble took over near the end of the Criminal

Rules restyling project and was the style consultant as the Civil Rules project went forward. Professor Kimble is the editor in chief of *The Scribes Journal of Legal Writing* and the author of *Lifting the Fog of Legalese*, a book that compiles some of his many essays. He and Mr. Garner are co-authors of a forthcoming book, *The Elements of Legal Drafting*, which West Publishing Company will publish. Professor Kimble has taught legal writing at Thomas Cooley Law School for 25 years.

Despite some initial opposition, each of the restyling projects has proved enormously successful. Indeed, in recognition of their work in restyling the Civil Rules, Professor Kimble, the Standing Committee, and the Civil Rules Advisory Committee each received a Burton Award for Reform in Law. The Burton is probably the nation's most prestigious legal-drafting award. Judge Rosenthal, Judge Thrash (of the Style Subcommittee), and Professor Kimble accepted the awards at a black-tie dinner at the Library of Congress on June 4, 2007.

The division of responsibility on the restyling projects has conformed generally to the protocol the Standing Committee has adopted for addressing style issues for a proposed amendment to a rule outside the restyling process. For an amendment outside a restyling project, the relevant Advisory Committee must submit its proposed language to the Style Subcommittee. On style issues, the Style Subcommittee, not the Advisory Committee, has the last word. Thus when an Advisory Committee submits a proposed amendment to any rule to the full Standing Committee, the amendment already has gone through a style review, and style issues have been determined by the Style Subcommittee. The Standing Committee chairs have kept the Style Subcommittee small in order to promote consistency. Although the Standing Committee retains the ultimate authority, through the years it has followed the style decisions of the Style Subcommittee, thus ensuring a high level of consistency across all sets of rules.

With this background, the Advisory Committee on Evidence Rules undertook its restyling project beginning in the Fall of 2007. The Committee established a step-by-step process for restyling that is substantially the same as that employed in the earlier restyling projects. Those steps are: 1) draft by Professor Kimble; 2) comments by the Reporter; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by

the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Advisory Committee divided the Evidence Rules into three parts. The process described above thus was conducted in three stages. The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time.

The Advisory Committee established a working principle for whether a proposed change is one of “style” (in which event the decision is made by the Style Subcommittee) or one of “substance” (in which event the decision is for the Advisory Committee). A proposed change is “substantive” if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or
2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or
3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or
4. It changes what Professor Kimble has referred to as a “sacred phrase”—“phrases that have become so familiar as to be fixed in cement.”

At its Spring 2008 meeting the Advisory Committee approved the restyling of the first third of the rules (Rules 101–415). The Standing Committee, at its June 2008 meeting, approved these rules for release for public comment, with the understanding that there could be further changes and that publication would occur after the Standing Committee approved all of the rules.

At its Fall 2008 meeting, the Advisory Committee approved the restyling of the second third of the rules (Rules 501–706). The Standing Committee, at its January 2009 meeting, approved these rules for release for public comment, again with the understanding that there could be further changes and that publication

would occur after the Standing Committee approved all of the rules.

At its April 2009 meeting, the Advisory Committee approved the restyling of the final third of the rules (Rules 801–1103). The rules came to the Advisory Committee after the full process outlined above. The Committee addressed each rule separately. The Committee then doubled back to all of the prior rules to ensure consistency throughout the entire set and to address global issues such as how to refer to a writing in a manner that would include its electronic form and how to refer to a public office or agency. These and similar matters were handled through a new set of definitions in proposed Rule 101(b). Finally, the Committee approved proposed Committee Notes conforming to the template and general approach of the Committee Notes to the restyled Civil Rules. The Committee delegated to the Reporter, the Style Consultant, and the Chair the authority to compile and implement the Committee’s many decisions and to ensure that no new inconsistencies were introduced. Two of the Style Committee’s three members attended and participated fully in the Advisory Committee meeting.

The April 2009 minutes—which summarize but are by no means a transcript of the two-day meeting—run to 85 pages and are attached to this report. I have not attempted to summarize in this report the extensive discussions and many drafting decisions detailed in the minutes.

The entire set of proposed restyled Evidence Rules—consisting of Rules 101 to 1103—are attached to this Report as Appendix A, with Committee Notes at the end. The rules are presented in a “side-by-side” version, with the existing rule in the left column and the restyled rule in the right.

Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve proposed restyled Evidence Rules 101–1103 for release for public comment.

II. Action Item — Proposed Amendment to Evidence Rule 804(b)(3)

As noted above in the introduction to this report, Rule 804(b)(3) now provides that in a criminal case, the defendant—but not the government—must show corroborating circumstances as a condition for admitting an unavailable declarant’s statement against penal interest. The proposed amendment would

extend the corroborating-circumstances requirement to the government, as some courts have done anyway.

Nobody asked to speak at the scheduled public hearings on the proposed amendment. The hearings were canceled. A small number of written public comments were filed. They are summarized at the end of Appendix B to this report. No comment opposed requiring the government to show corroborating circumstances. Two comments suggested that although the government should be required to show corroborating circumstances, the defendant should not. The Advisory Committee rejected that suggestion. One comment suggested the rule should be amended further to overturn a controlling Supreme Court decision on another aspect of the rule. The Advisory Committee rejected that suggestion. Finally, several comments proposed stylistic changes. The Advisory Committee implemented those suggestions and sought to avoid successive changes by restyling the proposed Rule 804(b)(3) as will occur anyway as part of the restyling process. The Committee revised the proposed Committee Note to reflect this decision and in response to a further comment on the Note.

Appendix B to this report sets out the proposed amendment in black-line form. The appendix also includes the proposed Committee Note and summarizes the public comments.

Recommendation: The Advisory Committee on Evidence Rules recommends that the Standing Committee approve the proposed amendment to Rule 804(b)(3) for submission to the Judicial Conference.

III. Minutes of the April 2009 Meeting

The Reporter's draft of the minutes of the Advisory Committee's April 2009 meeting is attached to this report as Appendix C. The minutes have not yet been approved by the Committee.

TAB 8A-B

<p style="text-align: center;">ARTICLE I. GENERAL PROVISIONS¹</p> <p style="text-align: center;">Rule 101. Scope</p>	<p style="text-align: center;">ARTICLE I. GENERAL PROVISIONS</p> <p style="text-align: center;">Rule 101 — Scope; Definitions</p>
<p>These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.</p>	<p>(a) Scope. These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.</p> <p>(b) Definitions. In these rules:</p> <p>(1) “civil case” means a civil action or proceeding;</p> <p>(2) “criminal case” includes a criminal proceeding;</p> <p>(3) “public office” includes a public agency;</p> <p>(4) “record” includes a memorandum, report, or data compilation;</p> <p>(5) a “rule prescribed by the Supreme Court” means a rule adopted by the Supreme Court under statutory authority; and</p> <p>(6) a reference to any kind of written material includes electronically stored information.</p>

Committee Note

The language of Rule 101 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal and Civil Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for*

¹ Rules in effect on December 1, 2008.

Restyling the Civil Rules, in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at page x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf).

2. *Formatting Changes*

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. “Hanging indents” are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 103 illustrates the benefits of formatting changes.

3. *Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words*

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from “accused” in many rules to “defendant in a criminal case” in all rules.

The restyled rules minimize the use of inherently ambiguous words. For example, the word “shall” can mean “must,” “may,” or something else, depending on context. The potential for confusion is exacerbated by the fact the word “shall” is no longer generally used in spoken or clearly written English. The restyled rules replace “shall” with “must,” “may,” or “should,” depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant “intensifiers”. These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rule does not change their substantive meaning. *See, e.g.*, Rule 103 (changing “interests of justice” to “justice”).

The restyled rules also remove words and concepts that are outdated or redundant.

4. *Rule Numbers*

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. *No Substantive Change*

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be “substantive” if any of the following conditions were met:

- a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

- b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);
- c. It alters the structure of a rule in a way that may alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or
- d. It changes a “sacred phrase” — phrases that have become so familiar in practice that to alter them would be unduly disruptive. Examples in the Evidence Rules include “unfair prejudice” and “truth of the matter asserted.”

<p>Rule 102. Purpose and Construction</p>	<p>Rule 102 — Purpose</p>
<p>These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.</p>	<p>These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.</p>

Committee Note

The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 103. Rulings on Evidence	Rule 103 — Rulings on Evidence
<p>(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and</p> <p>(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or</p> <p>(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.</p> <p>Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.</p>	<p>(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:</p> <p>(1) if the ruling admits evidence, the party, on the record:</p> <p style="padding-left: 40px;">(A) timely objects or moves to strike; and</p> <p style="padding-left: 40px;">(B) states the specific ground, unless it was apparent from the context; or</p> <p>(2) if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.</p> <p>(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.</p>
<p>(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.</p>	<p>(c) Court’s Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.</p>
<p>(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.</p>	<p>(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.</p>
<p>(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.</p>	<p>(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.</p>

Committee Note

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 104. Preliminary Questions	Rule 104 — Preliminary Questions
<p>(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.</p>	<p>(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.</p>
<p>(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.</p>	<p>(b) Relevancy That Depends on a Fact. When the relevancy of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled.</p>
<p>(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.</p>	<p>(c) Matters That the Jury Must Not Hear. A hearing on a preliminary question must be conducted outside the jury's hearing if:</p> <ol style="list-style-type: none"> (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and requests that the jury not be present; or (3) justice so requires.
<p>(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.</p>	<p>(d) Testimony by a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.</p>
<p>(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.</p>	<p>(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.</p>

Committee Note

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 105. Limited Admissibility	Rule 105 — Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
<p>When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.</p>	<p>If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.</p>

Committee Note

The language of Rule 105 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106. Remainder of or Related Writings or Recorded Statements	Rule 106 — Rest of or Related Writings or Recorded Statements
<p>When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.</p>	<p>If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.</p>

Committee Note

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p style="text-align: center;">ARTICLE II. JUDICIAL NOTICE</p> <p style="text-align: center;">Rule 201. Judicial Notice of Adjudicative Facts</p>	<p style="text-align: center;">ARTICLE II. JUDICIAL NOTICE</p> <p style="text-align: center;">Rule 201 — Judicial Notice of Adjudicative Facts</p>
<p>(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.</p>	<p>(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.</p>
<p>(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.</p>	<p>(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:</p> <ol style="list-style-type: none"> (1) is generally known within the court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
<p>(c) When discretionary. A court may take judicial notice, whether requested or not.</p> <p>(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.</p>	<p>(c) Taking Notice. At any stage of the proceeding, the court:</p> <ol style="list-style-type: none"> (1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
<p>(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.</p>	<p>(d) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the noticed fact. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.</p>
<p>(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.</p>	
<p>(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.</p>	<p>(e) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.</p>

Committee Note

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p align="center">ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS</p> <p align="center">Rule 301. Presumptions in General in Civil Actions and Proceedings</p>	<p align="center">ARTICLE III. PRESUMPTIONS IN CIVIL CASES</p> <p align="center">Rule 301 — Presumptions in a Civil Case Generally</p>
<p>In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.</p>	<p>In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. But this rule does not shift the burden of proof in the sense of the risk of nonpersuasion; the burden of proof remains on the party who had it originally.</p>

Committee Note

The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 302. Applicability of State Law in Civil Actions and Proceedings</p>	<p>Rule 302 — Effect of State Law on Presumptions in a Civil Case</p>
<p>In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.</p>	<p>In a civil case, state law governs the effect of a presumption with respect to a claim or defense for which state law supplies the rule of decision.</p>

Committee Note

The language of Rule 302 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401. Definition of “Relevant Evidence”	ARTICLE IV. RELEVANCY AND ITS LIMITS Rule 401 — Test for Relevant Evidence
<p>“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.</p>	<p>Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.</p>

Committee Note

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible</p>	<p>Rule 402 — General Admissibility of Relevant Evidence</p>
<p>All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.</p>	<p>Relevant evidence is admissible unless any of the following provides otherwise:</p> <ul style="list-style-type: none"> • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. <p>Irrelevant evidence is not admissible.</p>

Committee Note

The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</p>	<p>Rule 403 — Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons</p>
<p>Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.</p>	<p>The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.</p>

Committee Note

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	Rule 404 — Character Evidence; Crimes or Other Acts
<p>(a) Character evidence generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:</p> <p>(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;</p> <p>(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;</p> <p>(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.</p>	<p>(a) Character Evidence.</p> <p>(1) <i>Prohibited Uses.</i> Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.</p> <p>(2) <i>Exceptions in a Criminal Case.</i> The following exceptions apply in a criminal case:</p> <p>(A) a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;</p> <p>(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged crime victim’s pertinent trait, and if the evidence is admitted, the prosecutor may:</p> <p style="padding-left: 40px;">(i) offer evidence to rebut it; and</p> <p style="padding-left: 40px;">(ii) offer evidence of the defendant’s same trait; and</p> <p>(C) in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor.</p> <p>(3) <i>Exceptions for a Witness.</i> Evidence of a witness’s character may be admitted under Rules 607, 608, and 609.</p>

<p>(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.</p>	<p>(b) Crimes or Other Acts.</p> <p>(1) <i>Prohibited Uses.</i> Evidence of a crime or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.</p> <p>(2) <i>Permitted Uses; Notice.</i> This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:</p> <p>(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and</p> <p>(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.</p>
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Committee Note

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 405. Methods of Proving Character	Rule 405 — Methods of Proving Character
<p>(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.</p>	<p>(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination, the court may allow an inquiry into relevant specific instances of the person's conduct.</p>
<p>(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.</p>	<p>(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.</p>

Committee Note

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 406. Habit; Routine Practice	Rule 406 — Habit; Routine Practice
<p>Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.</p>	<p>Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.</p>

Committee Note

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 407. Subsequent Remedial Measures</p>	<p>Rule 407 — Subsequent Remedial Measures</p>
<p>When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.</p>	<p>When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:</p> <ul style="list-style-type: none"> • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. <p>But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.</p>

Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

<p>Rule 408. Compromise and Offers to Compromise</p>	<p>Rule 408 — Compromise Offers and Negotiations</p>
<p>(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:</p> <p style="padding-left: 40px;">(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and</p> <p style="padding-left: 40px;">(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.</p>	<p>(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:</p> <p style="padding-left: 40px;">(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim; and</p> <p style="padding-left: 40px;">(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.</p>
<p>(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.</p>	<p>(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.</p>

Committee Note

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 409. Payment of Medical and Similar Expenses	Rule 409 — Offers to Pay Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Committee Note

The language of Rule 409 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements</p>	<p>Rule 410 — Pleas, Plea Discussions, and Related Statements</p>
<p>Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:</p> <ul style="list-style-type: none"> (1) a plea of guilty which was later withdrawn; (2) a plea of nolo contendere; (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. <p>However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.</p>	<ul style="list-style-type: none"> (a) Prohibited Uses. In any civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: <ul style="list-style-type: none"> (1) a guilty plea that was later withdrawn; (2) a nolo contendere plea; (3) a statement about either of those pleas made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. (b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4): <ul style="list-style-type: none"> (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if both statements should in fairness be considered at the same time; or (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and in the presence of counsel.

Committee Note

The language of Rule 410 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 411. Liability Insurance</p>	<p>Rule 411 — Liability Insurance</p>
<p>Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.</p>	<p>Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice or — if disputed — proving agency, ownership, or control.</p>

Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

<p>Rule 412. Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition</p>	<p>Rule 412 — Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition</p>
<p>(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):</p> <p style="padding-left: 40px;">(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.</p> <p style="padding-left: 40px;">(2) Evidence offered to prove any alleged victim’s sexual predisposition.</p>	<p>(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:</p> <p style="padding-left: 40px;">(1) evidence offered to prove that a victim engaged in other sexual behavior; or</p> <p style="padding-left: 40px;">(2) evidence offered to prove a victim’s sexual predisposition.</p>
<p>(b) Exceptions.</p> <p style="padding-left: 40px;">(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:</p> <p style="padding-left: 80px;">(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;</p> <p style="padding-left: 80px;">(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and</p> <p style="padding-left: 80px;">(C) evidence the exclusion of which would violate the constitutional rights of the defendant.</p> <p style="padding-left: 40px;">(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim.</p>	<p>(b) Exceptions.</p> <p style="padding-left: 40px;">(1) Criminal Cases. The court may admit the following evidence in a criminal case:</p> <p style="padding-left: 80px;">(A) evidence of specific instances of a victim’s sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;</p> <p style="padding-left: 80px;">(B) evidence of specific instances of a victim’s sexual behavior toward the defendant, if offered by the prosecutor or if offered by the defendant to prove consent; and</p> <p style="padding-left: 80px;">(C) evidence whose exclusion would violate the defendant’s constitutional rights.</p> <p style="padding-left: 40px;">(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim’s reputation only if the victim has placed it in controversy.</p>

<p>(c) Procedure To Determine Admissibility.</p> <p>(1) A party intending to offer evidence under subdivision (b) must—</p> <p>(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and</p> <p>(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim’s guardian or representative.</p> <p>(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.</p>	<p>(c) Procedure to Determine Admissibility.</p> <p>(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:</p> <p>(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;</p> <p>(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;</p> <p>(C) serve the motion on all parties; and</p> <p>(D) notify the victim or, when appropriate, the victim’s guardian or representative.</p> <p>(2) Hearing. Before admitting evidence under this rule, the court must conduct an in-camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and record of the hearing must be and remain sealed.</p>
	<p>(d) Definition of “Victim.” In this rule, “victim” includes an alleged victim.</p>

Committee Note

The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 413. Evidence of Similar Crimes in Sexual Assault Cases</p>	<p>Rule 413 — Similar Crimes in Sexual-Assault Cases</p>
<p>(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.</p>	<p>(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.</p>
<p>(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.</p>	<p>(b) Disclosure. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses’ statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.</p>
<p>(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.</p>	<p>(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.</p>
<p>(d) For purposes of this rule and Rule 415, “offense of sexual assault” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—</p> <ul style="list-style-type: none"> (1) any conduct proscribed by chapter 109A of title 18, United States Code; (2) contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person; (3) contact, without consent, between the genitals or anus of the defendant and any part of another person’s body; (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4). 	<p>(d) Definition of “Sexual Assault.” In this rule and Rule 415, “sexual assault” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:</p> <ul style="list-style-type: none"> (1) any conduct prohibited by 18 U.S.C. chapter 109A; (2) contact, without consent, between any part of the defendant’s body — or an object — and another person’s genitals or anus; (3) contact, without consent, between the defendant’s genitals or anus and any part of another person’s body; (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Committee Note

The language of Rule 413 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 414. Evidence of Similar Crimes in Child Molestation Cases</p>	<p>Rule 414 — Similar Crimes in Child-Molestation Cases</p>
<p>(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.</p>	<p>(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other act of child molestation. The evidence may be considered on any matter to which it is relevant.</p>
<p>(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.</p>	<p>(b) Disclosure. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses’ statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.</p>
<p>(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.</p>	<p>(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.</p>

<p>(d) For purposes of this rule and Rule 415, “child” means a person below the age of fourteen, and “offense of child molestation” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—</p> <p>(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;</p> <p>(2) any conduct proscribed by chapter 110 of title 18, United States Code;</p> <p>(3) contact between any part of the defendant’s body or an object and the genitals or anus of a child;</p> <p>(4) contact between the genitals or anus of the defendant and any part of the body of a child;</p> <p>(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or</p> <p>(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).</p>	<p>(d) Definition of “Child” and “Child Molestation.” In this rule and Rule 415:</p> <p>(1) “child” means a person below the age of 14; and</p> <p>(2) “child molestation” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:</p> <p>(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;</p> <p>(B) any conduct prohibited by 18 U.S.C. chapter 110;</p> <p>(C) contact between any part of the defendant’s body — or an object — and a child’s genitals or anus;</p> <p>(D) contact between the defendant’s genitals or anus and any part of a child’s body;</p> <p>(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or</p> <p>(F) an attempt or conspiracy to engage in conduct described in paragraphs (A)–(E).</p>
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Committee Note

The language of Rule 414 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation</p>	<p>Rule 415 — Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation.</p>
<p>(a) In a civil case in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party’s commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.</p>	<p>(a) Permitted Uses. In a civil case involving a claim for relief based on a party’s alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or act of child molestation. The evidence may be considered as provided in Rules 413 and 414.</p>
<p>(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.</p>	<p>(b) Disclosure. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses’ statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.</p>
<p>(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.</p>	<p>(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.</p>

Committee Note

The language of Rule 415 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>ARTICLE V. PRIVILEGES</p> <p>Rule 501. General Rule</p>	<p>ARTICLE V. PRIVILEGES</p> <p>Rule 501 — Privilege in General</p>
<p>Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.</p>	<p>The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:</p> <ul style="list-style-type: none"> • the United States Constitution; • a federal statute; or • other rules prescribed by the Supreme Court. <p>But in a civil case, state law governs a claim of privilege with respect to a claim or defense for which state law supplies the rule of decision.</p>

Committee Note

The language of Rule 501 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p align="center">Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver</p>	<p align="center">Rule 502 — Attorney-Client Privilege and Work Product; Limitations on Waiver</p>
<p>The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.</p>	<p>The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.</p>
<p>(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:</p> <ul style="list-style-type: none"> (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together. 	<p>(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:</p> <ul style="list-style-type: none"> (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.
<p>(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:</p> <ul style="list-style-type: none"> (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B). 	<p>(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:</p> <ul style="list-style-type: none"> (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

<p>(c) Disclosure made in a State proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:</p> <p>(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or</p> <p>(2) is not a waiver under the law of the State where the disclosure occurred.</p>	<p>(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:</p> <p>(1) would not be a waiver under this rule if it had been made in a federal proceeding; or</p> <p>(2) is not a waiver under the law of the state where the disclosure occurred.</p>
<p>(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.</p>	<p>(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.</p>
<p>(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.</p>	<p>(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.</p>
<p>(f) Controlling effect of this rule. Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.</p>	<p>(f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.</p>
<p>(g) Definitions. In this rule:</p> <p>(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and</p> <p>(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.</p>	<p>(g) Definitions. In this rule:</p> <p>(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and</p> <p>(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.</p>

Committee Note

Rule 502 has been amended by changing the initial letter of a few words from upper-case to lower-case as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

<p style="text-align: center;">ARTICLE VI. WITNESSES</p> <p style="text-align: center;">Rule 601. General Rule of Competency</p>	<p style="text-align: center;">ARTICLE VI. WITNESSES</p> <p style="text-align: center;">Rule 601 — Competency to Testify in General</p>
<p>Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.</p>	<p>Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness’s competency with respect to a claim or defense for which state law supplies the rule of decision.</p>

Committee Note

The language of Rule 601 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 602. Lack of Personal Knowledge	Rule 602 — Need for Personal Knowledge
<p>A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.</p>	<p>A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 703.</p>

Committee Note

The language of Rule 602 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 603. Oath or Affirmation	Rule 603 — Oath or Affirmation to Testify Truthfully
<p>Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.</p>	<p>Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.</p>

Committee Note

The language of Rule 603 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p align="center">Rule 604. Interpreters</p>	<p align="center">Rule 604 — Interpreter</p>
<p>An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.</p>	<p>An interpreter must be qualified and must give an oath or affirmation to make a true translation.</p>

Committee Note

The language of Rule 604 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 605. Competency of Judge as Witness</p>	<p>Rule 605 — Judge’s Competency as a Witness</p>
<p>The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.</p>	<p>The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.</p>

Committee Note

The language of Rule 605 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 606. Competency of Juror as Witness	Rule 606 — Juror’s Competency as a Witness
<p>(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.</p>	<p>(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury’s presence.</p>
<p>(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.</p>	<p>(b) During an Inquiry into the Validity of a Verdict or Indictment.</p> <p>(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.</p> <p>(2) Exceptions. A juror may testify about whether:</p> <p>(A) extraneous prejudicial information was improperly brought to the jury’s attention;</p> <p>(B) an outside influence was improperly brought to bear on any juror; or</p> <p>(C) a mistake was made in entering the verdict on the verdict form.</p>

Committee Note

The language of Rule 606 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 607. Who May Impeach	Rule 607 — Who May Impeach a Witness
The credibility of a witness may be attacked by any party, including the party calling the witness.	Any party, including the party that called the witness, may attack the witness's credibility.

Committee Note

The language of Rule 607 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 608. Evidence of Character and Conduct of Witness	Rule 608 — A Witness’s Character for Truthfulness or Untruthfulness
<p>(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.</p>	<p>(a) Reputation or Opinion Evidence. A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked.</p>
<p>(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.</p> <p>The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.</p>	<p>(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:</p> <ol style="list-style-type: none"> (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about. <p>(c) Privilege Against Self-Incrimination. A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.</p>

Committee Note

The language of Rule 608 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee is aware that the Rule’s limitation of bad act impeachment to “cross-examination” is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term “on cross-examination” to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

<p>Rule 609. Impeachment by Evidence of Conviction of Crime</p>	<p>Rule 609 — Impeachment by Evidence of a Criminal Conviction</p>
<p>(a) General rule. For the purpose of attacking the character for truthfulness of a witness,</p> <p>(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and</p> <p>(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.</p>	<p>(a) In General. The following rules apply to attacking a witness’s character for truthfulness by evidence of a criminal conviction:</p> <p>(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:</p> <p>(A) must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and</p> <p>(B) must be admitted if the witness is a defendant in a criminal case and the probative value of the evidence outweighs its prejudicial effect; and</p> <p>(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness’s admitting — a dishonest act or false statement.</p>
<p>(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.</p>	<p>(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness’s conviction or release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if:</p> <p>(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and</p> <p>(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.</p>

<p>(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.</p>	<p>(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:</p> <ul style="list-style-type: none"> (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
<p>(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.</p>	<p>(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:</p> <ul style="list-style-type: none"> (1) it is offered in a criminal case; (2) the adjudication was of a witness other than the defendant; (3) a conviction of an adult for that offense would be admissible to attack the adult's credibility; and (4) admitting the evidence is necessary to fairly determine guilt or innocence.
<p>(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.</p>	<p>(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.</p>

Committee Note

The language of Rule 609 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 610. Religious Beliefs or Opinions</p>	<p>Rule 610 — Religious Beliefs or Opinions</p>
<p>Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.</p>	<p>Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.</p>

Committee Note

The language of Rule 610 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611 — Mode and Order of Questioning Witnesses and Presenting Evidence
<p>(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.</p>	<p>(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to:</p> <ol style="list-style-type: none"> (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.
<p>(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.</p>	<p>(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting a witness's credibility. The court may allow inquiry into additional matters as if on direct examination.</p>
<p>(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.</p>	<p>(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions on cross-examination. And the court should allow leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.</p>

Committee Note

The language of Rule 611 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 612. Writing Used to Refresh Memory	Rule 612 — Writing Used to Refresh a Witness’s Memory
<p>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—</p> <p>(1) while testifying, or</p> <p>(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,</p> <p>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. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.</p>	<p>(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:</p> <p>(1) while testifying; or</p> <p>(2) before testifying, if the court decides that justice requires a party to have those options.</p> <p>(b) Adverse Party’s Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.</p> <p>(c) Failure to Produce or Deliver. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness’s testimony or — if justice so requires — declare a mistrial.</p>

Committee Note

The language of Rule 612 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 613. Prior Statements of Witnesses	Rule 613 — Witness’s Prior Statement
<p>(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.</p>	<p>(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness’s prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party’s attorney.</p>
<p>(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).</p>	<p>(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness’s prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party’s statement under Rule 801(d)(2).</p>

Committee Note

The language of Rule 613 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614 — Court’s Calling or Questioning a Witness
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	(a) Calling. The court may call a witness on its own or at a party’s suggestion. Each party is entitled to cross-examine the witness.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	(b) Questioning. The court may question a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	(c) Objections. A party may object to the court’s calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

Committee Note

The language of Rule 614 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 615. Exclusion of Witnesses	Rule 615 — Excluding Witnesses
<p>At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.</p>	<p>At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:</p> <ul style="list-style-type: none"> (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or (d) a person authorized by statute to be present.

Committee Note

The language of Rule 615 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p align="center">ARTICLE VII. OPINIONS AND EXPERT TESTIMONY</p> <p align="center">Rule 701. Opinion Testimony by Lay Witnesses</p>	<p align="center">ARTICLE VII. OPINIONS AND EXPERT TESTIMONY</p> <p align="center">Rule 701 — Opinion Testimony by Lay Witnesses</p>
<p>If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.</p>	<p>If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:</p> <ul style="list-style-type: none"> (a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Committee Note

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 702. Testimony by Experts	Rule 702 — Testimony by Expert Witnesses
<p>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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.</p>	<p>A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:</p> <ul style="list-style-type: none"> (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Committee Note

The language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 703. Bases of Opinion Testimony by Experts	Rule 703 — Bases of an Expert’s Opinion Testimony
<p>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 the expert 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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.</p>	<p>An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.</p>

Committee Note

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 704. Opinion on Ultimate Issue	Rule 704 — Opinion on an Ultimate Issue
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.	(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Committee Note

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

<p style="text-align: center;">Rule 705. Disclosure of Facts or Data Underlying Expert Opinion</p>	<p style="text-align: center;">Rule 705 — Disclosing the Facts or Data Underlying an Expert’s Opinion</p>
<p>The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to 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.</p>	<p>Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.</p>

Committee Note

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 706. Court Appointed Experts	Rule 706 — Court-Appointed Expert Witnesses
<p>(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.</p>	<p>(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.</p> <p>(b) Expert's Role. The court must inform the expert in writing of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert at a conference in which the parties have an opportunity to participate. The expert:</p> <ol style="list-style-type: none"> (1) must advise the parties of any findings the expert makes; (2) may be deposed by any party; (3) may be called to testify by the court or any party; and (4) may be cross-examined by any party, including the party that called the expert.
<p>(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.</p>	<p>(c) Compensation. The expert is entitled to whatever reasonable compensation the court allows. The compensation is payable as follows:</p> <ol style="list-style-type: none"> (1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and (2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
<p>(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.</p>	<p>(d) Disclosing the Appointment. The court may authorize disclosure to the jury that the court appointed the expert.</p>
<p>(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.</p>	<p>(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.</p>

Committee Note

The language of Rule 706 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p style="text-align: center;">ARTICLE VIII. HEARSAY</p> <p style="text-align: center;">Rule 801. Definitions</p>	<p style="text-align: center;">ARTICLE VIII. HEARSAY</p> <p style="text-align: center;">Rule 801 — Definitions That Apply To This Article</p>
<p>The following definitions apply under this article:</p> <p>(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.</p>	<p>(a) Statement. “Statement” means:</p> <p style="margin-left: 20px;">(1) a person’s oral or written assertion; or</p> <p style="margin-left: 20px;">(2) a person’s nonverbal conduct, if the person intended it as an assertion.</p>
<p>(b) Declarant. A “declarant” is a person who makes a statement.</p>	<p>(b) Declarant. “Declarant” means the person who made the statement.</p>
<p>(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.</p>	<p>(c) Hearsay. “Hearsay” means a prior statement — one the declarant does not make while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant.</p>
<p>(d) Statements which are not hearsay. A statement is not hearsay if—</p> <p style="margin-left: 20px;">(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or</p>	<p>(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:</p> <p style="margin-left: 20px;">(1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about the prior statement, and the statement:</p> <p style="margin-left: 40px;">(A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;</p> <p style="margin-left: 40px;">(B) is consistent with the declarant’s testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or</p> <p style="margin-left: 40px;">(C) identifies a person as someone the declarant perceived earlier.</p>

<p>(2) Admission by party-opponent. The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant’s authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).</p>	<p>(2) <i>An Opposing Party’s Statement.</i> The statement is offered against an opposing party and:</p> <ul style="list-style-type: none"> (A) was made by the party in an individual or representative capacity; (B) is one that the party adopted or the party accepted as true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party’s co-conspirator during and in furtherance of the conspiracy. <p>The statement must be considered but does not by itself establish the declarant’s authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).</p>
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Committee Note

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exemption provided by Rule 801(d)(2) are no longer referred to as “admissions” in the title to the subdivision. The term “admissions” is confusing because not all statements covered by the exemption are admissions in the colloquial sense — a statement can be within the exemption even it “admitted” nothing and was not against the party’s interest when made. The term “admissions” also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exemption is intended.

Rule 802. Hearsay Rule	Rule 802 — The Rule Against Hearsay
<p>Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.</p>	<p>Hearsay is not admissible unless any of the following provides otherwise:</p> <ul style="list-style-type: none"> • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.

Committee Note

The language of Rule 802 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial</p>	<p>Rule 803 — Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness</p>
<p>The following are not excluded by the hearsay rule, even though the declarant is available as a witness:</p> <p>(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.</p>	<p>The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:</p> <p>(1) <i>Present Sense Impression.</i> A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.</p>
<p>(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.</p>	<p>(2) <i>Excited Utterance.</i> A statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused.</p>
<p>(3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.</p>	<p>(3) <i>Then-Existing Mental, Emotional, or Physical Condition.</i> A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.</p>
<p>(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.</p>	<p>(4) <i>Statement Made for Medical Diagnosis or Treatment.</i> A statement that:</p> <p>(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and</p> <p>(B) describes medical history; past or present symptoms or sensations; or the inception or general character of their cause.</p>

<p>(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.</p>	<p>(5) Recorded Recollection. A record that:</p> <ul style="list-style-type: none"> (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge. <p>If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.</p>
<p>(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.</p>	<p>(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:</p> <ul style="list-style-type: none"> (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; and (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification. <p>But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.</p>

<p>(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.</p>	<p>(7) <i>Absence of a Record of a Regularly Conducted Activity.</i> Evidence that a matter is not included in a record described in paragraph (6) if:</p> <ul style="list-style-type: none"> (A) the evidence is admitted to prove that the matter did not occur or exist; and (B) a record was regularly kept for a matter of that kind. <p>But this exception does not apply if the possible source of the information or other circumstances indicate a lack of trustworthiness.</p>
<p>(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.</p>	<p>(8) <i>Public Records.</i> A record of a public office setting out:</p> <ul style="list-style-type: none"> (A) the office’s activities; (B) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (C) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation. <p>But this exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.</p>
<p>(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.</p>	<p>(9) <i>Public Records of Vital Statistics.</i> A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.</p>

<p>(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.</p>	<p>(10) <i>Absence of a Public Record.</i> Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that:</p> <ul style="list-style-type: none"> (A) the record does not exist; or (B) a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.
<p>(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.</p>	<p>(11) <i>Records of Religious Organizations Concerning Personal or Family History.</i> A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.</p>
<p>(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.</p>	<p>(12) <i>Certificates of Marriage, Baptism, and Similar Ceremonies.</i> A statement of fact contained in a certificate:</p> <ul style="list-style-type: none"> (A) made by a person who is authorized by a religious organization or by law to perform the act certified; (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and (C) purporting to have been issued at the time of the act or within a reasonable time after it.
<p>(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.</p>	<p>(13) <i>Family Records.</i> A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.</p>

<p>(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.</p>	<p>(14) <i>Records of Documents That Affect an Interest in Property.</i> The record of a document that purports to establish or affect an interest in property if:</p> <p>(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;</p> <p>(B) the record is kept in a public office; and</p> <p>(C) a statute authorizes recording documents of that kind in that office.</p>
<p>(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.</p>	<p>(15) <i>Statements in Documents That Affect an Interest in Property.</i> A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document’s purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.</p>
<p>(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.</p>	<p>(16) <i>Statements in Ancient Documents.</i> A statement in a document that is at least 20 years old and whose authenticity is established.</p>
<p>(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.</p>	<p>(17) <i>Market Reports and Similar Commercial Publications.</i> Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.</p>

<p>(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.</p>	<p>(18) <i>Statements in Learned Treatises, Periodicals, or Pamphlets.</i> A statement contained in a treatise, periodical, or pamphlet if:</p> <ul style="list-style-type: none"> (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. <p>If admitted, the statement may be read into evidence but not received as an exhibit.</p>
<p>(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.</p>	<p>(19) <i>Reputation Concerning Personal or Family History.</i> A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.</p>
<p>(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.</p>	<p>(20) <i>Reputation Concerning Boundaries or General History.</i> A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or about general historical events important to that community, state, or nation.</p>
<p>(21) Reputation as to character. Reputation of a person's character among associates or in the community.</p>	<p>(21) <i>Reputation Concerning Character.</i> A reputation among a person's associates or in the community concerning the person's character.</p>

<p>(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.</p>	<p>(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:</p> <ul style="list-style-type: none"> (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; (B) the judgment was for a crime punishable by death or by imprisonment for more than a year; (C) the evidence is admitted to prove any fact essential to the judgment; and (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. <p>The pendency of an appeal may be shown but does not affect admissibility.</p>
<p>(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.</p>	<p>(23) Judgments Involving Personal, Family, or General History or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:</p> <ul style="list-style-type: none"> (A) was essential to the judgment; and (B) could be proved by evidence of reputation.
<p>(24) [Other exceptions.] [Transferred to Rule 807]</p>	<p>(24) [Other exceptions.] [Transferred to Rule 807]</p>

Committee Note

The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 804. Hearsay Exceptions; Declarant Unavailable</p>	<p>Rule 804 — Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness</p>
<p>(a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant—</p> <p>(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or</p> <p>(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or</p> <p>(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or</p> <p>(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or</p> <p>(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.</p> <p>A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.</p>	<p>(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:</p> <p>(1) is exempted by a court ruling on the ground of having a privilege to not testify about the subject matter of the declarant’s statement;</p> <p>(2) refuses to testify about the subject matter despite a court order to do so;</p> <p>(3) testifies to not remembering the subject matter;</p> <p>(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or</p> <p>(5) is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure:</p> <p>(A) the declarant’s attendance; or</p> <p>(B) in the case of a hearsay exception under Rule 804(b)(2), (3), or (4) below, the declarant’s attendance or testimony.</p> <p>But this subdivision (a) does not apply if the statement’s proponent procured or wrongfully caused the declarant’s unavailability in order to prevent the declarant from attending or testifying.</p>

<p>(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:</p> <p>(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.</p>	<p>(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:</p> <p>(1) Former Testimony. Testimony that:</p> <p>(A) was given as a witness at a trial, hearing, or deposition, whether given during the current proceeding or a different one; and</p> <p>(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.</p>
<p>(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.</p>	<p>(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant’s death to be imminent, made about its cause or circumstances.</p>
<p>(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.</p>	<p>(3) Statement Against Interest. A statement that:</p> <p>(A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and</p> <p>(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.</p>

<p>(4) Statement of personal or family history. (A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared.</p>	<p>(4) <i>Statement of Personal or Family History.</i> A statement about:</p> <p>(A) the declarant’s own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or</p> <p>(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person’s family that the declarant’s information is likely to be accurate.</p>
<p>(5) [Other exceptions.] [Transferred to Rule 807]</p> <p>(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.</p>	<p>(5) <i>Statement Offered Against a Party Who Wrongfully Caused the Declarant’s Unavailability.</i> A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant to be unavailable in order to prevent the declarant from attending or testifying.</p> <p>[Other exceptions.] [Transferred to Rule 807]</p>

Committee Note

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The amendment to Rule 804(b)(3) provides that the corroborating circumstances requirement applies not only to declarations against penal interest offered by the defendant in a criminal case, but also to such statements offered by the government. The language in the original rule does not so provide, but a proposed amendment to Rule 804(b)(3) — released for public comment in 2008 and scheduled to be enacted before the restyled rules — explicitly extends the corroborating circumstances requirement to statements offered by the government.

<p>Rule 805. Hearsay Within Hearsay</p>	<p>Rule 805 — Hearsay Within Hearsay</p>
<p>Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.</p>	<p>Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.</p>

Committee Note

The language of Rule 805 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 806. Attacking and Supporting Credibility of Declarant	Rule 806 — Attacking and Supporting the Declarant’s Credibility
<p>When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant’s hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.</p>	<p>When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.</p>

Committee Note

The language of Rule 806 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 807. Residual Exception	Rule 807 — Residual Exception
<p>A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.</p>	<p>(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:</p> <ol style="list-style-type: none"> (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice. <p>(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.</p>

Committee Note

The language of Rule 807 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p style="text-align: center;">ARTICLE IX. AUTHENTICATION AND IDENTIFICATION</p> <p style="text-align: center;">Rule 901. Requirement of Authentication or Identification</p>	<p style="text-align: center;">ARTICLE IX. AUTHENTICATION AND IDENTIFICATION</p> <p style="text-align: center;">Rule 901 — Authenticating or Identifying Evidence</p>
<p>(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.</p>	<p>(a) In General. To authenticate or identify an item of evidence in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.</p>
<p>(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:</p>	<p>(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:</p>
<p>(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.</p>	<p>(1) <i>Testimony of a Witness with Knowledge.</i> Testimony that an item is what it is claimed to be.</p>
<p>(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.</p>	<p>(2) <i>Nonexpert Opinion About Handwriting.</i> A nonexpert’s opinion that the handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.</p>
<p>(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.</p>	<p>(3) <i>Comparison by an Expert Witness or the Trier of Fact.</i> A comparison with an authenticated specimen by an expert witness or the trier of fact.</p>
<p>(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.</p>	<p>(4) <i>Distinctive Characteristics and the Like.</i> The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.</p>
<p>(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.</p>	<p>(5) <i>Opinion About a Voice.</i> An opinion identifying a person’s voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.</p>

<p>(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.</p>	<p>(6) Evidence About a Phone Conversation. For a phone conversation, evidence that a call was made to the number assigned at the time to:</p> <p>(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or</p> <p>(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the phone.</p>
<p>(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.</p>	<p>(7) Evidence About Public Records. Evidence that:</p> <p>(A) a record is from the public office where items of this kind are kept; or</p> <p>(B) a document was lawfully recorded or filed in a public office.</p>
<p>(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.</p>	<p>(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:</p> <p>(A) is in a condition that creates no suspicion about its authenticity;</p> <p>(B) was in a place where, if authentic, it would likely be; and</p> <p>(C) is at least 20 years old when offered.</p>
<p>(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.</p>	<p>(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.</p>
<p>(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.</p>	<p>(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.</p>

Committee Note

The language of Rule 901 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 902. Self-authentication</p>	<p>Rule 902 — Evidence That Is Self-Authenticating</p>
<p>Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:</p> <p>(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.</p>	<p>The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted.</p> <p>(1) <i>Domestic Public Documents That Are Signed and Sealed.</i> A document that bears:</p> <p>(A) a signature purporting to be an execution or attestation; and</p> <p>(B) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above.</p>
<p>(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.</p>	<p>(2) <i>Domestic Public Documents That Are Signed But Not Sealed.</i> A document that bears no seal if:</p> <p>(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(B); and</p> <p>(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.</p>

<p>(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.</p>	<p>(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:</p> <p>(A) order that it be treated as presumptively authentic without final certification; or</p> <p>(B) allow it to be evidenced by an attested summary with or without final certification.</p>
<p>(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.</p>	<p>(4) Certified Copies of Public Records. A copy of an official record — or a copy of a document that was lawfully recorded or filed in a public office — if the copy is certified as correct by:</p> <p>(A) the custodian or another person authorized to make the certification; or</p> <p>(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.</p>
<p>(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.</p>	<p>(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.</p>
<p>(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.</p>	<p>(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.</p>

<p>(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.</p>	<p>(7) <i>Trade Inscriptions and the Like.</i> An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.</p>
<p>(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.</p>	<p>(8) <i>Acknowledged Documents.</i> A document accompanied by a certificate of acknowledgment that is lawfully signed by a notary public or another officer who is authorized to take acknowledgements.</p>
<p>(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.</p>	<p>(9) <i>Commercial Paper and Related Documents.</i> Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.</p>
<p>(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.</p>	<p>(10) <i>Presumptions Under a Federal Statute.</i> A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.</p>
<p>(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—</p> <p style="padding-left: 40px;">(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;</p> <p style="padding-left: 40px;">(B) was kept in the course of the regularly conducted activity; and</p> <p style="padding-left: 40px;">(C) was made by the regularly conducted activity as a regular practice.</p> <p>A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.</p>	<p>(11) <i>Certified Domestic Records of a Regularly Conducted Activity.</i> The original or a copy of a domestic record that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.</p>

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The language of Rule 902 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 903. Subscribing Witness' Testimony Unnecessary</p>	<p>Rule 903 — Subscribing Witness's Testimony</p>
<p>The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.</p>	<p>A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.</p>

Committee Note

The language of Rule 903 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p style="text-align: center;">ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS</p> <p style="text-align: center;">Rule 1001. Definitions</p>	<p style="text-align: center;">ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS</p> <p style="text-align: center;">Rule 1001 — Definitions That Apply to This Article</p>
<p>For purposes of this article the following definitions are applicable:</p> <p>(1) Writings and recordings. “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.</p> <p>(2) Photographs. “Photographs” include still photographs, X-ray films, video tapes, and motion pictures.</p> <p>(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”.</p> <p>(4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.</p>	<p>In this article, the following definitions apply:</p> <p>(a) Writing. A “writing” consists of letters, words, numbers, or their equivalent set down in any form.</p> <p>(b) Recording. A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.</p> <p>(c) Photograph. “Photograph” means a photographic image or its equivalent stored in any form.</p> <p>(d) Original. An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.</p> <p>(e) Duplicate. “Duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.</p>

Committee Note

The language of Rule 1001 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 1002. Requirement of Original</p>	<p>Rule 1002 — Requirement of the Original</p>
<p>To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.</p>	<p>An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.</p>

Committee Note

The language of Rule 1002 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1003. Admissibility of Duplicates	Rule 1003 — Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.	A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Committee Note

The language of Rule 1003 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1004. Admissibility of Other Evidence of Contents	Rule 1004 — Admissibility of Other Evidence of Content
<p>The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—</p> <p>(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or</p> <p>(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or</p> <p>(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or</p> <p>(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.</p>	<p>An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:</p> <p>(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;</p> <p>(b) an original cannot be obtained by any available judicial process;</p> <p>(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or</p> <p>(d) the writing, recording, or photograph is not closely related to a controlling issue.</p>

Committee Note

The language of Rule 1004 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1005. Public Records	Rule 1005 — Copies of Public Records to Prove Content
<p>The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.</p>	<p>The proponent may use a copy to prove the content of an official record — or of a document that was lawfully recorded or filed in a public office — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.</p>

Committee Note

The language of Rule 1005 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p>Rule 1006. Summaries</p>	<p>Rule 1006 — Summaries to Prove Content</p>
<p>The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.</p>	<p>The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.</p>

Committee Note

The language of Rule 1006 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p align="center">Rule 1007. Testimony or Written Admission of Party</p>	<p align="center">Rule 1007 — Testimony or Admission of a Party to Prove Content</p>
<p>Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.</p>	<p>The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written admission of the party against whom the evidence is offered. The proponent need not account for the original.</p>

Committee Note

The language of Rule 1007 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1008. Functions of Court and Jury	Rule 1008 — Functions of the Court and Jury
<p>When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.</p>	<p>Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:</p> <ul style="list-style-type: none"> (a) an asserted writing, recording, or photograph ever existed; (b) another one produced at the trial or hearing is the original; or (c) other evidence of content accurately reflects the content.

Committee Note

The language of Rule 1008 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

<p style="text-align: center;">XI. MISCELLANEOUS RULES</p> <p style="text-align: center;">Rule 1101. Applicability of Rules</p>	<p style="text-align: center;">XI. MISCELLANEOUS RULES</p> <p style="text-align: center;">Rule 1101 — Applicability of the Rules</p>
<p>(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, 1 and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include United States bankruptcy judges and United States magistrate judges.</p>	<p>(a) To Courts and Judges. These rules apply to proceedings before:</p> <ul style="list-style-type: none"> • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.
<p>(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.</p>	<p>(b) To Proceedings. These rules apply in:</p> <ul style="list-style-type: none"> • civil cases and proceedings, including admiralty and maritime cases; • criminal cases and proceedings; • contempt proceedings, except those in which the court may act summarily; and • cases and proceedings under 11 U.S.C.
<p>(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.</p>	<p>(c) Rules on Privilege. The rules on privilege apply to all stages of a case or proceeding.</p>
<p>(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:</p> <p>(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.</p> <p>(2) Grand jury. Proceedings before grand juries.</p> <p>(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.</p>	<p>(d) Exceptions. These rules — except for those on privilege — do not apply to the following:</p> <p>(1) the court’s determination, under Rule 104(a), on a preliminary question of fact governing admissibility;</p> <p>(2) grand-jury proceedings; and</p> <p>(3) miscellaneous proceedings such as:</p> <ul style="list-style-type: none"> • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise.

<p>(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled “An Act to authorize association of producers of agricultural products” approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled “An Act authorizing associations of producers of aquatic products” approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled “An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes”, approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); 2 actions against the United States under the Act entitled “An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes”, approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.</p>	<p>(e) Other Statutes and Rules. A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.</p>
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Committee Note

The language of Rule 1101 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1102. Amendments	Rule 1102 — Amendments
Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.	These rules may be amended as provided in 28 U.S.C. § 2072.

Committee Note

The language of Rule 1102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 1103. Title	Rule 1103 — Title
These rules may be known and cited as the Federal Rules of Evidence.	These rules may be cited as the Federal Rules of Evidence.

Committee Note

The language of Rule 1103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

TAB 8C

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF EVIDENCE***

Rule 804. Hearsay Exceptions; Declarant Unavailable

1

* * * * *

2

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

3

4

5

* * * * *

6

(3) Statement against interest. A statement ~~which~~ that:

7

8

(A) a reasonable person in the declarant's

9

position would have made only if the

10

person believed it to be true because,

11

when made, it was so contrary to the

12

declarant's proprietary or pecuniary

13

interest or had so great a tendency to

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

14 invalidate the declarant's claim against
15 someone else or to expose the declarant
16 to civil or criminal liability ~~was at the~~
17 ~~time of its making so far contrary to the~~
18 ~~declarant's pecuniary or proprietary~~
19 ~~interest, or so far tended to subject the~~
20 ~~declarant to civil or criminal liability, or~~
21 ~~to render invalid a claim by the~~
22 ~~declarant against another, that a~~
23 ~~reasonable person in the declarant's~~
24 ~~position would not have made the~~
25 ~~statement unless believing it to be true.~~
26 ; and

27 **(B)** ~~A statement tending to expose the~~
28 ~~declarant to criminal liability and~~
29 ~~offered to exculpate the accused is not~~
30 ~~admissible unless is supported by~~

31 corroborating circumstances that clearly
32 indicate ~~the~~ its trustworthiness ~~of the~~
33 statement, if it is offered in a criminal
34 case as one that tends to expose the
35 declarant to criminal liability.

36 * * * * *

Committee Note

Subdivision (b)(3). Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (“by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)”); *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause, because the requirements of this exception assure that declarations admissible under it will not be testimonial.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The rule, as submitted for public comment, was restyled in accordance with the style conventions of the Style Subcommittee of the Committee on Rules of Practice and Procedure. As restyled, the proposed amendment addresses the style suggestions made in public comments.

The proposed Committee Note was amended to add a short discussion on applying the corroborating circumstances requirement.

SUMMARY OF PUBLIC COMMENTS

David F. Binder, Esq. (08-EV-001) favors the amendment as it will make the rule consistent with much of the case law, which has extended the corroborating circumstances requirement to declarations against interest offered by the prosecution. He suggests that the amendment clarify that the corroborating circumstances requirement applies only to hearsay offered as a declaration against penal interest under Rule 804(b)(3), and is not intended to affect admissibility under other hearsay exceptions. This suggestion was implemented in the rule as restyled after public comment.

The Federal Magistrate Judges Association (08-EV-003) is in agreement with the general principle that the prosecution, as well as the accused, must show corroborating circumstances clearly indicating trustworthiness before a declaration against penal interest may be admitted. But the Association suggests that the reference in the amended rule to “criminal case” should be changed to “criminal case or proceeding” in order to make the rule more consistent with other Evidence Rules and with the Federal Rules of Criminal Procedure. This suggestion is being implemented in the project to restyle all of the Evidence Rules — under which “criminal case” is defined as including a “criminal proceeding.”

Professor David P. Leonard (08-EV-004) favors the amendment because it is “sensible and fair to level the playing field by imposing the same restrictions on the prosecution as are imposed on the accused.” He suggests that the amendment clarify that the corroborating circumstances requirement applies only to hearsay offered as a declaration against penal interest under Rule 804(b)(3), and is not intended to affect admissibility under other hearsay exceptions. This suggestion was implemented in the rule as restyled after public comment.

The National Association of Criminal Defense Lawyers (08-EV-005) approves the extension of the corroborating circumstances requirement to declarations against penal interest offered by the prosecution. The Association recommends, however, that the corroborating circumstances requirement be deleted insofar as it applies to statements offered by the accused.

Professor Richard Friedman (08-EV-006) advocates the elimination of the corroborating circumstances requirement as applied to hearsay statements offered by an accused. Professor Friedman also suggests that the proposed amendment be changed to add language that would reject the Supreme Court's analysis in *Williamson v. United States*, 512 U.S. 594 (1994), by providing that a non-adverse statement that is part of a broader inculpatory statement would be admissible if "it appears likely that the declarant would make the statement in question only if believing it to be true." Finally, Professor Friedman suggests that the text of the Rule include language providing that the credibility of the in-court witness is irrelevant to the reliability of the hearsay statement — and that if such a statement is not included in the text, it should at least be included in the Committee Note. The Committee added a paragraph to the Committee Note in response to Professor Friedman's suggestion.

What follows is the proposed amendment in “clean” form:

(3) Statement against interest. A statement that:

(A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

TAB 8D

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 23-24, 2009

Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on May 23rd and 24th in Washington, D.C..

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangle, Esq.
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure (“Standing Committee”)
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee’s Style Subcommittee
Hon. James A. Teilborg, Chair of the Standing Committee’s Style Subcommittee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Hon. Judith H. Wiznur, Liaison from the Bankruptcy Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Standing Committee’s Style Subcommittee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Thomas E. Willging, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

Professor Stephen A. Saltzburg, Representative of the ABA Section on Criminal Justice
Alan Rudlin, Esq., Representative of the ABA Section of Litigation

Opening Business

Judge Hinkle welcomed the members and other participants to the meeting.

The Committee approved the minutes of the Spring 2008 meeting.

Judge Hinkle reported on developments since the last meeting. At its January 2009 meeting, the Standing Committee approved for publication the proposed amendment to the proposed restyled Rules 501-706. He noted that the Standing Committee amended the proposed Rules 501 and 601 from the restyled version approved by the Advisory Committee. The Standing Committee determined that the restyled language in both rules may have made a change in the substantive law on the applicability of state laws of privilege in cases where both federal and state claims are brought. Most federal courts have applied federal law to both state and federal claims in this situation, and the Standing Committee determined that the rules as restyled by the Evidence Rules Committee could be read to require that state law would govern both claims.

Judge Hinkle also reported that two members of the Standing Committee dissented from the vote to approve Rules 501-706 for public comment. Those members expressed concern with some of the style conventions, but were not opposed in principle to the restyling project.

Finally, Judge Hinkle informed the Committee that the Standing Committee has established a Subcommittee on Privacy, chaired by Judge Reena Raggi. The Privacy Subcommittee will investigate problems and developments arising since the enactment of the e-government rules, which require redaction of certain information from court filings. Each Advisory Committee has designated one member to serve on the Subcommittee. Judge Hinkle is the representative from the Evidence Rules Committee. Professor Capra has been appointed Reporter to the Privacy Subcommittee.

I. Restyling Project

A. Introduction

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. At the Spring 2008 meeting the Committee approved the restyled Rules 101-415; the Standing Committee authorized those rules to be released for public comment, but publication will be delayed until all the Evidence Rules are restyled. The Committee approved Restyled Rules 501-706 at its Fall 2008 meeting, and as discussed above, the Standing Committee approved release for publication, with a minor amendment to two Rules.

At the Spring 2009 meeting the Committee reviewed a draft of restyled Rules 801-1103. The draft had been prepared in the following steps: 1) Professor Kimble prepared a first draft, which was reviewed by the Reporter; 2) Professor Kimble made some changes in response to the Reporter's comment; 3) the revised draft was reviewed by the Evidence Rules Committee, and Professor Kimble made some further revisions in light of Committee comments; 4) the Style Subcommittee reviewed the draft and implemented changes, resolving most of the open questions left in the draft. The Advisory Committee reviewed the Style Subcommittee's approved version at the Spring 2009 meeting.

At the meeting, the Committee reviewed each rule to determine whether any change was one of substance rather than style (with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase"). Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change should not be implemented. The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be considered by the Style Subcommittee of the Standing Committee.

After considering possible changes of both substance and style, the Committee unanimously voted to refer the Restyled Rules 801-1103 to the Standing Committee, with the recommendation that they be released for public comment.

In order to assure consistency throughout the Restyled Rules, Professor Kimble made a number of suggested changes to Rules 101-706, which had previously been approved for public comment. The Committee reviewed these changes and, as discussed below, most were approved, some were rejected and some were modified. **The Committee then voted unanimously to refer the entire package of Restyled Rules to the Standing Committee with the recommendation that they be approved for release for public comment in August, 2009.**

What follows is a description of the Committee's determinations, rule by rule. **It should be noted that a number of the rules required no discussion because any drafting questions in those rules had already been resolved in the extensive vetting process described above.**

The Committee also noted that it might be necessary to make minor changes to the Rules as approved by the Committee, in order to assure internal consistency, correct typographical errors and the like. The Committee gave the Chair, the Reporter and the Style Consultant the authority to make these minor changes.

B. Rules 801-1103

Many of these Rules are essentially a independent rules placed under one rule number. Accordingly, the Committee reviewed some of these rules subdivision by subdivision, and others as a single rule. These minutes reflect that delineation.

Rule 801(a)-(c)

Rule 801(a)-(c) currently provides as follows:

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The restyled version of Rule 801(a)-(c), reviewed by the Committee at the meeting, provides as follows:

(a) Statement. "Statement" means:

- (1) a person's oral or written assertion; or
- (2) a person's nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a prior statement — one not made by someone while testifying at the current trial or hearing — that a party offers in evidence to prove the truth of the matter asserted by the declarant.

Committee Discussion:

1. Committee members observed that the reference to “one not made by someone” was vague. Because the rule already defines the one who makes the statement as the “declarant,” it would be more precise to refer explicitly to the declarant as opposed to “someone.”

2. Professor Kimble and the Style Subcommittee agreed with the change from “one not made by someone” to “the declarant.”

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 801(a)-(c) be released for public comment, with the substitution of “the declarant” for “one not made by someone.”

Rule 801(d)(1)

Rule 801(d)(1) currently provides as follows:

(d) Statements which are not hearsay. A statement is not hearsay if-

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

The restyled version of Rule 801(d)(1), reviewed by the Committee at the meeting, provides as follows:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Witness's Prior Statement. The declarant testifies and is subject to cross-examination about the statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant’s testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from an improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

Committee Discussion:

1. Professor Kimble proposed two minor changes to the rule as approved by the Style Subcommittee — both intended to clarify that the hearsay statement offered is that of the witness: first, changing the heading to “A *Declarant-Witness’s* Prior Statement”; second, to refer to “cross-examination about the *prior* statement.” The Committee agreed with both clarifications.

2. Judge Hinkle observed that the restyled provision on prior consistent statements made a substantive change because the requirement of recency is made to apply only to fabrication and not to improper influence or motive. The substantive law requires that the “recency” requirement applies to both kinds of attacks on the witness. **The Committee unanimously agreed that the restyled version made a substantive change to Rule 801(d)(1)(B). The Committee unanimously adopted the following change:**

is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a *recent*, improper influence or motive in so testifying

3. The Style Subcommittee agreed with the change.

Committee Vote

The Committee unanimously approved the restyled version of Rule 801(d)(1), as modified by the stylistic changes proposed by Professor Kimble, and with the addition of the term *recent* before “improper influence or motive.”

Rule 801(d)(2) — Title

The restyling changed the title of Rule 801(d)(2) from “Admission by Party-Opponent” to “An Opposing Party’s Statement.” Some Committee members argued that a change from the term “admissions” would be jarring to lawyers and courts, as that term has been used to describe hearsay statements made by a party, and offered against that party, for more than 30 years. But other members of the Committee found the change to be very useful. They noted that many lawyers are confused by the term “admissions” — thinking that such statements must “admit” something to qualify the statement; and others confuse admissions with declarations against interest.

After discussion, the Committee unanimously approved the restyled heading to Rule 801(d)(2). It also unanimously approved a Committee Note to the change, describing the motivation for the change and stating that there is no intent to change substantive law. (See discussion on Committee Notes later in these Minutes).

Rule 801(d)(2)(A)

Rule 801(d)(2)(A) currently provides as follows:

The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or

The restyled version of Rule 801(d)(2)(A), reviewed by the Committee at the meeting, provides as follows:

The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

Committee Vote:

The Committee unanimously approved the restyled version of Rule 801(d)(2)(A).

Rule 801(d)(2)(B)

Rule 801(d)(2)(B) currently provides as follows:

(B) a statement of which the party has manifested an adoption or belief in its truth, or

The restyled version of Rule 801(d)(2)(B), reviewed by the Committee at the meeting, provides as follows:

(B) is one that the party adopted or the party accepted as true;

Committee Discussion:

1. Members expressed a concern about the change from “manifested an adoption or belief” to “that the party adopted or the party accepted as true.” Members believed that the change was substantive because deleting the word “manifested” could persuade a court that adoption should be found more easily than previously. One member noted that in a criminal case, admitting an accusation because it was adopted raised confrontation questions. Consequently, any change that could be interpreted to find adoptions more easily was extremely problematic. **The Committee voted unanimously that the proposed change would effectuate a substantive change.**

2. Professor Kimble prepared several alternatives for restyling Rule 801(d)(2)(B) in a different way. He noted that the word “manifested” was awkward and that any attempt to include it would result in a poorly styled rule. After discussion, the Committee agreed on the following language for Rule 801(d)(2)(B):

“is one that the party appeared to adopt or to accept as true;”

Committee Vote

The Committee voted unanimously to approve an amendment to Rule 801(2)(B), stating that the hearsay exemption applies to a statement “that the party appeared to adopt or to accept as true.”

Rules 801(d)(2)(C) and (D)

Rules 801(d)(2)(C) and (D) currently provide as follows:

or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

The restyled version of Rules 801(d)(2)(C) and (D), reviewed by the Committee at the meeting, provide as follows:

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

Committee Vote:

The Committee voted unanimously to approve Rules 801(d)(2)(C) and (D) as restyled.

Rule 801(d)(2)(E)

Rule 801(d)(2)(E) currently provides as follows:

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The restyled version of Rules 801(d)(2)(C) and (D), reviewed by the Committee at the meeting, provide as follows:

(E) was made by the party's co-conspirator during the conspiracy and to further it.

Committee Discussion:

1. Some Committee members thought the phrase “during the course and in furtherance of the conspiracy” was a so-called “sacred phrase” that cannot be restyled. It was observed that the language was taken from the substantive law of conspiracy, which Rule 801(d)(2)(E) was designed to track. Others disagreed.

2. After substantial discussion, the Committee determined that changing “during the course of” to “during” could never result in a difference in result in applying the coconspirator exception.

3. In contrast, Committee members concluded that substituting “to further it” for “in furtherance of” could be interpreted as a substantive change. The “in furtherance of” requirement, as applied in the cases, is relatively mild. The more assertive phrase “to further it” could be interpreted to require more in the way of intent and action than is the case under the current law.

Committee Vote:

A motion was made to retain “during the course and in furtherance of the conspiracy” as a substantively required phrase. That vote failed by a vote of 6 to 3.

Thereafter, the Committee unanimously agreed that the change of the “in furtherance of” language was substantive. It unanimously approved the following language for Rule 801(d)(2)(E):

“was made by the party's co-conspirator during and in furtherance of the conspiracy.”

Rule 801(d)(2), last sentence

The last sentence Rule 801(d)(2) currently provides as follows:

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

The restyled version of the last sentence of Rule 801(d)(2) is set out as an independent paragraph, and provides as follows:

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Committee Vote:

The Committee voted unanimously to approve the restyled version of the last sentence of Rule 801(d)(2)(E).

Rule 802

Rule 802 currently provides as follows:

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

The restyled version of Rule 802, reviewed by the Committee at the meeting, provides as follows:

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Committee Discussion:

Professor Kimble and the Reporter noted that the reference to Supreme Court rules as being under “statutory authority” had been eliminated from the Rule, but not as a substantive change. Rather, the new definitions section would define Supreme Court rules as those being prescribed under statutory authority. The definitions section was considered later at the meeting. (See below).

Committee Vote:

The Committee unanimously approved the restyled version of Rule 802.

Rule 803, Structure

The Style Subcommittee and Professor Kimble proposed to restructure Rule 803 so that the hearsay exceptions would be set forth under a new subdivision (a), and a new subdivision (b) would define “record” for purposes of some Rule 803 exceptions as including a memorandum, report or data compilation in any form. The rationale for the restructuring is that the existing Rule follows a number (803) with another number — whereas the proper structure is to follow a number with a letter, with a number, and so forth. Professor Kimble also argued that the new subdivision (b) would streamline the records-based exceptions under Rule 803, by eliminating the need to repeat “memorandum, data compilation” etc. in all those rules.

Committee members were generally opposed to restructuring Rule 803 because it would disrupt electronic searches and impose transaction costs that far outweighed any benefit. Members argued that it made little sense to define “record” only in Rule 803 when the word “record” appears throughout the Evidence Rules. **Indeed it would be a substantive change to define “record” in Rule 803 differently from any other rule.** The Committee determined that it would make much more sense to define “record” in the general definitions section (see below), and retain the existing, albeit idiosyncratic, structure of Rule 803.

Committee Vote

The Committee voted unanimously to retain the existing structure of Rule 803, and to move the proposed definition of “record” to the general definitions section in the proposed restyling. The Style Subcommittee agreed with and implemented this suggestion.

Rule 803(1)

Rule 803(1) currently provides as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

The restyled version of Rule 803(1), reviewed by the Committee at the meeting, provides as follows:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(1).

Rule 803(2)

Rule 803(2) currently provides as follows:

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The restyled version of Rule 803(2), reviewed by the Committee at the meeting, provides as follows:

(2) **Excited Utterance.** A statement related to a startling event or condition, made while the declarant was under the stress or excitement that it caused.

Committee Discussion:

Committee members believed that the change from “relating to” to “related to” could substantively alter the scope of the exception. The term “relating to” has been construed to cover statements that are not necessarily “related” in terms of subject matter, but rather are part of the same transaction as the startling event.

Committee Vote:

The Committee voted unanimously that the change from “relating to” to “related to” was substantive. The Style Committee agreed to restore the term “relating to.” As so modified, the Committee voted unanimously to approve the restyled Rule 803(2).

Rule 803(3)

Rule 803(3) currently provides as follows:

(3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

The restyled version of Rule 803(3), reviewed by the Committee at the meeting, provides as follows:

(3) **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.

Committee Vote:

The Committee voted unanimously to approve the restyled Rule 803(3).

Rule 803(4)

Rule 803(4) currently provides as follows:

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The restyled version of Rule 803(4), reviewed by the Committee at the meeting, provides as follows:

- (4) Statement Made for Medical Diagnosis or Treatment. A statement that:
- (A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and
 - (B) describes medical history; past or present symptoms or sensations; or the inception or general character of their cause.

Committee Discussion:

Two Committee members objected to the deletion of the word “pain” from the rule. They contended that most of the cases under this exception involve statements about the declarant’s pain, and that “pain” is an evocative word to describe the kinds of statements covered by the exception. But other members argued that the word “pain” is unnecessary because it is covered by the words “symptoms” and “sensations.” The Reporter noted that Professor Broun had surveyed the case law and found no indication that deletion of the word “pain” would lead to any substantive change.

Committee Vote:

The Committee voted 7 to 2 to approve the restyled version of Rule 803(4).

Rule 803(5)

Rule 803(5) currently provides as follows:

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The restyled version of Rule 803(5), reviewed by the Committee at the meeting, provides as follows:

- (5) **Recorded Recollection.** A record that:
- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Committee Vote:

The Committee voted unanimously to approve the restyled Rule 803(5).

Rule 803(6)

Rule 803(6) currently provides as follows:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies

with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The restyled version of Rule 803(6), reviewed by the Committee at the meeting, provides as follows:

- (6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
- (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
 - (B) the record was kept in the course of a regularly conducted business activity;
 - (C) making the record was a regular practice of that business activity;
 - (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification; and
 - (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

“Business” in this paragraph (6) includes any kind of organization, occupation, or calling, whether or not conducted for profit.

Committee Discussion:

1. The Reporter noted that the proposed restyling provided a helpful clarification that if the basic admissibility requirements of regularly conducted activity, regularly recorded are met, then it is the opponent that has the burden of showing that the record is untrustworthy despite fitting those requirements. Unfortunately, a recent case stated in passing that it is the proponent who has the burden of showing, essentially, lack of untrustworthiness. **Accordingly, under the style protocol, any explicit allocation of the burden of proof on the untrustworthiness factor would be a substantive change because it would change the case law in at least one circuit.** Professor Kimble suggested that the untrustworthiness clause be altered to provide that Rule 803(6) “does not apply” if the source of information, etc., indicate a lack of trustworthiness. The Committee agreed with this solution. The question then was where to put the language. The problem was that it does not fit in the list of admissibility requirements, and so cannot really be placed as its own subdivision. Various solutions were discussed. Eventually the Committee decided that the best place to put the trustworthiness clause was as a dangling sentence at the end of the rule. (See below).

2. Professor Kimble proposed a change in which the last sentence of the restyled Rule 803(6)— the definition of “business” — would be moved up in the rule. The goal of this move would be to eliminate a dangling sentence at the end of the rule — and this would seem especially required because the trustworthiness clause had to be moved from being an admissibility requirement, essentially to retain the lack of clarity over which party had the burden of proof on that point. The problem with the move of the “business” definition is that it could not be placed as a freestanding admissibility requirement, because it is simply a definition. Some Committee members argued that the move raised the risk of an inadvertent change in the meaning and application of the rule — a cost that outweighed any benefit of eliminating a dangling sentence. But other members thought that the definition could be moved in a way that would make the rule more compact and understandable.

Committee Vote:

The Committee voted 6 to 3 in favor of adopting the following restyled version of Rule 803(6) (with the three dissenters objecting to moving the definition of “business” into the body of the rule):

- (6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
- (A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;
 - (B)** the record was kept in the course of a regularly conducted business activity, including the regular activity of any kind of organization, occupation, or calling, whether or not for profit;
 - (C)** making the record was a regular practice of that activity; and
 - (D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification.

But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Rule 803(7)

Rule 803(7) currently provides as follows:

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

The restyled version of Rule 803(7), reviewed by the Committee at the meeting, provides as follows:

- (7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6), if:
- (A) the evidence is offered to prove that the matter did not occur or exist;
 - (B) a record was regularly kept for a matter of that kind; and
 - (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

Committee Discussion:

1. Committee members observed that the trustworthiness clause of Rule 803(7) needed to be consistent with the same clause that was changed in 803(6). That is, it could not explicitly allocate the burden of proof of showing untrustworthiness, because courts have not been clear in allocating that burden. Consequently, the Committee determined that the clause would have to be placed as a dangling sentence at the end of the rule.

2. Committee members observed that the language “the evidence is offered to prove” is problematic because admissibility is not determined by an offer. It is determined by whether the judge finds that the admissibility requirements are met. **Thus the use of the word “offered” is substantively inaccurate.** The Committee agreed that the word should be changed to “admitted” to reflect the judge’s decision on admissibility.

Committee Vote:

The Committee unanimously approved the following version of Rule 803(7):

(7) Absence a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

- (A)** the evidence is admitted to prove that the matter did not occur or exist; and
- (B)** a record was regularly kept for a matter of that kind.

But this exception does not apply if the possible source of the information or other circumstances indicate a lack of trustworthiness.

The Style Subcommittee approved the version adopted by the Committee.

Rule 803(8)

Rule 803(8) currently provides as follows:

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The restyled version of Rule 803(8), reviewed by the Committee at the meeting, provides as follows:

- (8) Public Records.** A record of a public office or agency setting out:
 - (A) the office's or agency's activities;
 - (B) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by someone officially engaged in law-enforcement; or
 - (C) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

But the record is not admissible if the opponent shows that the source of information or other circumstances indicate a lack of trustworthiness.

Committee Discussion:

1. As with Rule 803(6) and 803(7), the Committee determined that the explicit allocation of the burden as to untrustworthiness had to be changed, because the case law is not clear on that allocation.

2. Members expressed concern about changing “police officers and other law enforcement personnel” in subdivision (B) to “someone officially engaged in law enforcement.” **The change could result in a substantive limitation on the existing exclusion.** For example, a report of an undercover informant or cooperating witness would undoubtedly be excluded under the existing rule, but it might not be excluded under the restyled rule because such a person might not be considered as a person “officially engaged in law-enforcement.” The Committee decided that it was necessary to retain the reference to “law enforcement personnel” — though it was not necessary to retain the reference to police officers, because they are stated in the rule as a subset of law enforcement personnel and so the reference is superfluous.

Committee Vote:

The Committee voted unanimously to approve the following version of Rule 803(8) — amended from the restyled draft in order to avoid any substantive change to the Rule:

- (8) Public Records.** A record of a public office setting out:
- (A)** the office’s or agency’s activities;
 - (B)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
 - (C)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

But this exception does not apply if the source of information or other circumstances indicate a lack of trustworthiness.

The Style Committee also approved this version of the rule.

Rule 803(9)

Rule 803(9) currently provides as follows:

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

The restyled version of Rule 803(9), reviewed by the Committee at the meeting, provides as follows:

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office or agency in accordance with a legal duty.

Committee Discussion:

1. Committee members noted that the term “data compilations in any form” had been deleted, but also noted that the term “record” will be defined — in the general rule on definitions — as including data compilations in any form. So the deletion is not a substantive change.

2. Professor Kimble noted that the reference to “public office or agency” was one that arose throughout the rules. The proposed definitions section would define “public office” as including “agency.” Accordingly, the Committee agreed that the words “or agency” should be deleted from the restyled rule.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(9), with the modification that the words “or agency” will be deleted.

Rule 803(10)

Rule 803(10) currently provides as follows:

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

The restyled version of Rule 803(10), reviewed by the Committee at the meeting, provides as follows:

(10) Absence of a Public Record or an Entry in a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record, or an entry in one, if the testimony or certification is offered to prove that:

(A) the record or entry does not exist; or

(B) a matter did not occur or exist, even though a public office or agency regularly kept a record for a matter of that kind.

Committee Discussion:

1. Professor Kimble suggested that all the references to “an entry” in a public record could be deleted. The Reporter researched the matter and determined that there was no distinction between the absence of “an entry” in a public record and an absence of a public record. Put another way, the absence of an entry is itself the absence of a public record. The Committee unanimously agreed that deleting references to “an entry” would not constitute a substantive change.

2. The Committee agreed to delete the words “or agency” as the rule on definitions will define public office as including agencies.

3. The Committee agreed to change all references to “offered to prove” throughout Rule 803 to “admitted to prove.” For reasons discussed previously, admissibility requirements under the hearsay exceptions are for the judge and are not dependent on the party’s offer.

Committee Vote:

The Committee voted unanimously to approve the following version of Rule 803(10):

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record if the testimony or certification is admitted to prove that:

(A) the record does not exist; or

(B) a matter did not occur or exist, even though a public office regularly kept a record for a matter of that kind.

Rules 803(11), (12), (13) and (14)

Rules 803(11), (12), (13) and (14) currently provide as follows:

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

The restyled version of Rules 803(11)-(14), reviewed by the Committee at the meeting, provides as follows:

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is offered to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

Committee Vote:

The Committee unanimously approved the style changes to Rules 803(11)-(14).

Rule 803(15)

Rule 803(15) currently provides as follows:

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

The restyled version of Rule 803(15), reviewed by the Committee at the meeting, provides as follows:

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if:

- (A) the matter stated was relevant to the document’s purpose; and
- (B) the opponent does not show that later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

Committee Discussion:

The existing Rule 803(15) has an “unless” clause similar to that in Rules 803(6) and 803(8). As with those earlier clauses, the Style Subcommittee changed the clause to an affirmative admissibility requirement, with the burden of showing untrustworthiness on the opponent. This resulted in a substantive change because the case law does not uniformly impose that burden on the opponent. Because the restylings in Rules 803(6) and 803(8) had to be changed, it was important, for purposes of consistency, to make a similar change to Rule 803(15).

Committee Vote:

The Committee unanimously approved the following restyled version of Rule 803(15):

(15) Statements in Documents That Affect an Interest in Property. A statement in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document’s purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

The Style Subcommittee also approved this version of Rule 803(15).

Rule 803(16)

Rules 803(16) currently provides as follows:

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

Restyled Rule 803(16), as reviewed by the Committee at the meeting, provides as follows:

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.

Committee Discussion:

Judge Hinkle sought assurance that the restyling had provided consistent treatment of the term “document.” Professor Kimble and the Reporter responded that the term “document” was not included in the definitions section, and that the restyling had left the term “document” unchanged from the existing rules. Thus there was no danger of a substantive change with respect to the use of the term “document.”

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(16).

Rule 803(17)

Rule 803(17) currently provides as follows:

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

The restyled version of Rule 803(17), reviewed by the Committee at the meeting, provided as follows:

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations — published in any form — generally relied on by the public or by persons in particular occupations.

Committee Discussion:

Professor Kimble suggested that the reference to “published in any form” — which was intended to cover information in electronic form — should be deleted, because the new rule on definitions (discussed below) defines any written material as including electronically stored information. The Committee agreed with Professor Kimble’s suggestion.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 803(17), with the modification of deleting the phrase “published in any form.”

Rule 803(18)

Rule 803(18) currently provides as follows:

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Restyled Rule 803(18), reviewed by the Committee at the meeting, provided as follows:

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet — published in any form — if the publication is:

- (A) called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
- (B) established as a reliable authority by the expert’s admission or testimony, by another expert’s testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

Committee Discussion:

1. The Reporter noted that the restyled version made a substantive change by deleting the limitation in the original rule that the treatise is only admissible to the extent called to the attention of the witness. Under the proposed restyling, an entire treatise could be admissible if generally called to the attention of the expert. This is contrary to the existing rule which limits admissibility to those portions of the treatise called to the attention of the expert. **The Committee unanimously agreed that the deletion of the “to the extent” language resulted in a substantive change.** After extensive discussion, the Committee determined that the proposal could be fixed by limiting admissibility to the statements in the treatise that are called to the attention of the expert.

2. As with other rules, Professor Kimble noted that the provision on publication “in any form” should be deleted as the newly proposed rule on definitions provides that any written material includes electronically stored information.

Committee Vote:

The Committee voted unanimously to adopt the following version of Rule 803(18):

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

Rules 803(19)-(21)

Rules 803(19)-(22) currently provide as follows:

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

The restyled version of Rules 803(19)-(21), reviewed by the Committee at the meeting, provides as follows:

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or about general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rules 803(19)-(21).

Rule 803(22)

Rule 803(22) currently provides as follows:

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

The restyled version of Rule 803(22), as reviewed by the Committee at the meeting, provided as follows:

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction — even one on appeal — if:

- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the judgment was for a crime punishable by death or by imprisonment for more than a year;
- (C) the evidence is intended to prove any fact essential to the judgment; and
- (D) when offered by the government in a criminal prosecution for a purpose other than impeachment, the judgment was against the defendant.

The opponent may show that an appeal is pending.

Committee Discussion:

1. Professor Kimble and the Committee discussed ways in which the final (dangling) sentence might be moved up into the body of the rule. One problem with the restyled version was that it separated the admissibility of a conviction on appeal with the fact that the opponent can tell the jury that the conviction is on appeal. Efforts to combine both concepts in a single place — other than a dangling sentence — did not seem workable, because the rule is set out as a series of admissibility requirements, and the two substantive points about convictions on appeal are not intended to be admissibility requirements for every proffered conviction. Professor Kimble and the Committee eventually decided to return to the original rule, and to place the provisions about appeal in a single sentence at the end of the rule.

2. Professor Saltzburg noted that the admissibility requirement that “the evidence is intended to prove any fact essential to the judgment” constituted a substantive change. Some courts have held that under Rule 803(22) the judge must find, under Rule 104(a), that the conviction proves a fact essential to the judgment. The phrase “intended to prove” is not accurate in these courts, because the requirement would simply be met by the proffering party’s declaration that it is offering the conviction with the intent to prove a fact essential to the judgment. **The Committee unanimously agreed that the use of the term “intended to prove” was a substantive change.** After much discussion, the Committee unanimously decided to substitute the phrase “the evidence is admitted to prove any fact essential to the judgment” — thus recognizing that the trial judge may have a factfinding role in determining admissibility.

3. Committee members suggested a stylistic change from “government in a criminal prosecution” to “prosecutor in a criminal case.” Professor Kimble and the Style Committee agreed with that suggestion.

Committee Vote:

The Committee voted unanimously to approve the following restyled version of Rule 803(22):

- (22) Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:
- (A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
 - (B)** the judgment was for a crime punishable by death or by imprisonment for more than a year;
 - (C)** the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

Rule 803(23)

Rule 803(23) currently provides as follows:

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

The restyled version of Rule 803(23), reviewed by the Committee at the meeting, provides as follows:

(23) Judgments Involving Personal, Family, or General History or a Boundary. A judgment that is offered to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) was essential to the judgment; and
- (B) could be proved by evidence of reputation.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 803(23).

Rule 803(24)

In 1997 the original Rule 803(24) — providing a residual exception to the hearsay rule — was consolidated with the identically-worded Rule 804(b)(5) and transferred to Rule 807. In the official publication of the Federal Rules of Evidence, the following designation of Rule 803(24) is indicated:

(24) [Other exceptions.] [Transferred to Rule 807.]

Professor Kimble suggested that, as part of the restyling project, this designation should be deleted. He reasoned that the designation served no purpose and that if the Committee were ever to

decide to propose a new hearsay exception under Rule 803, it would have to encounter the problem of enumeration that arose with respect to Rule 804 when a new hearsay exception was promulgated in 1997.

But Committee members argued that it was useful to retain the existing designation for Rule 803(24). First, it would indicate some history about the development of the Evidence Rules for those who study the rules. Second, such designations are also found in the restyled Criminal and Civil Rules, and so it is important to be consistent with those earlier style projects. Finally, it is unlikely that any new hearsay exception would ever be developed under Rule 803, but if that event came to pass, the Committee could deal with any enumeration problem at that time. At this point, there is no “gap” in the enumeration of the Rule 803 exceptions, because Rule 803(24) is at the end.

The Committee voted unanimously to suggest to the Style Subcommittee that the existing designation of Rule 803(24) be retained. The Style Subcommittee and Professor Kimble agreed to adopt this suggestion.

Rule 804(a)

Rule 804(a) currently provides as follows:

(a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

The restyled version of Rule 804(a), as reviewed by the Committee at the meeting, provided as follows:

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted by a court ruling on the ground of having a privilege to not testify about the subject matter of the declarant's statement;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance; or
 - (B) in the case of a hearsay exception under Rule 804 (b)(2), (3), or (4) below, the declarant's attendance or testimony.

But this subdivision (a) does not apply if the statement's proponent wrongfully caused the declarant to be unavailable in order to prevent the declarant from attending or testifying.

Committee Discussion:

The restyling of the last sentence of the rule took out the reference to absence "due to the procurement or wrongdoing of the proponent." Committee members were concerned that the substituted language — "wrongfully caused" — did not accurately describe the situations in which a party, under existing law, is disentitled from introducing hearsay under Rule 804. For example, a number of courts have held that a party must engage in an affirmative act in order to be disentitled from introducing the hearsay — thus, the government is not barred from introducing hearsay when the ground of unavailability is the declaration of a privilege, and the government's only role is that it refused to immunize the witness. The refusal to act is not "procurement" within the existing rule, but it could be argued to be "wrongful causation" within the restyled version. Then on the other hand, under the existing rule a party might procure the unavailability of the declarant without acting wrongfully, and yet would be disentitled from proffering hearsay. That would not be the case under the restyled version, because it would not be "wrongful conduct."

After extensive discussion of all these concerns, the Committee unanimously concluded that the restyled version of the last sentence of Rule 804(a) would effectuate a substantive change. The Committee proposed as an alternative “procured or wrongfully caused.” The Style Subcommittee and Professor Kimble agreed with that proposal.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(a), with the modification of adding “procured or” before “wrongly caused” in the last sentence.

Rule 804(b)(1)

Rule 804(b)(1) currently provides as follows:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The restyled version of Rule 804(b)(1), as reviewed by the Committee at the meeting, provided as follows:

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party — or, in a civil case, a predecessor in interest — who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Committee Discussion

1. Some Committee members objected to using the term “the rule against hearsay” in the introduction to Rule 804(b) and in other rules, because it sounds like hearsay is always barred when that is not the case. Professor Kimble argued in response that the existing term — “the hearsay rule” — is not descriptive about what the rule does (unlike, for example, “the rule of lenity” or the “rule against perpetuities”). After discussion, the Committee observed that the objections of some of its members to the use of “the rule against hearsay” had already been considered by the Style Subcommittee. The Committee decided to let the matter rest.

2. The Reporter observed that the restyled version of (b)(1) was substantively inaccurate because, in a civil case, it provided for admissibility if the testimony is “now offered . . . against a predecessor in interest.” This is incorrect because the testimony is always offered against a party to the case. The predecessor in interest language is intended to cover situations in which a party in a *prior* case had a motive similar to that of the party in the existing case. **The Committee unanimously concluded that the restyled version was substantively inaccurate.** After discussion, the Committee determined that the error could be fixed by revising the restyled language to provide that the testimony:

is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive . . .

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(1), with the modification of changing “a predecessor in interest” to “whose predecessor in interest had.”

Rule 804(b)(2)

Rule 804(b)(2) currently provides as follows:

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

The restyled version of Rule 804(b)(2), reviewed by the Committee at the meeting, provides as follows:

(2) **Statement Under the Belief of Imminent Death.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Committee Discussion

The Committee noted that the existing rule seems to use the terms "imminent" and "impending" interchangeably. Under the style protocol it is important to provide consistent terminology, and thus the term "imminent" is used throughout. Professor Broun researched the cases and found no substantive difference between "imminent" and "impending." The Committee concluded that the restyled version did not make a substantive change to Rule 804(b)(2).

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(2).

Rule 804(b)(3)

Rule 804(b)(3) currently provides as follows:

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The restyled version of Rule 804(b)(3), reviewed by the Committee at the meeting, provides as follows:

(3) **Statement Against Interest.** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the

declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Committee Discussion:

The Reporter noted that the restyled version intentionally made a substantive change to the rule — it states that the government must provide corroborating circumstances indicating trustworthiness before a declaration against interest can be admitted against an accused. The current rule by its terms requires only the accused to provide corroborating circumstances indicating trustworthiness. But this substantive change is not being made in the context of the restyling project. Rather, it is being made on a separate track in a proposed amendment that has already been released for public comment, and would be scheduled for enactment a year ahead of the restyled rules. (See the discussion of the proposed substantive amendment to Rule 804(b)(3) below.) Under the circumstances, the Reporter concluded that the most efficient procedure would be to restyle the rule under the assumption that the substantive change would already have been made before the restyled rules are adopted. The Committee agreed with this procedure, deferring consideration of the substantive amendment until later in the meeting.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(3).

Rule 804(b)(4)

Rule 804(b)(4) currently provides as follows:

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

The restyled version of Rule 804(b)(4), as reviewed by the Committee at the meeting, provided as follows:

(4) **Statement of Personal or Family History.** A statement about:

(A) the declarant’s own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person’s family that the declarant’s information is probably accurate.

Committee Discussion:

The proposed restyling would change “likely to have accurate information” to the “information is probably accurate.” **Committee members expressed concern that the change from “likely” to “probably” would be a substantive change — it would raise the threshold of admissibility.** One Committee member contended that there was no substantive difference between “likely” and “probably.”

Committee Vote:

The Committee voted, with one dissent, to approve the restyled version, with the modification that “probably accurate” would be changed to “likely to be accurate.”

Rule 804(b)(5)

In 1997 the original Rule 804(b)(5) — providing a residual exception to the hearsay rule — was consolidated with the identically-worded Rule 803 and transferred to Rule 807. In the official publication of the Federal Rules of Evidence, the following designation of Rule 804(b)(5) is indicated:

(5) [Other exceptions.] [Transferred to Rule 807.]

As with Rule 803(24), Professor Kimble suggested that, as part of the restyling project, this designation should be deleted. The difference in the argument is that there is another hearsay

exception coming after Rule 804(b)(5), thus creating a gap in enumeration that, in Professor Kimble’s view, should be remedied.

But many Committee members argued that the existence of the hearsay exception in Rule 804(b)(6) was all the more reason to keep Rule 804(b)(5) as a placeholder. Changing what is now Rule 804(b)(6) to Rule 804(b)(5) would be very disruptive to searches. A person searching under Rule 804(b)(5) for cases on forfeiture would also collect all the pre-1997 cases on residual hearsay.

After substantial discussion, the Committee recognized that the retention of Rule 804(b)(5) as a placeholder presented a question of style and not substance. It voted 7 to 2 to recommend to the Style Subcommittee that the existing enumeration of Rule 804(b) be retained. The Style Subcommittee agreed to retain the existing enumeration. Therefore, there is no proposal to change the designation of Rule 804(b)(5) in the official version of the Federal Rules of Evidence.

Rule 804(b)(6)

Rule 804(b)(6) currently provides as follows:

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

The restyled version of Rule 804(b)(6), reviewed by the Committee at the meeting, provides as follows:

(6) Statement Offered Against a Party Who Wrongfully Caused the Declarant’s Unavailability. A statement offered against the party that wrongfully caused — or acquiesced in wrongfully causing — the declarant to be unavailable in order to prevent the declarant from attending or testifying.

Committee Discussion:

The Reporter questioned the change from “intended to procure unavailability” to “in order to prevent the declarant from attending or testifying.” The requirement of intentionality is important, as the Supreme Court recognized in deciding the constitutional standards of forfeiture in *Giles*. The court must find not only that the party caused unavailability, but also that the act was done with the specific intent to keep the declarant from testifying. The Reporter was not sure that the words “in order to” accurately captured the intentionality requirement. But after discussion, the Committee concluded that there was no substantive difference between “in order to” and “with the intent to.”

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 804(b)(6).

Rule 805

Rule 805 currently provides as follows:

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

The restyled version of Rule 805, reviewed by the Committee at the meeting, provides as follows:

Rule 805 — Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 805.

Rule 806

Rule 806 currently provides as follows:

Rule 806. Attaching and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If

the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

The restyled version of Rule 806, as reviewed by the Committee at the meeting, provided as follows:

Rule 806 — Attacking and Supporting the Declarant’s Credibility

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of an inconsistent statement or conduct by the declarant, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Committee Discussion:

Committee members noted that the restyling reference to “an inconsistent statement or conduct by the declarant” is vague on whether the conduct, like the statement, must be inconsistent with the proffered hearsay statement to trigger the exceptions provided in the rule. Professor Kimble agreed that a clarifying change was necessary. After discussion, the Committee agreed on the following language:

The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

The Style Subcommittee and Professor Kimble agreed with this change.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 806, with the modification that the second sentence would be changed to provide that: “The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.”

Rule 807

Rule 807 currently provides as follows:

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The restyled version of Rule 807 provides as follows:

Rule 807 — Residual Exception

(a) **In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) the statement is offered as evidence of a material fact;
- (3) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting the statement will best serve the purposes of these rules and the interests of justice.

(b) **Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Committee Discussion:

1. A Committee member noted that the restyled version sets out, as independent subdivisions, the requirements of “material fact”, “more probative” and “interests of justice/purposes of the rules” — on the same level as the trustworthiness requirement. The current rule separates the trustworthiness requirement from those less important requirements. The Committee member raised the question that the restyled structure might indicate a change of emphasis from the primary focus on trustworthiness. Committee members suggested that the Style Committee take under advisement the suggestion that the rule be structured so that the trustworthiness factor is the most important requirement. The Style Committee, and Professor Kimble, agreed to take the matter under advisement.

2. The Reporter observed that the restyling placed some separation between the reference to Rule 803 and 804 and the words “equivalent circumstantial guarantees of trustworthiness.” This might raise the question of what “equivalent” means — with what is the offered hearsay statement to be compared? Committee members determined that the separation between Rules 803/804 and the term “equivalent” raised a question of style, not substance — because there is no frame of reference for an equivalence analysis other than the Rule 803 and 804 exceptions. The Committee suggested that the Style Committee take under advisement the possibility that the term “equivalent circumstantial guarantees of trustworthiness” be placed next to the reference to Rules 803 and 804. The Style Subcommittee, and Professor Kimble, agreed to consider this suggestion.

Committee Vote:

The Committee voted unanimously to approve the restyled version of Rule 807.

Rule 901(a)

Rule 901(a) currently provides as follows:

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

The restyled version of Rule 901(a), as reviewed by the Committee at the meeting, provided as follows:

Rule 901 — Authenticating or Identifying Evidence

(a) In General. When an exhibit or other item must be authenticated or identified in order to have it admitted, the requirement is satisfied by evidence sufficient to support a finding that the item is what its proponent claims.

(Alternative) To authenticate or identify an exhibit or other item in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Committee Discussion:

1. Committee members uniformly expressed the opinion that the use of the term “exhibit or other item” was wrong because it did not cover all the types of evidence that are subject to the authentication requirement. The Committee had on several previous occasions favored using the term “evidence.” Professor Kimble responded that the use of the term “evidence” was problematic because the Rule uses that term in another context, i.e., “evidence sufficient to support a finding”; he contended it would be confusing to use the term “evidence” both to indicate what is being qualified and the standard of qualification. Committee members responded that the dual use of the term “evidence” occurs in the *restyled* version of Rule 104(b) — and that it would make sense to be consistent with that Rule, because Rule 901(a) is just a particularized application of the Rule 104(b) test. After substantial discussion, the Committee and Professor Kimble compromised and agreed to use the term “item of evidence.” The Style Subcommittee agreed with this resolution.

2. The Reporter observed that the restyled rule created a substantive problem because it implied that authentication of evidence might not always be required. The restyled version states that “*when*” evidence “must be authenticated” then the standard is evidence sufficient to support a finding. In contrast, the existing rule refers to the “requirement” of authentication “as a condition precedent to admissibility.” **The Committee agreed that the restyled version of Rule 901(a) would effect a substantive change.** The Committee then focused on whether the alternative proposed by Professor Kimble would solve the problem. That alternative — “To authenticate . . . in order to have it admitted” does fairly imply that authentication is a requirement that must always be met. The Committee voted unanimously to adopt the alternative language.

Committee Vote:

The Committee voted unanimously to approve the following version of Rule 901(a):

(a) In General. To authenticate or identify an item of evidence in order to have it admitted, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Rule 901(b)

Rule 901(b) currently provide as follows:

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

- (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.
- (2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
- (3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
- (4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
- (5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
- (6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
- (7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
- (8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.
- (9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
- (10) Methods provided by statute or rule. Any method of authentication or

identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

The restyled version of Rule 901(b), reviewed by the Committee at the meeting, provides as follows:

(b) **Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) **Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.

(2) **Nonexpert Opinion About Handwriting.** A nonexpert's opinion that the handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) **Comparison by an Expert Witness or the Trier of Fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) **Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) **Opinion About a Voice.** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) **Evidence About a Phone Conversation.** For a phone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the phone.

(7) **Evidence About Public Records.** Evidence that:

(A) a record is from the public office where items of this kind are kept; or

(B) a document was lawfully recorded or filed in a public office.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

- (A) is in a condition that creates no suspicion about its authenticity;
- (B) was in a place where, if authentic, it would likely be; and
- (C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Committee Discussion:

1. The Committee noted that several changes from the existing rule were made in order to conform with the new rule on definitions. For example, the reference to Supreme Court rules “pursuant to statutory authority” was deleted because the definition will encompass that term. Similarly, the reference to records, reports and data compilations in Rule 901(b)(7) was shortened to “record” because that term is defined in the definitions rule to include reports and data compilations.

2. The Style Subcommittee asked the Committee to review whether the term “lawfully recorded” in Rule 901(b)(7) accurately captures the language in the existing rule — “authorized by law to be recorded and filed and in fact recorded.” After extensive discussion of a number of hypothetical situations, the Committee concluded that the restyled language accurately captured the original.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 901(b).

Rule 902, Structure

Professor Kimble proposed restructuring Rule 902 to add two lettered subdivisions, (a) and (b). Subdivision (a) would restate the introduction of the current rule, i.e., that the items discussed in the rule are self-authenticating. Subdivision (b) would then include the grounds for self-

authentication as numbered subsections, and the beginning text of (b) would read “The following are self-authenticating:”

The justification for lettered subdivisions was the same as that posed for Rule 803 — to correct the asserted anomaly of a numbered rule followed immediately by a numbered subdivision. Committee members noted, however, that the proposed subdivisions in Rule 902 would serve even less a real purpose than those proposed for Rule 803: proposed subdivision (b) would simply restate the terms of proposed subdivision (b). Professor Kimble noted that in light of the fact that the structure of Rule 803 was going to be preserved (see discussion above), it was now acceptable to retain the existing structure of Rule 902. The Style Subcommittee agreed.

The Committee voted unanimously to retain the number-after-number structure of Rule 902.

Rule 902 provisions:

Rule 902 currently provides as follows:

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the

execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress

or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

The restyled version of Rule 902, as reviewed by the Committee at the meeting, reviewed by the Committee, provided as follows (with the proposed lettered subdivisions deleted, as discussed above):

Rule 902 — Items That Are Self-Authenticating

The items described in this rule are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted.

(1) Domestic Public Documents That Are Signed and Sealed. A document that bears:

(A) a signature purporting to be an execution or attestation ; and

(B) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above.

(2) Domestic Public Documents That Are Signed But Not Sealed. A document that bears no seal, if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(B); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) permit it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record, report, data compilation — or a copy of a document that was lawfully recorded or filed in a public office or agency — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification;
or

(B) a certificate that complies with Rule 902 (1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully signed by a notary public or another officer who is authorized to take acknowledgements.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6), modified as follows: the conditions referred to in 803(6)(D) must be shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court under statutory authority. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the declaration, rather than complying with a federal

statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the declaration is signed.

Committee Discussion:

1. As in Rule 901, discussed above, the Committee uniformly objected to use of the term “item” as the controlling term for authenticity. And as with Rule 901 — and for purposes of consistency — the Committee and the Style Subcommittee settled on the term “item of evidence.” Therefore, by consent, “item of evidence” replaced “item” in the introductory sentence of the Rule, as well as in the heading.

2. The Committee and the Style Subcommittee agreed that the reference in Rule 902(4) to “record, report,” etc. should be shortened to “record” in light of the previous decision to define the term “record” as including reports, etc., in the new rule on definitions.

3. As under Rule 901(b), the Style Subcommittee requested consideration of whether the term “lawfully recorded” accurately captures the existing language of Rule 902(4). After discussion, the Committee determined that the term “lawfully recorded” was accurate.

4. The Reporter questioned whether adding the term “reasonable” before “notice” in Rule 902(11) was necessary. He reasoned that the specific provisions in the notice requirement, in effect, required notice to be reasonable, and therefore adding the term was redundant. Professor Kimble responded that adding the term “reasonable” would make the Rule 902(11) notice requirement more consistent with the notice requirements in other Evidence Rules. The Committee did not object to addition of the term “reasonable.”

5. A Committee member pointed out that the notice requirement might be read to be left out of Rule 902(12), which now ties into the admissibility requirements of Rule 902(11). Restyled Rule 902(12) now requires the certificate to meet the requirements of Rule 902(11) with some modifications. But it is not clear that notice is one of the requirements referred to. The Committee voted unanimously to add the following sentence to the end of Rule 902(12):

“The proponent must also meet the notice requirements of Rule 902(11).”

The Style Subcommittee and Professor Kimble agreed with this clarification.

6. The Committee agreed with Professor Kimble’s suggestions that the references to “the declaration” in Rule 902(12) should be changed to “the certification.”

Committee Vote:

The Committee unanimously approved the restyled version of Rule 902, with the following modifications: substituting “item of evidence” for “item”; referring only to “record” in Rule 902(4); adding a sentence to Rule 902(12) to refer explicitly to the notice requirement; and substituting “the certification” for “the declaration” in Rule 902(12).

Rule 903

Rule 903 currently provides as follows:

Rule 903. Subscribing Witness’ Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

The restyled version of Rule 903, reviewed by the Committee at the meeting, provides as follows:

Rule 903. Subscribing Witness’s Testimony

A subscribing witness’s testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Committee Discussion

1. Professor Kimble suggested that the term “subscribing” should be changed to “attesting.” But Committee members were concerned that the change in language could result in an inadvertent substantive change, without providing any particular style advantage. Some members noted that the term “subscribing” was a more accurate description of the process. After some discussion, Professor Kimble agreed to drop his suggestion and “subscribing” was retained.

2. Professor Kimble suggested that the term “required by the law of the jurisdiction” should be changed to “required in the jurisdiction.” Committee members disagreed with this suggestion because it seemed to refer to a physical location rather than the law of a governing jurisdiction. After some discussion, Professor Kimble agreed to drop his suggestion and “required by the law of the jurisdiction” was retained.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 903.

Rule 1001

Rule 1001 currently provides as follows:

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. “Photographs” include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”.

(4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

The restyled version of Rule 1001, as reviewed by the Committee at the meeting, provided as follows:

Rule 1001 – Definitions That Apply to This Article

(a) **Writing.** “Writing” means any object or medium on which letters, words, numbers, or their equivalent are set down.

(b) **Recording.** “Recording” means any object or medium on which letters, words, numbers, or their equivalent are recorded.

(c) **Photograph.** “Photograph” means an image in any form.

(d) **Original.** An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For data stored in a computer or similar device, “original” means any

printout — or other output readable by sight — if it accurately reflects the data. An “original” of a photograph includes the negative or a print from it.

(e) **Duplicate.** “Duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Committee Discussion:

1. The Committee engaged in a lengthy and wide-ranging discussion of how and whether to restyle the definitions section of the Best Evidence Rule. One question was how the definitions section would relate to the new definitions rule that would apply to a number of terms (like “record” and written material) that are used throughout the Evidence Rules. Committee members eventually concluded that an independent set of definitions for Article 10 remained justified. None of the terms were defined in the new definitions rule (which, for example, defines “written material” as opposed to “writing”) and most of the terms, such as “photograph”, “original”, and “duplicate” are only used in Article 10. The Committee determined, however, that Rule 1001 should definitely start with text indicating that the definitions only applied to Article 10 — a specification made in the existing rule that was dropped in the restyling. Professor Kimble and the Style Subcommittee agreed with the proposal to restore something like the original introduction to Rule 1001.

2. The Committee discussed in detail the various definitions proposed by the restyling. One of the problems in the existing definition is that “writings” and “recordings” are lumped together, and essentially defined in the same way. Professor Kimble stated that it was essential that each individual term should have its own definition. The Committee then discussed how best to define each of the terms set forth in Rule 1001. This required the Committee to take account of technological advances in photography, recording, etc., without making any substantive changes to the Rule. After much discussion, the Committee, the Style Subcommittee, and Professor Kimble agreed on definitions for the terms specified in Rule 1001. That language is set forth below.

Committee Vote:

The Committee unanimously approved restyled Rule 1001(a) in the following form:

Rule 1001 – Definitions That Apply to This Article

In this article, the following definitions apply:

(a) **Writing.** A “writing” consists of letters, words, numbers, or their equivalent set down in any form.

(b) **Recording.** A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) **Photograph.** “Photograph” means a photographic image or its equivalent stored in any form.

(d) **Original.** An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.

(e) **Duplicate.** “Duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1002

Rule 1002 currently provides as follows:

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Restyled Rule 1002, reviewed by the Committee, provides as follows:

Rule 1002 – Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1002.

Rule 1003

Rule 1003 currently provides as follows:

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

The restyled version of Rule 1003, reviewed by the Committee at the meeting, provides as follows:

Rule 1003 – Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1003.

Rule 1004

Rule 1004 currently provides as follows:

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or

otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

The restyled version of Rule 1004, reviewed by the Committee at the meeting, provides as follows:

Rule 1004 — Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

- (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) an original cannot be obtained by any available judicial process;
- (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) the writing, recording, or photograph is not closely related to a controlling issue.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1004.

Rule 1005

Rule 1005 currently provides as follows:

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which

complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

The restyled version of Rule 1005, reviewed by the Committee at the meeting, provides as follows:

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record — or of a document that was lawfully recorded or filed in a public office — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Committee Discussion:

As under Rule 901(b) and 902, the Style Subcommittee requested consideration of whether the term “lawfully recorded” accurately captures the existing language of Rule 1005. After discussion, the Committee determined that the term “lawfully recorded” was accurate.

Rule 1006

Rule 1006 currently provides as follows:

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The restyled version of Rule 1006, as reviewed by the Committee at the meeting, provided as follows:

Rule 1006 – Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them.

Committee Discussion:

Committee members observed that the last sentence of the restyled provision reads more like a rule of discovery than a rule of evidence. The point of the rule is that the underlying information must be produced *in court*. **Therefore the last sentence of the restyled provision would effect a substantive change.** The Committee unanimously agreed that the words “in court” should be added to the last sentence of the restyled rule.

Committee Vote:

The Committee unanimously approved the restyled Rule 1006, with the modification that the words “in court” be added at the end of the last sentence in the rule.

Rule 1007

Rule 1007 currently provides as follows:

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the nonproduction of the original.

The restyled version of Rule 1007, as reviewed by the Committee at the meeting, provides as follows:

Rule 1007 — Testimony or Admission of a Party to Prove Content

The proponent may use the testimony, deposition, or written admission of the party against whom a writing, recording, or photograph is offered to prove its content. The proponent need not account for the original.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1007.

Rule 1008

Rule 1008 currently provides as follows:

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

The restyled version of Rule 1008, reviewed by the Committee at the meeting, provides as follows:

Rule 1008 – Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1008.

Rule 1101

Rule 1101 currently provides as follows:

Rule 1101. Applicability of Rules

(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally.—These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege.—The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury.—Proceedings before grand juries.

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled “An Act to authorize association of producers of agricultural products” approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled “An Act authorizing associations of producers of aquatic products” approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of

the Act entitled “An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes”, approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the AntiSmuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled “An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes”, approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.

The restyled version of Rule 1101, as reviewed by the Committee at the meeting, provided as follows:

Rule 1101 – Applicability of the Rules

(a) **To Courts and Judges.** These rules apply to proceedings before:

- United States district courts;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

(b) **To Proceedings.** These rules apply in:

- civil cases and proceedings, including admiralty and maritime cases;
- criminal cases and proceedings;
- contempt proceedings, except those in which the court may act summarily; and
- cases and proceedings under 11 U.S.C.

(c) **Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.

(d) **Exceptions.** These rules — except for those on privilege — do not apply to the following:

- (1) the court’s determination, under Rule 104(a) on a preliminary question of fact governing admissibility;
- (2) grand-jury proceedings; and
- (3) miscellaneous proceedings such as:
 - extradition or rendition;
 - issuing an arrest warrant, criminal summons, or search warrant;
 - a preliminary examination in a criminal case;
 - sentencing;
 - granting or revoking probation or supervised release; and
 - considering whether to release on bail or otherwise.

Committee Discussion:

1. Before the meeting, Professor Broun did extensive research on the scope of Rule 1101, particularly on whether some courts should be added to or excluded from Rule 1101(a). Professor Broun concluded that the Territorial Courts should remain included on the list, and that it was unnecessary to include the Court of International Trade on the list (because the Evidence Rules are made applicable to that court by an independent statute, and including that court might result in an inadvertent negative inference about other courts in which the Evidence Rules apply by independent statute). The Committee agreed with Professor Broun’s conclusions.

2. The Committee decided that it was appropriate to add “supervised release” to the reference to proceedings on granting or revoking probation in Rule 1101(d) — this would accord with the existing practice.

3. At the Reporter’s suggestion, the restyled version deleted subdivision (e), the laundry list of statutes that alter in some way the applicability of the evidence rules in specific proceedings. The rationales for deleting subdivision (e) are: 1. The list is underinclusive, and in fact could never be accurate because statutory development is dynamic; and 2. The list is unnecessary because the Evidence Rules already allow for statutes to control over the rules, as seen in Rules 301, 502, 501, 802, etc. One Committee member raised the prospect that deleting Rule 1101(e) might be thought to supersede the specified statutory provisions, but the Reporter responded that this would not be the case because of the various Evidence Rules provisions that bow to statutory authority. Another member argued that there should be some place in the Evidence Rules in which a practitioner is warned that the rules are not exclusive, and that reference must often be made to independent statutes that might govern evidentiary admissibility. While no rule could accurately cover all the possibly applicable statutes, Committee members generally agreed that some general provision referring to independent statutory authority was warranted. Ultimately, the Committee agreed that the best solution was to delete the laundry list of statutes in Rule 1101(e), but to provide a single sentence for the subdivision that would read as follows:

“A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.”

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1101, with the modification that the following sentence would be, in its entirety, subdivision (e):

(e) Other Statutes and Rules. A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

Rule on Definitions

The Style Subcommittee and Professor Kimble proposed a rule on definitions, in order to 1: alleviate the need for constant repetition throughout the rules; and 2. assure that electronic information would be covered by the rules without the need to repeat that point in every rule involving “written” information. During the meeting, the proposed rule on definitions was expanded to include a definition of “record” that would cover analogous terms such as “report” — that provision was transferred, by unanimous vote of the Committee from its original proposed placement as a new subdivision (b) to Rule 803 (see the discussion on the structure of Rule 803 above).

The Style Subcommittee proposed to place the rule on definitions as a new Rule 1102, which would have required changing the numbers of existing Rules 1102 and 1103. The Committee engaged in an extensive discussion of the optimal placement of a new rule on definitions. After that discussion, Committee members unanimously agreed that it would be problematic to place the definitions rule anywhere in Article 11, as it would be unlikely to be found by some, if not many, practitioners. Some members thought that the best placement would be a new Rule 107, but Professor Kimble argued that if a definitions rule is intended to be applicable throughout the rules, then it would be inconsistent with style conventions to put it anywhere other than at the very beginning or the very end of the whole body of rules. Committee members then turned to another solution: amending Rule 101 to include the definitions as a new subdivision (b). Members noted that the Criminal Rules added a definitions section in the restyling of Criminal Rule 1 — thus it was appropriate and consistent with restyling conventions to place the definitions rule in the scope provision of Rule 101.

Finally the Committee turned to the language of the specific definitions. One of the subdivisions proposed to define written material to include electronic information in the following manner:

“a reference to any kind of written material includes the electronic form of the material.”

Judge Rosenthal observed that the Civil Rules use the term “electronically stored information”, and that term is commonly used by courts and lawyers. She suggested — and the Committee unanimously agreed — that the definition of written material should refer to “electronically stored information.”

The Committee voted unanimously to approve Evidence Rule 101, as amended, in the following form:

Rule 101 — Scope; Definitions

(a) **Scope.** These rules apply to proceedings before United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) **Definitions.** In these rules:

- (1) “civil case” means a civil action or proceeding;
- (2) “criminal case” includes a criminal proceeding;
- (3) “public office” includes a public agency;
- (4) “record” includes a memorandum, report, or data compilation in any form;
- (5) a “rule prescribed by the Supreme Court” means a rule adopted by the Supreme Court under statutory authority; and
- (6) a reference to any kind of written material includes electronically stored information.

Rule 1102

Rule 1102 currently provides as follows:

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

The restyled version of Rule 1102, reviewed by the Committee at the meeting, provides as follows:

Rule 1102 — Amendments

These rules may be amended as provided in 28 U.S.C. § 2072.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1102.

Rule 1103

Rule 1103 currently provides as follows:

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

The restyled version of Rule 1103, reviewed by the Committee at the meeting, provides as follows:

Rule 1103 – Title

These rules may be cited as the Federal Rules of Evidence.

Committee Vote:

The Committee unanimously approved the restyled version of Rule 1103

C. Rules 101-706

The restyled Rules 101-706 were approved for release for public comment at previous meetings. In preparation for this meeting, Professor Kimble reviewed these rules to check for consistency of terminology through all the restyled rules, and to raise any lingering style questions. Professor Kimble proposed some minor changes to some of the previously approved rules. Other than changes in the nature of typos and correcting minor inconsistencies, the Committee considered, and voted on, the following proposals:

1. Rule 101: as discussed immediately above, the Committee unanimously agreed to amend Rule 101 to add a subdivision on definitions.

2. Rule 403: Professor Kimble asked to revisit the rule to determine whether there was some way to effectively categorize the various factors that are listed in the rule, e.g., prejudice, confusion, delay, etc., with some referred to as “dangers” and others as “considerations.” *Professor Kimble proposed — and after discussion the Committee unanimously approved, the following restyling of Rule 403:*

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

3. Rule 404(b): Professor Kimble proposed adding to the heading, which under the existing restyling reads, in part, “; Notice.” Professor Kimble suggested adding “in a Criminal Case” after “Notice.” But Committee members determined that adding the reference to a criminal case might lead to a misimpression that Rule 404(b) is only applicable in criminal cases, whereas in fact the rule is applicable to all cases and it is only the notice provision that is limited to criminal cases. *The Committee voted unanimously not to change the existing restyling of Rule 404.*

4. Rule 405: Professor Kimble proposed some minor changes that would make Rule 405 a bit more consistent with Rule 608. One question was whether to delete the term “relevant” in Rule 405 on the ground that all evidence must be relevant to be admissible. But the Committee was cautious about taking out the term “relevant” because it might send some unintended signal. Professor Kimble responded that if “relevant” is going to be retained in Rule 405(a), then it should be added to Rule 405(b) for purposes of consistency, as both subdivisions are referring (though admittedly in different contexts) to specific act evidence. The Committee agreed with the proposal to add “relevant” to Rule 405(b). *After discussion, the Committee unanimously approved the following restyling of Rule 405:*

Rule 405 — Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion. On cross-examination, the court may allow an inquiry into relevant specific instances of the person’s conduct.

(b) **By Specific Instances of Conduct.** When a person’s character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person’s conduct.

5. Rule 406: Professor Kimble suggested that Rule 406 be slightly changed to provide more consistency with the other restyled “relevance rules”, e.g., Rules 407-409. *After discussion, the Committee unanimously approved the following restyling of Rule 406:*

Rule 406 — Habit; Routine Practice

Evidence of a person’s habit or an organization’s routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

6. Rule 411: Professor Kimble proposed a change to the “exceptions” clause to the Rule that would provide more consistency with Rule 407. *After discussion, the Committee approved the following restyling of Rule 411:*

Rule 411 — Liability Insurance

Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice or — if disputed — proving agency, ownership, or control.

7. Rule 412: Professor Kimble proposed changes to the notice provision of Rule 412 that would make it more consistent with the notice provisions of Rules 413-15. But the Committee unanimously rejected the proposal. Committee members noted that the notice provision in Rule 412 is designed to protect different interests than those protected by the notice provisions in Rules 413-15. Any change in the notice provisions, in terms of timing or triggering, would be substantive in any case. Therefore the proposal to change the notice provision of Rule 412 was rejected.

8. Rules 501 and 601: Professor Kimble proposed changing the last sentence of these restyled rules: the sentence covering whether state law of privilege/competency applies when state law provides the rule of decision. These sentences were adopted by the Standing Committee at its last meeting; members of the Standing Committee were concerned that the initial restyling might

be read to indicate that state law on privilege/competency governs *federal* claims as well as state claims when the claims are brought together in federal court — a result that is inconsistent with most of the case law and therefore substantive. The language for the second sentence, as adopted by the Standing Committee, is as follows:

But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege.

The Evidence Rules Committee unanimously agreed that it would not consider any change to this language, because 1) it had been adopted by a vote of the Standing Committee; and 2) it successfully avoided the possibility of a substantive change from the existing rule.

9. Rule 502: Professor Kimble proposed changes to Rule 502, which was enacted by Congress in September, 2008. The two changes were: 1) changing the subdivisions by making the introductory language a new subdivision (a) and relettering the rest of the subdivisions; and 2) amending the subdivision on subject matter waiver by changing “ought in fairness to be considered” to “should in fairness be considered” — in order to track the restyling that had occurred in Rule 106, from which Rule 502 took the “ought in fairness” language.

The Committee was unalterably opposed to any word or structure changes to Rule 502. Many members of the Committee (and the Standing Committee) had spent long hours resisting any congressional change to the rule on the ground that it had been restyled in accordance with the style conventions, and that to alter it in any way would make it inconsistent with the other rules. Committee members determined that any attempt to change the rule now would undermine the arguments that members of both the Committee and the Standing Committee had made to Congress.

Professor Kimble responded that Rule 502 was now inconsistent with the restyled Rule 106. The Committee unanimously responded that the solution to the inconsistency was to amend the restyled version of Rule 106, so as to restore the original “ought in fairness” language. *After more discussion, the Committee unanimously voted to reject any word changes to Rule 502, and further voted unanimously to change the restyled version of Rule 106 as follows:*

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

10. Rule 608(a): Professor Kimble proposed changes to Rule 608(a) intended to provide more consistency with Rule 405. *After discussion, the Committee approved a restyled Rule 608(a) in the following form:*

(a) **Reputation or Opinion Evidence.** A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked.

11. Rule 609(b): Professor Kimble proposed changes to Rule 609(b) that would break out and unpack the complicated admissibility requirements in a more user-friendly way. *After discussion, the Committee approved a restyled Rule 609(b) in the following form:*

(b) **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness’s conviction or release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

D. Committee Notes to Restyled Rules

1. Basic Committee Note

The Committee resolved to prepare Committee Notes that would be consistent with previous restyling efforts. Accordingly, the Committee approved a basic Committee Note providing a disclaimer that the changes were only stylistic and no substantive changes were intended. *That note, which would be added to the large majority of the restyled rules, was unanimously approved in the following form:*

Committee Note

The language of Rule [] has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

2. *Committee Note to Rule 101:*

In addition — and again consistently with other restyling efforts — the Committee approved a Committee Note to Rule 101 that describes the functions and goals of the restyling effort. *The Committee unanimously approved a Committee Note to restyled Rule 101 in the following form:*

Committee Note

The language of Rule 101 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal and Civil Rules.

1. *General Guidelines*

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf).

2. *Formatting Changes*

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. “Hanging indents” are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 103 illustrates the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from “accused” in many rules to “defendant in a criminal case” in all rules.

The restyled rules minimize the use of inherently ambiguous words. For example, the word “shall” can mean “must,” “may,” or something else, depending on context. The potential for confusion is exacerbated by the fact the word “shall” is no longer generally used in spoken or clearly written English. The restyled rules replace “shall” with “must,” “may,” or “should,” depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant “intensifiers”. These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rule does not change their substantive meaning. *See, e.g.*, Rule 103 (changing “interests of justice” to “justice”).

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be “substantive” if any of the following conditions were met:

- a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);
- b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in

which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. It alters the structure of a rule in a way that creates tension with the approach that courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. It changes a “sacred phrase” — phrases that have become so familiar in practice that to alter them would be unduly disruptive. Examples in the Evidence Rules include “unfair prejudice” and “truth of the matter asserted.”

3. More Detailed Notes for Some Restyled Rules

After discussion, the Committee determined that a few of the restyled Evidence Rules warranted a more fulsome statement to indicate the intent of the amendment and to assure the Bench and Bar that no substantive change is being made. The Committee adopted the working principle that if a fair number of members of the Bench and Bar might wonder about the scope of the change, it could warrant a more expansive explanation in the Committee Note. *After discussion, the Committee approved the following Committee Notes (recognizing that further development of Committee Notes might be necessary after public comment):*

Rules 407, 408 and 411

Explanation for Special Treatment:

These rules had always been rules of exclusion. They had never provided a ground of admissibility. The rules stated that certain evidence was inadmissible if offered for certain purposes, but that the preclusion *did not apply* if the evidence were offered for other purposes. The restyling has turned them into positive rules of admissibility. They now state that the court *may admit* the evidence if offered for a permissible purpose. It is possible that in the public comment period there will be some concern that the change in tone and structure substantive (though the Committee has taken a vote and found the changes to be stylistic only).

Approved Committee Note:

The Rule previously provided that evidence was not excluded if offered for a purpose not prohibited by the rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Rule 608(b)

Explanation for Special Treatment

Rule 608 allows specific acts to be inquired into “on cross-examination.” But because of Rule 607, impeachment with specific acts may also be permitted on direct examination. The courts have permitted such impeachment on direct in appropriate cases despite the language of Rule 608(b). The restyling makes no change to the language “on cross-examination” on the ground that there is no reason to make a change because courts are already applying the rule properly. A reasonable lawyer might wonder whether the Committee, by keeping the language, intends that it apply the way it is written. (The Civil Rules Committee tried to add a Note if retained language was inconsistent with the practice.)

Approved Committee Note:

The Committee is aware that the Rule’s limitation of bad act impeachment to “cross-examination” is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term “on cross-examination” to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

Rules 701, 703, 704 and 705

Explanation for Special Treatment:

These restyled rules cut out all references to an “inference.” The Committee determined that the change was stylistic only, but as the term “inference” is often used by lawyers, it is possible that some could think that the change is more important than intended.

Approved Committee Note:

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 801(d)(2)

Explanation for Special Treatment:

The restyled Rule deletes all reference to the term “admission.” As that has been a basic – if often misunderstood — term for the hearsay statement of a party, it is an important shift that may raise questions in the public comment.

Approved Committee Note:

Statements falling under this hearsay exemption are no longer referred to as “admissions” in the title to the Rule. The term “admissions” is confusing because not all statements covered by exemption are admissions in the colloquial sense— a statement can be admissible under the exemption even it “admitted” nothing and was not against the party’s interest when made. The term also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exemption is intended.

Rule 804(b)(3)

Explanation for Special Treatment:

The Rule provides for a substantive change from the existing rule, in that it extends the corroborating circumstances requirement to declarations against interest offered by the government. But all the Rule does is to track the substantive change that is planned for the rule a year before the restyling is to take effect. The Committee Note can explain the process.

Approved Committee Note:

The amendment provides that the corroborating circumstances requirement applies not only to declarations against penal interest offered by the defendant in a criminal case, but also to such statements offered by the government. The language in the original rule does not so provide, but a proposed amendment to Rule 804(b)(3) — released for public comment in 2008 — explicitly extends the corroborating circumstances requirement to statements offered by the government.

II. Proposed Amendment to Evidence Rule 804(b)(3)

A. Introduction

The proposed amendment to Rule 804(b)(3) would require the government to provide corroborating circumstances indicating trustworthiness before a declaration against penal interest could be admitted in a criminal case. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the meeting, the Committee considered the relatively few public comments that had been received on the Rule. Most of the comments were in the nature of style suggestions that are already being accommodated by the restyling project (e.g., specifying that the corroborating circumstances requirement applies only to statement offered under this exception and not more broadly). Some suggestions had been made about previous proposals to amend Rule 804(b)(3) and had been previously rejected by the Committee — such as a suggestion to add language that would abrogate the Supreme Court's decision in *Williamson v. United States*, and a suggestion to eliminate the corroborating circumstances requirement as applied to the accused.

B. Text of Proposed Amendment

As it had on a number of previous occasions, the Committee (including the Department of Justice representative) unanimously agreed with the substantive result mandated by the amendment, i.e., that the government will have to provide corroborating circumstances before a declaration against penal interest can be admitted by the accused. The Committee's discussion then shifted to how to respond to the stylistic suggestion proposed in the public comment, given that those stylistic suggestions had already been answered in the proposed restyled Rule 804(b)(3). **After substantial debate, the Committee unanimously resolved that the most efficient procedure was to propose that Rule 804(b)(3) be sent to the Judicial Conference in the form in which it had been restyled as part of the restyling project.** That restyled rule contained the substantive amendment that had already gone through the public comment, and it was common practice to implement style changes proposed by the Style Subcommittee after a proposed amendment was issued for public comment.

The Committee voted unanimously to recommend to the Standing Committee that the proposed amendment to Rule 804(b)(3), as restyled, be sent to the Judicial Conference with the recommendation that it be approved and referred to the Supreme Court.

What follows is the proposed amendment, as approved by the Committee, in blackline form:

(3) *Statement Against Interest.* A statement ~~which that:~~

~~(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. ; and~~

~~(B) A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless— is supported by corroborating circumstances that clearly indicate the its trustworthiness of the statement, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.~~

What follows is the proposed amendment in “clean” form:

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

C. Committee Note

The Committee Note as issued for public comment contained a short discussion of the case law on confrontation. **After discussion, the Committee unanimously determined that the citations to case law should be deleted.** The case law is dynamic, and the Committee note is static. Moreover, the point of the passage in the Committee Note is to indicate that the Committee did not intend to treat constitutional issues. It was enough to state that without referring to case law.

Continuing the discussion of the Committee Note, the Reporter observed that one public comment suggested that the Note address the fact that the credibility of the witness who reports the hearsay in court is irrelevant to the admissibility of the hearsay statement itself. The Reporter noted that some courts had incorrectly excluded hearsay offered under Rule 804(b)(3) on the ground that the in-court witness was untrustworthy — this is a classic error in hearsay analysis, as the trustworthiness of the in-court witness can be assessed by the jury. Finally, the Reporter noted that a similar entry in the Committee Note in a previous iteration of Rule 804(b)(3) had been approved by the Standing Committee.

After discussion, the Committee unanimously approved the following Committee Note to the proposed amendment to Rule 804(b)(3):

Committee Note

The second sentence of Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (“by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)”); *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest helps to assure both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause, because the requirements of this exception assure that declarations admissible under it will not be testimonial.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

III. Next Meeting

The Fall 2009 meeting of the Committee is scheduled for October in Charleston, S.C.

Respectfully submitted,

Daniel J. Capra
Reporter

TAB 9

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

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CHAIR

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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

**To: Hon. Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure**

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

Subject: Report of the Advisory Committee on Criminal Rules

Date: May 11, 2009

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure (“the Committee”) met on April 6-7, 2009 in Washington, D.C., and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report presents a number of action items:

- (1) approval to transmit to the Judicial Conference published amendments to two rules pertaining to victims, Rules 12.3 and 21;
- (2) approval to transmit to the Judicial Conference published amendments to Rules 15 and 32.1; and
- (3) approval to publish a package of proposed amendments incorporating technology in Rules 1, 3, 4, 9, 32.1, 40, 41, 43, and 49;
- (4) approval to publish proposed amendments to Rules 12 and 34.

II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

A. Rules Pertaining to Victims

The first amendments the Committee recommends for transmission to the Judicial Conference pertain to victims. The Committee recommends that two of the three published amendments be transmitted to the Judicial Conference. It does not recommend transmittal of the proposed amendment to Rule 5.

The Committee received written comments and heard testimony from witnesses who opposed all of the amendments.

Some of the arguments were applicable to all of the amendments. The Committee was urged to remain consistent with its own policy of incorporating, but not going beyond, the requirements of the Crime Victims' Rights Act (CVRA) and leaving other issues to case-by-case development that may provide a basis for later rule making. The Committee's first victim-related rules have just gone into effect, and the Committee was urged by some groups to observe the experience under these rules before making further changes. Since the recent comprehensive review of the implementation of the CVRA by the Government Accountability Office (GAO) found no problems with the judicial implementation of the Act, opponents characterized the proposed amendments as premature. Although this argument applies to some degree to all three of the rules, it has the greatest bite in connection with the proposed amendment to Rule 12.3, which parallels an amendment to Rule 12.1 that went into effect December 1, 2008.

Some opponents of the amendments also expressed concern that the promulgation of rules not necessary to implement the CVRA might provide the basis for the proliferation of mandamus actions that would tie up the courts. Alternatively, the proposed rules might cause district courts to bend over backwards to avoid rulings that could generate mandamus actions, and by so doing prejudice the rights of defendants, the government, or witnesses in ways not amendable to appellate correction.

Comments pertaining to specific amendments are addressed below.

1. ACTION ITEM—Rule 12.3 (Notice of Public Authority Defense)

The proposed amendment parallels the amendment to Rule 12.1 (Notice of Alibi Defense) that went into effect on December 1, 2009. Both are intended to implement the CVRA, which states that victims have the right to be reasonably protected from the accused and to be treated with respect for their dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense but also protects the victim's interests. The same procedures and standards

20 victim's address and telephone number, the
21 court may:
22 (i) order the government to provide the
23 information in writing to the defendant
24 or the defendant's attorney; or
25 (ii) fashion a reasonable procedure that
26 allows for preparing the defense and
27 also protects the victim's interests.

28 * * * * *

29 **(b) Continuing Duty to Disclose.**

30 **(1) In General.** Both an attorney for the
31 government and the defendant must
32 promptly disclose in writing to the other
33 party the name of any additional witness —
34 and the; address, and telephone number of
35 any additional witness other than a victim
36 — if:

37 **(1 A)** the disclosing party learns of the
38 witness before or during trial;
39 and
40 **(2 B)** the witness should have been
41 disclosed under Rule 12.3(a)(4)

42 if the disclosing party had known
43 of the witness earlier.

44 **(2) Address and Telephone Number of an**
45 **Additional Victim-Witness.** The address
46 and telephone number of an additional
47 victim-witness must not be disclosed except
48 as provided in Rule 12.3(a)(4)(D).

49 * * * * *

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

The Federal Magistrate Judges Association endorsed the proposal, which was opposed by the Federal Defenders and the National Association of Criminal Defense Lawyers (NACDL). The comments of Federal Defenders and NACDL parallel the arguments made in opposition to the amendment to Rule 12.1. The central concern is that the amendment requires the defendant to disclose the names and addresses of the witnesses who will support his public authority defense without any guarantee of reciprocal discovery of all of the government's rebuttal witnesses. The opponents argue that the amendment would violate due process under *Wardius v. Oregon*, 412 U.S. 470 (1973), which requires discovery to be a two-way street. Moreover, they urge that amendment has the same constitutional defect as restrictions on cross examining a

COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

This amendment requires the court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceeding to another district for trial under Rule 21(b). It does not apply to Rule 21(a), which governs transfers for prejudice.

Although the Federal Magistrate Judges Association endorses the proposal, the remaining comments by the Federal Defenders, the National Association of Criminal Defense Lawyers (NACDL), and Mr. Alex Zipperer oppose the amendment. The comments opposing the amendment correctly observe that nothing in the CVRA compels the adoption of the amendment. Although the CVRA restricts the court’s authority to exclude victims who are otherwise able to attend proceedings, the Act neither gives non-testifying victims a right to have the proceedings held at a place convenient for them nor requires the government to transport victims to the place of the trial.

NACDL argued that the proposed amendment in effect creates such a substantive right, and in so doing exceeds the authority of the Rules Enabling Act as well as the policy judgment expressed in the enactment of the CVRA. Opponents of the amendment also expressed concern that the proposed amendment improperly equates the convenience of the non-testifying victims with the convenience of the defendant, the prosecution, and the witnesses. This could result in holding the trial in a location that requires substantial travel, or imposes other significant costs on the parties and witnesses who are required to attend. In order to avoid a time consuming mandamus challenge, the district court might actually give greater weight to the convenience of those who claim the status of non-testifying victims than to the interests of the defendant, the government, or the witnesses, because they do not have the ability to seek mandamus to enforce their preferences.

The Committee did not find these arguments persuasive. The rule comes into play if and only if a defendant moves to transfer the case. At that point the court “may” transfer the case, which makes the court’s discretion clear. This point is further emphasized in the Committee Note, which states that “[t]he court has substantial discretion to balance any competing interests.” This emphasis on the court’s discretion was intended to allay any fear that mandamus would be a realistic concern. (Indeed, it was unclear how mandamus could be properly be employed to enforce a provision of the Federal Rules, when the statutory right to mandamus applies to the rights afforded by the Crime Victims’ Rights Act. *See* 18 U.S.C. § 3771(d)(3).) Finally, Committee members noted that the rule already allows the court to consider “the interest of justice,” which might in some cases be thought to include the interest of victims.

§ 3771(a)(1), states that victims have the “right to be reasonably protected from the accused.”

In general the public comments urged (1) the amendment is unnecessary and (2) it is undesirable to single out only one of the many factors that courts must consider under the Bail Reform Act. The comments also expressed concern that the amendment could be read to change the standard for detention or release, creating a conflict with the carefully circumscribed limits Congress placed on preventive detention in the Bail Reform Act. The Bail Reform Act allows preventive detention only when necessary to satisfy a compelling need to protect individuals or the community from a particularly dangerous class of defendants. The court must find that “no condition or combination of conditions . . . will reasonably assure the appearance of the person required and the safety of any other person and the community.” 18 U.S.C. § 3143(e) & (f). The proposed amendment, however, does not reflect those limitations. If it were interpreted as changing the standard to be applied, it would create a new substantive right and thus run afoul of the Rules Enabling Act. It might also run afoul of the Eighth Amendment.

Members of the Committee discussed whether there was a need for the amendment and the constitutional and statutory arguments raised by opponents. The current text—which requires the decision to detain or release be made “as provided by statute or these rules”—clearly requires the courts to consider the requirements of the CVRA as well as the Bail Reform Act. Thus the proposed amendment is not necessary. There is, moreover, some force to the argument that in this context singling out the right of a victim to be protected from the defendant might be read as altering a constitutionally based substantive standard. This would exceed the authority conferred by the Rules Enabling Act.

The Committee voted not to forward the proposed amendment, rejecting by a vote of 9 to 3 a motion to resolve the issues raised in the comment period by adding a reference to the Bail Reform Act.

B. Other Published Rules

1. ACTION ITEM—Rule 15

The Committee voted with three dissents to approve and forward to the Standing Committee the proposed amendment Rule 15, which incorporates several changes made after publication.

The proposed amendment (reproduced below) provides for depositions at which the defendant is not physically present if the court finds that a series of stringent criteria are met. The amendment, which applies only to depositions taken outside the United States, addresses the growing frequency of cases in which important witnesses — both government and defense witnesses — live in, or have fled to, countries where they cannot be reached by the court’s subpoena power. Although Rule 15 authorizes depositions of

witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition. The proposed amendment is intended to fill that gap by allowing such depositions to be taken in a small group of cases that meet stringent criteria.

Four comments were received in response to the publication of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorses the proposal. The General Counsel of the Drug Enforcement Administration raised some issues concerning the drafting of the rule. The Federal Defenders and the National Association of Criminal Defense Lawyers opposed the rule and urged that it be withdrawn, or, at a minimum, substantially redrafted.

The principal arguments in the lengthy submissions from the Federal Defenders and NACDL concern the effect of the proposed amendment on the defendant's rights under the Confrontation Clause of the Sixth Amendment. They argue that *Crawford v. Washington*, 541 U.S. 36 (2004), interprets the Confrontation Clause as providing an unqualified right to face-to-face confrontation that would preclude the admission of testimony preserved by a deposition taken under the proposed rule. There is no indication that the Supreme Court will continue to allow any exception to the right of face-to-face confrontation even when this would serve an important public policy interest and there are guarantees of trustworthiness. Moreover, the proposed amendment may not be confined to a small number of exceptional cases. The amendment in its current form is not, in the opponents' view, limited to cases where an interest as significant as national security is at issue, nor does it guarantee the level of participation by the defendant that was provided in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 2009 WL 425086 (Feb. 23, 2009) (two-way live video feed, one defense lawyer with defendant and another at the deposition, frequent opportunities for private conversations between defendant and counsel at the deposition, and split screen display at trial allowing jury to see reactions of both defendant and witness during deposition).

Specifically, as published the amendment (1) was not limited to transnational cases, (2) was not limited to felonies, (3) did not require a showing that the evidence sought is "necessary" to the government's case, and (4) imposed no obligation on the government to secure the witness's presence.

NACDL argues that the real significance of the amendment is not the taking of the depositions per se, but rather that it would enable the prosecution to present evidence at trial that has not been subject to confrontation. They argue that the amendment would in effect create a right to introduce the resulting deposition at trial, and as such exceed the authority of the Rules Enabling Act. It would also be a back door means of achieving the goals of the failed 2002 attempt to amend Rule 26. Rather than create inevitable constitutional challenges, they urge the Committee to await either legislation or further

clarification from the case law. They also urge that the safeguards and limits in the proposed amendment are insufficient to restrict its scope and to guarantee the defendant's participation. In their view, "meaningfully participate ... through reasonable means" creates only a vague and subjective test that offers little real protection. Similarly, the showing required would encompass every witness beyond the court's subpoena power. Finally, they note there is reason to doubt the credibility and reliability of the testimony of the potential witnesses who are willing to be deposed, but not travel to the United States to testify. These will include, for example, persons who have fled justice in this country and know that their oath taken abroad will have no practical significance.

The Committee also heard testimony stressing the frequency with which the technology is inadequate or fails, as well as other problems that defense attorneys experience in taking foreign depositions, such as the requirement in some countries that only local counsel can question witnesses.

The Committee adopted several amendments intended to address some of the issues raised during the comment period. It explicitly limited the amendment to felonies. After discussion, the Committee declined to adopt a requirement that the Attorney General or his designee certify or determine that the case serves an important public interest. Although there was support for a mechanism that would guarantee that requests under the new rule would be rigorously reviewed within DOJ and made only infrequently, members were concerned that adding a provision in the rules requiring the action by the Attorney General might raise separation of powers issues. Instead, the Committee added a provision requiring the attorney for the government to establish that the prosecution advances an important public interest. (This provision was placed at the end of the rule because, unlike the other requirements, it is applicable only to government witnesses.)

The Committee also incorporated several minor changes suggested during the comment period and by the style consultant to improve the clarity of the proposed amendment.

The Committee did not adopt three other suggestions. First, it declined to limit the rule to government witnesses, though it recognized that there will be only a small number of cases in which a defendant will wish to use this procedure.¹ Second, the Committee declined to require the government to show that the deposition would produce evidence "necessary" to its case, viewing that standard as unrealistic when the government is still assembling its case. Third, the

¹In cases involving a single defendant, Rule 15 would pose no difficulties if the defendant consented not to be present at the deposition of his witness, and there would be no Confrontation Clause barrier to the introduction of the deposition. However, in a case involving multiple defendants, one defendant might wish to depose a witness overseas, and another defendant who could not be present at the deposition might object to the admission of the evidence.

Committee declined to add a requirement that the government show it had made diligent efforts to secure the witness's testimony in the United States. In the Committee's view, this might actually water down the requirement in the rule as published that the witness's presence "cannot be obtained."

The Committee discussed the Confrontation Clause issues at length. Members emphasized that when that the government (or a codefendant) seeks to introduce deposition testimony, the court will rule on admissibility under the Rules of Evidence as well as the Sixth Amendment. Members stressed that providing a procedure to take a deposition did not guarantee its later admission, which could turn on a number of factors. For example, if the technology does not work well enough to allow the defendant to participate or to create a high quality recording, the deposition would likely not be admitted. Similarly, the situation might change so that it would be possible for the witness to testify at the trial. The decision to allow the taking of the deposition in no way forecloses a Confrontation Clause challenge to admission or one based on the Rules of Evidence. The Committee Note was amended to make this point clear.

Issues concerning the propriety of allowing depositions for witnesses outside the United States and the procedures under which such depositions may be taken have arisen, and will continue to arise, in the lower courts in cases such as *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 2009 WL 425086 (Feb. 23, 2009). In *Ali* the district court adopted procedures similar to those outlined in the proposed amendment, and the Fourth Circuit held that the Confrontation Clause did not prohibit the introduction of deposition testimony taken under those procedures. In the Committee's view, it is now appropriate to distill the analysis in cases such as *Ali* and use it to set forth a procedural framework in the Federal Rules of Criminal Procedure. The proposed amendment is intended to meet the criteria developed in the lower court decisions, as well as the Supreme Court's Confrontation Clause decisions. Although there will undoubtedly be issues arising from the use of technology, members felt that the district courts have ample authority and experience to handle those issues on a case by case basis.

The Committee voted, with three dissents, to approve the proposed amendment to Rule 15, as revised, and to send it to the Standing Committee. As revised, the amendment provides:

22 defendant — absent good cause — waives both
23 the right to appear and any objection to the
24 taking and use of the deposition based on that
25 right.

26 **(3) Taking Depositions Outside the United States**

27 **Without the Defendant's Presence.** The
28 deposition of a witness who is outside the United
29 States may be taken without the defendant's
30 presence if the court makes case-specific
31 findings of all the following:

32 (A) the witness's testimony could provide
33 substantial proof of a material fact in a
34 felony prosecution;

35 (B) there is a substantial likelihood that the
36 witness's attendance at trial cannot be
37 obtained;

38 (C) the witness's presence for a deposition in
39 the United States cannot be obtained;

40 (D) the defendant cannot be present because:

- 41 (i) the country where the witness is
42 located will not permit the defendant
43 to attend the deposition;
44 (ii) for an in-custody defendant, secure
45 transportation and continuing custody
46 cannot be assured at the witness's
47 location; or
48 (iii) for an out-of-custody defendant, no
49 reasonable conditions will assure an
50 appearance at the deposition or at trial
51 or sentencing;
52 (E) the defendant can meaningfully participate
53 in the deposition through reasonable means;
54 and
55 (F) for the deposition of a government witness,
56 the attorney for the government has
57 established that the prosecution advances
58 an important public interest.
59 * * * * *

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 15 be approved as amended following publication and forwarded to the Judicial Conference.

COMMITTEE NOTE

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill-suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law. *See, e.g., United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).

Four comments were received in response to the publication of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorses the proposal, but the other three comments were critical. Although one comment criticized the standard of clear and convincing evidence as “impossibly high,” this standard is mandated by statute. The current rule requires the court to follow 18 U.S.C. § 3143(a), subsection (1) of which requires detention unless “the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released”

The Federal Public Defenders (whose views were also endorsed by the National Association of Criminal Defense Lawyers) did not challenge the clear and convincing evidence standard, but they opposed the rule as drafted and sought two significant changes:

- (1) a preliminary requirement that the court find probable cause before detaining an individual under this provision, and
- (2) a requirement that the government bear the burden of proof in cases in which the Sentencing Commission’s policy statements provide for modification of the term or conditions of supervised release (rather than imprisonment).

The Committee rejected the proposal to add a preliminary requirement that the court find probable cause. The present rule was intended to satisfy due process by requiring a finding of probable cause at a preliminary hearing which must be held “promptly,” and Rule 32.1(a)(1)-(6) sets forth a procedure for an initial appearance that would occur before—and not duplicate the function of—the preliminary hearing. Rule 32.1 was amended in 2002 to add the provisions concerning the initial appearance. The 2002 Committee Note indicates the Committee’s awareness that some districts were not conducting an initial appearance. The Note states that under the new language an initial appearance is required, although a court may combine the initial appearance with the preliminary hearing if that can be done within the accelerated time requirement of Rule 32(a)(1) (“without unnecessary delay”). The purpose of the initial appearance is to provide the defendant with the advice required in Rule 32.1(a)(3), and to make an initial decision on release or retention under Rule 32.1(a)(6). As noted below, under Rule 32.1(a)(6) the person has the burden of establishing that he is not a flight risk or a danger to any other person or the community. Unless an individual court chooses to combine the initial appearance with the preliminary hearing, they serve distinct purposes.

Additionally, 18 U.S.C. § 3606 provides another important safeguard that occurs even earlier in the process. This section provides the authority for the arrest of a probationer or person on supervised release if there is probable cause to believe that he or she has violated a condition of the probation or release. Where the arrest of a person on probation or supervised release is made pursuant to a warrant, a judicial officer will necessarily have made a finding of probable cause pursuant to § 3606 (and the Fourth Amendment) before the arrest is made.

The Committee also declined to add a provision to the amendment that would shift the burden of proof in cases in which the applicable Guideline policy statement would not provide for imprisonment. The text of 18 U.S.C. § 3143(a)(1) places the burden of proof on the defendant except in cases when no imprisonment is provided for in the applicable “guideline” promulgated by the Sentencing Commission. The Commission has not promulgated any guidelines concerning supervised release, though it has promulgated policy statements. The Commission determined that policy statements rather than guidelines “provided greater flexibility to both the Commission and the courts.” U.S.S.G. Ch. 7, Pt.A.3 (a). The court in *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007), found that the language of § 3143(a)(1) was not applicable in the absence of a guideline.

In this context there is a significant difference between guidelines—to which 18 U.S.C. § 3143(a)(1) refers—and the policy statements concerning revocation. At least seven circuits have held that the Commission intended the policy statements of Chapter Seven to be only recommendations that are not binding on the courts. *See, e.g. United States v. O’Neill*, 11 F.3d

292, 301 n.11 (1st Cir. 1993) (noting that the policy statements of Chapter 7 “are prefaced by a special discussion making manifest their tentative nature” and “join[ing] six other circuits in recognizing Chapter 7 policy statements as advisory rather than mandatory”); *United States v. Hooker*, 993 F.2d 898, 901 (D.C. Cir. 1993) (stating “it seems contrary to the Commission's purpose to treat Chapter VII policy statements, which were adopted to preserve the courts’ flexibility, as binding.”). Courts have employed their discretion to order imprisonment for lower grade offenders even when the policy statements would provide only for lesser alternatives. *See, e.g., United States v. Redcap*, 505 F.3d 1321 (10th Cir. 2007) (supervised release revoked for violation of drinking alcohol, and sentence imposed exceeded that recommended in the policy statement); *United States v. Moulden*, 478 F. 3d 652 (4th Cir. 2007) (probation revoked for defendant who argued that his violations were "technical" and "only" Grade C violations); *United States v. Crudup*, 461 F.3d 433 (4th Cir. 2006) (supervised release revoked and maximum sentence imposed for Grade C violations). Accordingly, the Committee determined that it would not be appropriate to rely upon the policy statement in Chapter 7 to define a class of cases in which the government would have to bear the burden of proving risk of flight or danger under Rule 32.1(a)(6).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be approved as published and forwarded to the Judicial Conference.

III. Action Items—Recommendations to Publish Amendments to the Rules

A. Technology Rules

The Committee is recommending a package of amendments following a comprehensive review of all of the Rules of Criminal Procedure to consider how and when to incorporate technological advances.²

The Committee is proposing one new rule (numbered 4.1) that (1) incorporates the portions of Rule 41 allowing a warrant to be issued on the basis of information submitted by reliable electronic means, and (2) makes those procedures applicable to complaints under Rule 3 and warrants or summonses issued under Rules 4 and 9. The new Rule 4.1 also contains an innovation that deals with the increasingly common situation where all supporting documentation is submitted by reliable electronic means, such as fax or email. The new rule requires a live conversation in which the person submitting the material is placed under oath, and

²During its April meeting, the Committee voted to forward all of the rules to the Standing Committee with the recommendation that they be published. In a subsequent vote taken by email, it approved the Committee Note to Rule 4.1 and the deletion of one amendment that was deemed to be duplicative.

also states that the judge may keep an abbreviated record of the oath, rather than transcribing verbatim the entire conversation and the material submitted electronically.

The remaining proposals amend existing rules, as follows:

- Rule 1: expanding the definition of telephone and telephonic to include cell phone technology and calls over the internet from computers
- Rules 3, 4, and 9: authorizing the consideration of complaints and issuance of arrest warrants and summonses based on information submitted by reliable electronic means as provided by new Rule 4.1
- Rules 4 and 41: authorizing the return of search warrants, arrest warrants, and warrants for tracking devices by reliable electronic means
- Rule 32.1: upon defendant's request, allowing the defendant to participate in proceedings concerning the revocation or modification of probation or supervised release by video teleconference
- Rule 40: with defendant's consent, allowing his appearance by video teleconference in proceeding on arrest for failure to appear in other district
- Rule 41: deleting portions now covered by new Rule 4.1
- Rule 43: conforming the rule to permit video conferencing as specified in other amendments; and—with defendant's written consent—allowing arraignment, trial, and sentencing of misdemeanor to occur by video teleconference.
- Rule 49: authorizing local rules permitting papers to be filed, signed, or verified by electronic means meeting standards of Judicial Conference.

With one exception, the proposed amendments were seen as uncontroversial and were approved unanimously by the Advisory Committee. Four members dissented on the amendment to Rule 32.1, which governs proceedings to revoke or modify probation or supervised release. The proposed amendment, as noted above, allows a defendant to request permission to participate by video teleconference. This amendment will be most useful when a defendant is alleged to have violated conditions of probation or supervised release while located in a district that lacks jurisdiction over the original sentence. Returning to the original district often involves substantial delays that work a significant hardship on defendants. The proposed amendment provides an option that could permit some defendants to remain in the district where the alleged violation occurred. While recognizing that in some instances being transported back to the

district where sentencing occurred may work a hardship, some members expressed concern that this amendment would become a slippery slope towards sentencing by video. There was also some concern that defendants might be pressured to appear by video teleconference in order to save the government the expense of transportation. The proposed amendment seeks to address this concern by limiting its application to cases where the defendant affirmatively requests this procedure.

The Standing Committee has already authorized, but not yet forwarded for publication, a related amendment to Rule 6(e), which provides for the taking of a grand jury return by video teleconference. In the Advisory Committee's view, it would be appropriate for that amendment to be published as part of an overall package of technology related amendments.

ACTION ITEMS—Rules 1, 3, 4, 9, 32.1, 40, 41, 43, 49, and new Rule 4.1

Recommendation—The Advisory Committee recommends that new Rule 4.1 and the proposed amendments to Rules 1, 3, 4, 9, 32.1, 40, 41, 43 and 49 be published for public comment.

B. ACTION ITEM—Rule 12

Under Rule 12, defects in the indictment or information—as well as improper joinder, the admission of illegally obtained evidence, and discovery violations—are “waived” if not raised prior to trial. Rule 12(e) provides that a “court may grant relief from the waiver” for “good cause.” Rule 12(b)(3)(B) presently excludes two classes of claims from these requirements. Claims that an indictment or information fails to invoke the court’s jurisdiction and claims that the indictment fails to state an offense may be heard “at any time while the case is pending.” The proposed amendment eliminates the exemption for a claim that the charge fails to state an offense, so that like other defects in the indictment it would be “waived” under Rule 12(e) if not raised prior to trial. The amendment also adds a separate standard for relief from waiver for this particular defect. Instead of “good cause,” relief for an untimely claim that the charge fails to charge an offense would require “prejudice” to a “substantial right of the defendant.” The proposal also includes a conforming amendment to Rule 34.

There are two reasons for this proposal. First, the failure to state an offense had previously been considered fatal whenever raised, but the decision in *United States v. Cotton*, 535 U.S. 625 (2002), undercut this “jurisdictional” justification for granting relief for this defect at any time. *Cotton* arose in the wake of the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On appeal the defendant in *Cotton* raised for the first time the objection that the indictment failed to specify drug weight that increased the maximum penalty under 21 U.S.C. § 841. Overruling *Ex parte Bain*, 121 U.S. 1 (1887), “[i]nsofar as it held that a defective indictment deprives a court of jurisdiction,” *Cotton* held that the omission of an essential element from the

defendant's indictment does not deprive a reviewing court of jurisdiction to review the conviction or sentence under Rule 52(b). 535 U.S. at 627-31. The second reason for the proposal is a recognition that exempting this particular challenge from the timing requirements of Rule 12 has significant costs, reducing the incentive of defendants to raise the objection before trial, wasting judicial resources, and undercutting the finality of criminal judgments. For these reasons, the Court of Appeals for the Third Circuit has urged the Committee to amend the Rule. See *United States v. Hedaithy*, 392 F.3d 580, 586-89 (3d Cir. 2004); *United States v. Panarella*, 277 F.3d 678, 686-88 (3d Cir. 2002).

The issues raised by the proposal fell into three categories: (1) whether this particular defect occurs with enough frequency to justify changing the rule, (2) whether the Fifth Amendment would limit the effectiveness of the amendment in cases in which the deficiency was raised for the first time mid-trial, and (3) under what conditions should relief be available for an untimely claim.

Magnitude of the problem. There is little information about exactly how often this type of error surfaces only after trial has started, or after conviction, or how often relief has been granted. The Department of Justice has stated that "a significant number of such motions" for relief on this basis are granted each year, and it provided more than a dozen case examples. Opponents contend that the problem does not warrant amendment, that the exception for "jurisdiction" would continue to require relief in many of these cases anyway, and that courts are already using plain error review and rejecting relief for this type of error when raised after trial. The Committee ultimately concluded that the costs of continuing to consider untimely claims under the current rule remain significant even if the problem arises infrequently.

Fifth Amendment issues. Under the existing rule, if a defendant waits until trial has begun to raise his claim that an indictment fails to state an offense, the trial judge must consider that claim and dismiss the charge if it indeed omits an essential element. This dismissal does not bar subsequent prosecution for the same offense. See *United States v. Scott*, 437 U.S. 82, 98-99 (1978); *Lee v. United States*, 432 U.S. 23, 30-34 (1977). The judge has no option other than dismissal at present because the defendant's Fifth Amendment right to grand jury review prevents the judge from either (1) allowing an amendment to the indictment to include the missing element, or (2) instructing the jury on an element not in the indictment (constructive amendment).

The Committee was divided over whether the proposed amendment to Rule 12 would expand options for trial judges should this type of defect surface mid-trial. Some members of the Committee believed that if under the amended Rule a defendant "waives" the claim that a charge fails to state an offense by delaying that objection until the trial has started, a trial judge would not have to dismiss the charge, but could proceed with the trial and instruct the jury on the missing element, granting a continuance if necessary. The defendant's failure to object to the missing element in the charge would also waive his right to claim that providing complete jury instructions is a constructive amendment of the indictment, these members concluded, as both the failure to include an element initially and the mid-trial addition of that element implicate the very same

constitutional guarantee—review of every element by the grand jury. Other members of the Committee anticipated that even under the proposed amendment, the Fifth Amendment would continue to bar a trial judge from constructively amending an incomplete indictment by instructing the jury on the missing element. A waiver of the right to object to the defective indictment, they argued, would not waive the future constitutional violation that would occur if the jury was instructed on an element that did not appear in the indictment. Because the current rule requires dismissal, there are no precedents on point. Thus courts have not confronted the implication of the Fifth Amendment in this context, and they will not do so as long as the rule requires dismissal in all cases.

The standards for relief. Courts have interpreted the “good cause” requirement in Rule 12(e) to bar relief for an untimely claim absent a showing of both prejudice from the error as well as cause for the failure to challenge the error on time. See *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963); *United States v. Crowley*, 236 F.3d 104 (2d Cir. 2004). The Committee was opposed to an amendment that would require “cause” as well as prejudice before a court could grant relief for an incomplete charge that was not raised prior to trial. A charge that fails to state an offense may not give adequate notice of the offense charged, or may otherwise prejudice the ability of the defendant to prepare a defense. Requiring “cause” could bar relief for a defendant who was caught off-guard about what charge he was facing because his counsel failed to spot the error before trial. Accordingly the proposed amendment includes a specific standard for relief from waiver of this particular defect, Rule 12(e)(2)(B), which allows the judge to grant relief if the failure to state an offense “has prejudiced a substantial right of the defendant.” The existing language of the Rule that permits a court to grant relief from the waiver of other claims for “good cause” is retained as Rule 12(e)(2)(A), and would apply to all other errors waived under Rule 12(e), such as motions to suppress evidence or obtain discovery.³

Although the proposed standard for relief in Rule 12(e)(2)(B)—“prejudiced a substantial right of the defendant”—eliminates the need to show cause for failing to challenge before trial a charge that fails to state an offense, the language does pose some risk of uncertainty in application. The Committee concluded that on balance the phrase will be easily understood by courts, both because the same phrase already exists in Rule 7(e) (permitting amendment of information unless a different offense is charged or “a substantial right of the defendant is prejudiced”) and because “substantial

³ The proposed amendment does not resolve the division in the courts of appeals over the interaction between plain error analysis under Rule 52(b) and “waiver” under Rule 12(e). Some courts have concluded that the failure to raise a claim in accordance with Rule 12(b) bars appellate review entirely absent a showing of “good cause” under Rule 12(e), while other courts have applied plain error review under Rule 52(b). The proposed amendment takes no position on the resolution of this debate for claims other than the failure of the charge to state an offense; it creates a different standard for relief expressly for failure-to-state-an-offense claims.

rights” is a concept already used under Rule 52. Nevertheless, the new standard leaves for case development what circumstances would meet the standard.

With four dissents, the Committee voted to recommend publication of the amendment. Those who favored the amendment concluded that it was unnecessary to resolve the uncertainty about the consequences of the proposed amendment for mid-trial objections, and that the proposal was warranted by the beneficial effects of encouraging timely objections. With two dissents, the Committee voted to recommend publication of the conforming amendment to Rule 34.

Recommendation—The Advisory Committee recommends that the amendment to Rules 12 and 34 be published for public comment.

IV. Information Items

A. Procedural Rules Governing Sentencing

A proposal to amend Rule 32(h) has been under consideration since the initial efforts to conform the rules to the Supreme Court’s ruling in *United States v. Booker*, 543 U.S. 220 (2005). At its April meeting, the Rules Committee had before it not only the proposal to amend Rule 32(h) to extend the notice requirement of that rule to variances as well as “departures,” but also an American Bar Association proposal to amend other portions of Rule 32 to provide the parties with disclosure of the information provided to and relied upon by the probation officer writing the presentence report (PSR). After discussion, both issues were recommitted to the Sentencing Subcommittee, with a request that it prepare a draft amendment or other recommendation for presentation to the Committee at the meeting in October.

The Committee has not yet reached consensus on the proper approach to Rule 32(h). Some favor expanding the rule’s disclosure obligation to variances, but others believe that under the advisory guidelines system disclosure should no longer be required even as to departures. Finally, some members favor leaving the rule as it is while the Supreme Court continues to refine the standards for post-*Booker* sentencing. Several members expressed concern about the difficulty of giving notice of variances, because the information upon which a judge relies may be continually supplemented right up to the time that sentence is pronounced. Therefore, it is hard to predict whether a variance from the guidelines may be imposed.

The new ABA proposal also raises a variety of issues, including not only the question whether the amendments are needed, but also concerns that they might work a fundamental change in the probation officers’ role as well as a significant expansion of their workload. The Committee heard from the Chief of Criminal Law Policy and the Probation Administrator in the Administrative Office of the Courts, both of whom expressed a variety of concerns. The Committee was also informed that a study by the Federal Judicial Center on the views of probation officers was being prepared and

that the Sentencing Commission was holding regional meetings at which this issue might be discussed. Additionally, the Federal Defenders wished to bring forward an additional related proposal. Accordingly, these issues were recommitted to the Sentencing Subcommittee, so that more information could be collected to allow the Committee to become more fully informed before acting.

B. Rule 12.4

The Committee on Codes of Conduct had asked the Advisory Committee on Criminal Rules to look at whether the disclosure requirements under Rule 12.4 should be expanded so that judges would be able to decide more easily whether recusal is advisable. The rule, adopted in 2000, requires the government to promptly disclose the identity of any organizational victim, and, if the organizational victim is a corporation, any parent corporation and any publicly held corporation that owns 10% or more of its stock. There is no present obligation that the identity of individual victims be disclosed. Under current Code of Conduct interpretation, a judge must recuse in a criminal case if the judge's impartiality might reasonably be questioned because of a close relationship to the victim or if the judge has a financial interest that could be substantially affected by the outcome, e.g., a restitution claim by the victim.

Upon the report of our Subcommittee on Victims' Rights, the full Committee opted not to change Rule 12.4 to require disclosure of an individual victim's identity. Such disclosure may pose serious privacy concerns for the victim. Even if the disclosure were filed under seal, unsealing may be required under certain circumstances, e.g., in response to media requests. *See United States v. Robinson*, No. 08-103090MLW, 2009 WL 137319 (D. Mass. Jan. 20, 2009) (denying media request for order requiring government to publicly disclose identity of individual victim in extortion prosecution, on the ground that the identity of the victim had not been filed and thus the court was not required to consider the presumptive right to access documents used in criminal proceedings). Moreover, the Department of Justice pointed out that an obligation by it to disclose individual victims would cause difficulty in cases involving data breach, identity theft, or securities fraud, where such victims may number in the millions.

C. Outreach to Crime Victim Advocates

The Committee also received information about the Department of Justice's ongoing efforts to communicate with the victims' rights community. Department representatives have held biannual discussions with victims' groups. During these discussions, the Department has informed the groups of relevant work being done by the Committee and solicited their concerns, if any, about the Federal Rules of Criminal Procedure. The Department also plans to continue meeting periodically with other victims' groups to seek their views.

TAB 9A

2 FEDERAL RULES OF CRIMINAL PROCEDURE

15 (D) Victim's Address and Telephone Number. If
16 the government intends to rely on a victim's
17 testimony to oppose the defendant's
18 public-authority defense and the defendant
19 establishes a need for the victim's address
20 and telephone number, the court may:
21 (i) order the government to provide the
22 information in writing to the defendant
23 or the defendant's attorney; or
24 (ii) fashion a reasonable procedure that
25 allows for preparing the defense and
26 also protects the victim's interests.

27 *****

28 **(b) Continuing Duty to Disclose.**

29 (1) In General. Both an attorney for the
30 government and the defendant must promptly
31 disclose in writing to the other party the

32 name of any additional witness — and the;
33 address, and telephone number of any
34 additional witness other than a victim — if:
35 **(1 A)** the disclosing party learns of the
36 witness before or during trial; and
37 **(2 B)** the witness should have been
38 disclosed under Rule 12.3(a)(4) if
39 the disclosing party had known of
40 the witness earlier.

41 **(2) Address and Telephone Number of an**
42 **Additional Victim-Witness.** The address and
43 telephone number of an additional victim-
44 witness must not be disclosed except as
45 provided in Rule 12.3(a)(4)(D).

46 * * * * *

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made after the amendment was released for public comment.

PUBLIC COMMENTS CONCERNING RULE 12.3

08-CR-003, Mr. Michael Nachmanoff, Federal Public Defender. Mr. Nachmanoff testified in opposition to the amendment (taking the place of Mr. Hillier). Based upon an unwarranted

assumption that every defendant poses a risk to prospective government witnesses, the amendment introduces uncertainty about whether the defendant will receive reciprocal discovery that is critical to pretrial preparation. Moreover, the amendment is unnecessary because it is so unlikely that the government will rely on a victim to rebut a public authority defense.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender.

Mr. Hillier opposes the amendment on several grounds: (1) it forces the defendant to provide the names and addresses of his witnesses without any guarantee of reciprocal discovery of the same information regarding the government's rebuttal witnesses; (2) it violates the defendant's right to due process and compromises the judge's neutrality; (3) any alternative to the provision of this information will be insufficient to satisfy due process; (4) when the defendant does not receive full reciprocal discovery he will be unable to retract his disclosures and the government will receive an unfair advantage; (5) the rule reverses the constitutionally required presumption that the defendant is entitled to investigate a witnesses background to discover avenues for impeachment. Since the amendment tracks the recent amendment to Rule 12.1, the Committee should defer this proposal until the constitutionality of Rule 12.1 has been litigated, particularly since there has been no showing of any need for the amendment.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association endorses the proposal.

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego oppose the amendment on several grounds: (1) the rule should reflect the reality that defendants will always have a need for this information and will seldom pose anythreat to the witnesses against him and should require a special

need for secrecy to justify withholding this information, (2) this information is critical not only to make it possible to contact the witnesses but also to conduct an investigation, and (3) even when the information may properly be withheld from the defendant, there is no justification for withholding it from counsel if disclosure to the defendant is prohibited.

Rule 15. Depositions

1 * * * * *

2 (c) **Defendant's Presence.**

3 (1) *Defendant in Custody.* Except as authorized by
4 Rule 15(c)(3), the ~~The~~ officer who has custody of
5 the defendant must produce the defendant at the
6 deposition and keep the defendant in the witness's
7 presence during the examination, unless the
8 defendant:

- 9 (A) waives in writing the right to be present; or
10 (B) persists in disruptive conduct justifying
11 exclusion after being warned by the court that

12 disruptive conduct will result in the
13 defendant's exclusion.

14 (2) *Defendant Not in Custody.* Except as authorized
15 by Rule 15(c)(3), a ~~A~~-defendant who is not in
16 custody has the right upon request to be present at
17 the deposition, subject to any conditions imposed
18 by the court. If the government tenders the
19 defendant's expenses as provided in Rule 15(d) but
20 the defendant still fails to appear, the defendant —
21 absent good cause — waives both the right to
22 appear and any objection to the taking and use of
23 the deposition based on that right.

24 (3) *Taking Depositions Outside the United States*
25 *Without the Defendant's Presence.* The
26 deposition of a witness who is outside the United
27 States may be taken without the defendant's

8 FEDERAL RULES OF CRIMINAL PROCEDURE

28 presence if the court makes case-specific findings

29 of all the following:

30 (A) the witness's testimony could provide

31 substantial proof of a material fact in a felony

32 prosecution;

33 (B) there is a substantial likelihood that the

34 witness's attendance at trial cannot be

35 obtained;

36 (C) the witness's presence for a deposition in the

37 United States cannot be obtained;

38 (D) the defendant cannot be present because:

39 (i) the country where the witness is located

40 will not permit the defendant to attend

41 the deposition;

42 (ii) for an in-custody defendant, secure

43 transportation and continuing custody

44 cannot be assured at the witness's
45 location; or
46 (ii) for an out-of-custody defendant, no
47 reasonable conditions will assure an
48 appearance at the deposition or at trial
49 or sentencing;
50 (E) the defendant can meaningfully participate in
51 the deposition through reasonable means; and
52 (F) for the deposition of a government witness,
53 the attorney for the government has
54 established that the prosecution advances an
55 important public interest.
56 * * * * *

COMMITTEE NOTE

Subdivision (c). This amendment addresses the growing frequency of cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court’s subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important

witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and other public interests are involved in these instances, the amended Rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court. New Rule 15(c) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence.

The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g., Lego v. Twomey*, 404 U.S. 477, 489 (1972). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

The Committee recognizes that authorizing a deposition under Rule 15(c)(3) does not determine the admissibility of the deposition itself, in part or in whole, at trial. Questions of admissibility of the evidence taken by means of these depositions are left to resolution by the courts applying the Federal Rules of Evidence and the Constitution.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The limiting phrase “in the United States” was deleted from Rule 15(c)(1) and (2) and replaced with the phrase “Except as authorized by Rule 15(c)(3).” The revised language makes clear that foreign depositions under the authority of (c)(3) are exceptions to the provisions requiring the defendant’s presence, but other depositions outside the United States remain subject to the general requirements of (c)(1) and (2). For example, a defendant may waive his right to be present at a foreign deposition, and a defendant who attends a foreign deposition may be removed from such a deposition if he is disruptive.

In subdivision (c)(3)(D) the introductory phrase was revised to the simpler “because.”

Two changes were made to restrict foreign depositions outside of the defendant’s presence to situations where the deposition serves an important public interest. The limiting phrase “in a felony prosecution” was added to subdivision (c)(3)(A), and new subdivision (c)(3)(F) requires the court to find that the attorney for the government has established that the prosecution advances an important public interest.

The Committee Note was revised in several respects. In conformity with the style conventions governing the rules, citations to cases were deleted. Other changes were made to improve clarity.

PUBLIC COMMENTS ON RULE 15

08-CR-004, Wendy H. Goggin, Chief Counsel, DEA. Ms. Goggin questioned whether the rule (1) should be limited to cases where no reasonable conditions can assure the defendant's presence at trial or sentencing, and (2) should require both that there be no conditions that can assure the defendant's presence and that the defendant be able meaningfully to participate in the deposition.

08-CR-006, Richard Anderson, Federal Public Defender. Mr. Anderson testified in opposition to the amendment, stressing that overseas depositions are an inadequate substitute for live testimony because of problems with technology as well as restrictions imposed by local laws and procedures that hamper both direct and cross examination, and may offer inadequate opportunities to consult with the defendant. In any event, even the best video taped depositions are not the equivalent of live testimony. Finally, he urged that if the amendment went forward it should be more narrowly tailored and should set standards for the effective participation of the defendant.

08-CR-007, Richard Anderson, Federal Public Defender. Mr. Anderson's written statement urges that the amendment be withdrawn because it creates a process which "strikes at the core of the Confrontation Clause, by denying face-to-face confrontation" and "threatens . . . to significantly impair the defense function, which relies on the defendant's presence with counsel when confronting and cross-examining a witness." He also proposes several changes be

made if the amendment is not withdrawn, including requiring authorization of the Attorney General or his designee, heightening the standard to be made by the government, and requiring that the defendant be able to participate by the least restrictive means available.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association “believes that this rule is reasonable and necessary in those few cases where a foreign deposition is necessary, and the defendant cannot be physically present.”

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego oppose the amendment on the grounds that (1) it exceeds the authority of the Rules Enabling Act, (2) it would effectively deprive the defendant of his constitutional right to confront the witnesses against him, thus achieving the purpose of the failed 2002 proposed amendment to Rule 26, (3) it is not limited to a narrow class of transnational crimes or critical witnesses, and (4) its safeguards are insufficient, and do not even guarantee that the defendant would be allowed to view and listen in real time and consult confidentially with counsel.

Rule 21. Transfer for Trial

1

* * * * *

2

(b) For Convenience. Upon the defendant's motion,

3

the court may transfer the proceeding, or one or

4

more counts, against that defendant to another

5

district for the convenience of the parties, any

6

victim, and the witnesses, and in the interest of

7

justice.

8

* * * * *

COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made after the amendment was released for public comment.

PUBLIC COMMENTS CONCERNING RULE 21.

08-CR-002. Alex L. Zipperer. Mr. Zipperer opposes the amendment to Rule 21 on the grounds that it would subordinate the convenience of parties and witnesses to those of non-witness victims, and it might even be construed to allow a transfer to accommodate voluntary public attendance despite imposing substantial costs on parties, witnesses, and government lawyers.

08-CR-003, Mr. Michael Nachmanoff, Federal Public Defender. Mr. Nachmanoff testified in opposition to the amendment (taking the place of Mr. Hillier). The convenience of those who are required to attend the trial—the defendant, government, and witnesses—should stand on a different footing than the preferences of those who regard themselves as victims. The CVRA gave victims a right not to be excluded from trial, not a right to attend. This rule goes beyond the CVRA and may cause practical problems, especially in cases with hundred or even thousands of victims, and may also generate time consuming mandamus actions.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier opposes the amendment on the grounds that (1) the CVRA does not give non-testifying victims a right to have the proceedings held at a place convenient for them, (2) the interests of the non-testifying victims should not be placed on an equal footing

See, e.g., United States v. Loya, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

PUBLIC COMMENTS ON RULE 32.1(a)(6)

08-CR-002. Alex L. Zipperer. Mr. Zipperer opposes the amendment on the ground that it requires the person seeking release to prove a negative and sets an impossibly high standard of proof by clear and convincing evidence, which will result in imprisonment for even the most minor infraction of release conditions.

08-CR-003, Mr. Michael Nachmanoff, Federal Public Defender. Mr. Nachmanoff testified in opposition to the amendment (taking the place of Mr. Hillier). He urged that the burden of proof should be placed on the defendant only in cases in which the applicable Sentencing Guidelines policy statement provides for imprisonment, and that burden of proving a risk of flight or danger should be shifted to the government in other cases.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier agrees that an amendment is needed, but argues that it should (1) require a preliminary finding of probable cause, and (2) place the burden of proof on the government when the applicable

policy statement would provide for a modification (rather than imprisonment) for the alleged violation.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association endorses the proposal to clarify the burden of proof.

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego endorse Mr. Hillier's comments in 08-CR-005.

TAB 9B

2 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 3. The Complaint

1 The complaint is a written statement of the essential
2 facts constituting the offense charged. ~~It~~ Except as provided
3 in Rule 4.1, it must be made under oath before a magistrate
4 judge or, if none is reasonably available, before a state or
5 local judicial officer.

COMMITTEE NOTE

Under the amended rule, the complaint and supporting material may be submitted by telephone or reliable electronic means, however, the Rule requires that the judicial officer administer the oath or affirmation in person or by telephone. The Committee concluded that the benefits of making it easier to obtain judicial oversight of the arrest decision and the increasing reliability and accessibility to electronic communication warranted amendment of the rule. The amendment makes clear that the submission of a complaint to a judicial officer need not be done in person and may instead be made by telephone or other reliable electronic means. The successful experiences with electronic applications under Rule 41, which permit electronic applications for search warrants, support a comparable process for arrests. The provisions in Rule 41 have been transferred to new Rule 4.1, which governs applications by telephone or other electronic means under Rules 3, 4, 9, and 41.

Rule 4. Arrest Warrant or Summons on a Complaint

1 **(c) Execution or Service, and Return.**

2 * * * * *

3 **(3) Manner.**

4 (A) A warrant is executed by arresting the
5 defendant. Upon arrest, an officer possessing
6 the original or a duplicate original warrant
7 must show it to the defendant. If the officer
8 does not possess the warrant, the officer must
9 inform the defendant of the warrant's
10 existence and of the offense charged and, at
11 the defendant's request, must show the
12 original or a duplicate original warrant to the
13 defendant as soon as possible.

14 * * * * *

15 **(4) Return.**

4 FEDERAL RULES OF CRIMINAL PROCEDURE

16 (A) After executing a warrant, the officer must
17 return it to the judge before whom the
18 defendant is brought in accordance with Rule
19 5. The officer may do so by reliable
20 electronic means. At the request of an
21 attorney for the government, an unexecuted
22 warrant must be brought back to and
23 canceled by a magistrate judge or, if none is
24 reasonably available, by a state or local
25 judicial officer.

26 * * * * *

27 **(d) Warrant by Telephone or Other Reliable Electronic**
28 **Means.** In accordance with Rule 4.1, a magistrate judge
29 **may issue a warrant or summons based on information**
30 **communicated by telephone or other reliable electronic**
31 **means.**

COMMITTEE NOTE

Rule 4 is amended in three respects to make the arrest warrant process more efficient through the use of technology.

Subdivision (c). First, Rule 4(c)(3)(A) authorizes a law enforcement officer to retain a duplicate original arrest warrant, consistent with the change to subdivision (d), which permits a court to issue an arrest warrant electronically rather than by physical delivery. The duplicate original warrant may be used in lieu of the original warrant signed by the magistrate judge to satisfy the requirement that the defendant be shown the warrant at or soon after an arrest. *Cf.* Rule 4.1 (b)(5) (providing for a duplicate original search warrant).

Second, consistent with the amendment to Rule 41(f), Rule 4(c)(4)(A) permits an officer to make a return of the arrest warrant electronically. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Subdivision (d). Rule 4(d) provides that a magistrate judge may issue an arrest warrant or summons based on information submitted electronically rather than in person. This change works in conjunction with the amendment to Rule 3, which permits a magistrate judge to consider a criminal complaint and accompanying documents that are submitted electronically. Subdivision (d) also incorporates the procedures for applying for and issuing electronic warrants set forth in Rule 4.1.

6 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

1 **(a) In General.** A magistrate judge may consider
2 information communicated by telephone or other
3 reliable electronic means when deciding whether to
4 approve a complaint or to issue a warrant or summons.

5 **(b) Procedures.** If a magistrate judge decides to proceed
6 under this rule, the following procedures apply:

7 **(1) Taking Testimony Under Oath.** The judge must
8 place under oath—and may examine—the applicant
9 and any person on whose testimony the application
10 is based.

11 **(2) Recording Testimony.** The judge must make a
12 verbatim record of the testimony with a suitable
13 recording device, if available; by a court reporter;
14 or in writing. But a written summary or order
15 suffices if the testimony is limited to attesting to

16 the contents of a written affidavit submitted by
17 reliable electronic means.

18 **(3) Certifying Testimony.** The judge must have any
19 verbatim recording or court reporter's notes
20 transcribed, certify the transcription's accuracy,
21 and file a copy of the record and the transcription
22 with the clerk. But the judge must simply sign and
23 file with the clerk any written verbatim record or
24 any written summary or order.

25 **(4) Preparing a Proposed Duplicate Original of a**
26 **Complaint, Warrant, or Summons.** The applicant
27 must prepare a proposed duplicate original of a
28 complaint, warrant, or summons, and must read or
29 otherwise transmit its contents verbatim to the
30 judge.

31 **(5) Preparing an Original Complaint, Warrant, or**
32 **Summons.** If the applicant reads the contents of

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33 the proposed duplicate original, the judge must
34 enter those contents into an original complaint,
35 warrant, or summons. If the applicant transmits
36 the contents by reliable electronic means, that
37 transmission may serve as the original.

38 **(6) *Modification.*** The judge may modify the
39 complaint, warrant, or summons. The judge must
40 transmit the modified version to the applicant by
41 reliable electronic means or direct the applicant to
42 modify the proposed duplicate original
43 accordingly.

44 **(7) *Signing.*** If the judge decides to approve the
45 complaint, or to issue the warrant or summons, the
46 judge must immediately:

47 **(A)** sign the original;

48 **(B)** enter on its face the exact date and time it is
49 approved or issued; and

50 (C) transmit it by reliable electronic means to the
 51 applicant or direct the applicant to sign the
 52 judge’s name on the duplicate original.

53 (c) **Suppression of Evidence Limited.** Absent a finding of
 54 bad faith, evidence obtained from a warrant issued
 55 under this rule is not subject to suppression on the
 56 ground that issuing the warrant in this manner was
 57 unreasonable under the circumstances.

COMMITTEE NOTE

New Rule 4.1 brings together in one Rule the procedures for using a telephone or other reliable electronic means to apply for, approve, or issue warrants, summonses, and complaints. The procedures that have governed search warrants “by telephonic or other means,” formerly in Rule 41(d)(3) and (e)(3), have been relocated to this Rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

With one exception noted in the next paragraph, the new Rule preserves the procedures formerly in Rule 41 without change. Limited to “magistrate judges,” the Rule continues to require, as did former Rule 41(d)(3) and (e)(3), that a federal judge (and not a state

judge) handle electronic applications, approvals, and issuances. The Rule continues to require that the judge place an applicant under oath over the telephone, and permits the judge to examine the applicant, as Rule 41 had provided. Rule 4.1 (b) continues to require that when electronic means are used to issue the warrant, the magistrate judge retains the original warrant. Minor changes in wording and reorganization of the language formerly in Rule 41 were made to aid in application of the rules, with no intended change in meaning.

The only substantive change to the procedures formerly in Rule 41(d)(3) and (e)(3) appears in new Rule 4.1 (b)(2). Former Rule 41(d)(3)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1 (b)(2) provides that when a warrant application and affidavit are sent electronically to the magistrate judge and the telephone conversation between the magistrate judge and affiant is limited to attesting to the written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge can simply prepare a written *summary* or order memorializing the affirmation of the oath. Rule 4.1 (b) (7) specifies that any written summary or order must be signed by the magistrate judge and filed with the clerk. This process will maintain the safeguard of documenting the warrant application process.

12 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12. Pleadings and Pretrial Motions

1

* * * * *

2

(b) Pretrial Motions.

3

* * * * *

4

(3) Motions That Must Be Made Before Trial. The

5

following must be raised before trial:

6

(A) a motion alleging a defect in instituting the

7

prosecution;

8

(B) a motion alleging a defect in the indictment

9

or information, including failure to state an

10

offense—but at any time while the case is

11

pending, the court may hear a claim that the

12

indictment or information fails to invoke the

13

court's jurisdiction ~~or to state an offense~~;

14

(C) a motion to suppress evidence;

15

(D) a Rule 14 motion to sever charges or

16

defendants; and

17 (E) a Rule 16 motion for discovery.

18 * * * * *

19 (e) **Waiver of a Defense, Objection, or Request.**

20 (1) **Generally.** A party waives any Rule 12(b)(3)
21 defense, objection, or request not raised by the
22 deadline the court sets under Rule 12(c) or by any
23 extension the court provides.

24 (2) **Relief from Waiver.** ~~For good cause,~~ The court
25 may grant relief from the waiver:

26 (A) for good cause; or

27 (B) when a failure to state an offense in the
28 indictment or information has prejudiced a
29 substantial right of the defendant.

30 * * * * *

COMMITTEE NOTE

Rule 12(b)(3)(B) has been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the “indictment or information fails . . . to state an offense.” This specific charging error was previously considered

“jurisdictional,” fatal whenever raised, and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), “[i]nsofar as it held that a defective indictment deprives a court of jurisdiction”). The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet “the plain-error test of Federal Rule of Criminal Procedure 52(b).” *Cotton*, 535 U.S. at 631.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before trial that the charge does not state an offense now “waives” that objection under Rule 12(e). However, Rule 12(e) has also been amended so that even when the objection is untimely, a court may grant relief whenever a failure to state an offense has prejudiced a substantial right of the defendant, such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense.

The amendment is not intended to affect existing law concerning when relief may be granted for other untimely challenges “waived” under Rule 12(e).

COMMITTEE NOTE

The amendment provides for video teleconferencing, in order to bring the rule into conformity with Rule 5(f).

Rule 41. Search and Seizure

1
2
3
4
5
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7
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9
10
11
12

* * * * *

(d) Obtaining a Warrant.

* * * * *

**(3) Requesting a Warrant by Telephonic or Other
Reliable Electronic Means. In accordance with
Rule 4.1, a magistrate judge may issue a warrant
based on information communicated by telephone
or other reliable electronic means.**

~~(A) **In General.** A magistrate judge may
issue a warrant based on information
communicated by telephone or other
reliable electronic means.~~

18 FEDERAL RULES OF CRIMINAL PROCEDURE

13 ~~(B) **Recording Testimony.** Upon learning~~
14 ~~that an applicant is requesting a warrant~~
15 ~~under Rule 41(d)(3)(A), a magistrate~~
16 ~~judge must:~~

17 ~~(i) place under oath the applicant and~~
18 ~~any person on whose testimony~~
19 ~~the application is based; and~~

20 ~~(ii) make a verbatim record of the~~
21 ~~conversation with a suitable~~
22 ~~recording device, if available, or~~
23 ~~by a court reporter, or in writing.~~

24 ~~(C) **Certifying Testimony.** The magistrate~~
25 ~~judge must have any recording or court~~
26 ~~reporter's notes transcribed, certify the~~
27 ~~transcription's accuracy, and file a copy~~
28 ~~of the record and the transcription with~~
29 ~~the clerk. Any written verbatim record~~

30 must be signed by the magistrate judge
31 and filed with the clerk.

32 ~~(D) **Suppression Limited.** Absent a finding~~
33 ~~of bad faith, evidence obtained from a~~
34 ~~warrant issued under Rule 41(d)(3)(A)~~
35 ~~is not subject to suppression on the~~
36 ~~ground that issuing the warrant in that~~
37 ~~manner was unreasonable under the~~
38 ~~circumstances.~~

39 (e) **Issuing the Warrant.**

40 * * * * *

41 ~~(3) **Warrant by Telephonic or Other Means.** If a~~
42 ~~magistrate judge decides to proceed under Rule~~
43 ~~41(d)(3)(A), the following additional procedures~~
44 ~~apply:~~

45 ~~(A) **Preparing a Proposed Duplicate Original**~~
46 ~~**Warrant.** The applicant must prepare a~~

20 FEDERAL RULES OF CRIMINAL PROCEDURE

47 ~~“proposed duplicate original warrant”~~ and
48 must read or otherwise transmit the contents
49 of that document verbatim to the magistrate
50 judge.

51 ~~(B) **Preparing an Original Warrant.** If the~~
52 applicant reads the contents of the proposed
53 duplicate original warrant, the magistrate
54 judge must enter those contents into an
55 original warrant. If the applicant transmits the
56 contents by reliable electronic means, that
57 transmission may serve as the original
58 warrant.

59 ~~(C) **Modification.** The magistrate judge may~~
60 modify the original warrant. The judge must
61 transmit any modified warrant to the
62 applicant by reliable electronic means under
63 Rule 41(e)(3)(D) or direct the applicant to

22 FEDERAL RULES OF CRIMINAL PROCEDURE

81 copy of the inventory—to the magistrate
82 judge designated on the warrant. The
83 officer may do so by reliable electronic
84 means. The judge must, on request, give a
85 copy of the inventory to the person from
86 whom, or from whose premises, the
87 property was taken and to the applicant for
88 the warrant.

89 **(2) Warrant for a Tracking Device.**

90 (A) **Noting the Time.** The officer executing a
91 tracking-device warrant must enter on it the
92 exact date and time the device was installed
93 and the period during which it was used.

94 (B) **Return.** Within 10 calendar days after the
95 use of the tracking device has ended, the
96 officer executing the warrant must return it
97 to the judge designated in the warrant. The

98 officer may do so by reliable electronic
99 means.

COMMITTEE NOTE

Subdivisions (d)(3) and (e)(3). The amendment deletes the provisions that govern the application for and issuance of warrants by telephone or other reliable electronic means. These provisions have been transferred to new Rule 4.1, which governs complaints and warrants under Rules 3, 4, 9, and 41.

Subdivision (f)(2). The amendment permits any warrant return to be made by reliable electronic means. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Rule 43. Defendant’s Presence

1 **(a) When Required.** Unless this rule, Rule 5, ~~or~~ Rule 10
2 or Rule 32.1 provides otherwise, the defendant must be
3 at:
4 (1) the initial appearance, the initial arraignment, and
5 the plea;

24 FEDERAL RULES OF CRIMINAL PROCEDURE

6 (2) every trial stage, including jury impanelment and
7 the return of the verdict; and

8 (3) sentencing.

9 **(b) When Not Required.** A defendant need not be present
10 under any of the following circumstances:

11 **(1) Organizational Defendant.** The defendant is an
12 organization represented by counsel who is
13 present.

14 **(2) Misdemeanor Offense.** The offense is punishable
15 by fine or by imprisonment for not more than one
16 year, or both, and with the defendant's written
17 consent, the court permits arraignment, plea, trial,
18 and sentencing to occur by video teleconferencing
19 or in the defendant's absence.

COMMITTEE NOTE

Subdivision (b). This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment allows participation through video teleconference as an

26 FEDERAL RULES OF CRIMINAL PROCEDURE

14

COMMITTEE NOTE

Subdivision (e). Filing papers, by electronic means is added as new subdivision (e), which is drawn from Civil Rule 5(d)(3). It makes it clear that a paper filed electronically in compliance with the Court's local rule is a written paper.

TAB 9C

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 6-7, 2009
Washington, D.C.

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the “Committee”) met in Washington, D.C. on April 6-7, 2009. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morris C. England, Jr.
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge James B. Zagel
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Rita M. Glavin, Acting Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, its Reporter, Professor Daniel R. Coquillette, and liaison member, Judge Reena Raggi. Supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Jeffrey N. Barr, Senior Attorney at the Administrative Office
Henry Wigglesworth, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department of Justice’s Criminal Division - Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton,

Deputy Chief of the Appellate Section. Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, attended as a representative of the Clerks of Court.

A. Chair’s Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed Bruce Rifkin and Rita Glavin, Acting Acting Assistant Attorney General, Criminal Division, Department of Justice.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the October 2008 meeting.

The Committee unanimously approved the minutes.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

Mr. Rabiej reported that the following proposed rule amendments designed to simplify the computation of time had been approved by the Supreme Court and transmitted to Congress. Unless Congress enacts legislation to reject, modify, or defer them, they will take effect on December 1, 2009.

1. Rule 45. Computing and Extending Time. Proposed amendment simplifying time computation methods.
2. Related amendments proposed regarding the time periods in Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58 and 59; Rule 8 of the Rules Governing § 2254 Cases; and Rule 8 of the Rules Governing § 2255 Proceedings.

Judge Rosenthal added that corresponding statutory amendments had been introduced in Congress, with bipartisan support. Mr. Rabiej stated that in anticipation of changes to the rules and statutes governing time computation, the Administrative Office was preparing a memorandum that would be circulated to all courts reminding them to check their local rules to conform them to the new changes.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed amendment to Rule 15 (Depositions)

The Committee discussed the proposed Rule 15 amendment that had been published for public comment. Judge Keenan, Chair of the Subcommittee on Rule 15, reported that the Subcommittee anticipated that the amendment would be challenged on the basis of *Crawford v. Washington*, 541 U.S. 36 (2004), but remained convinced that the amendment was needed in limited circumstances. The Subcommittee had reviewed the comments made during the public comment period and agreed with the suggestion made by the Federal Defenders and supported

by the Department of Justice that the Attorney General (“AG”) or his designee certify or authorize that the deposition is necessary to a prosecution that advances an important public policy interest. The Subcommittee revised the proposed amendment to include this requirement.

There was discussion about which word – “certify” or “authorize” – was appropriate to describe the AG’s required action. Adopting any language that *requires* action by the AG raised a separation of powers issue. Debate ensued with some members pointing out that the Department did not object to the requirement and that the requirement served a valuable purpose in limiting the scope of the Rule, while others agreed that requiring specific action by the AG raised concerns.

As an initial matter, it was moved that Rule 15(c)(3)(A) (page 148 of agenda book) be amended to exclude misdemeanor prosecutions from the rule’s application by adding “in a felony prosecution” after “material fact.”

The motion was approved unanimously.

To avoid directing the AG to act and sidestep the separation of powers issue, Judge Molloy moved to amend the proposed language of Rule (15)(c)(3)(F) (page 149 of agenda book) to read, in its entirety, “for the deposition of a government witness, that the prosecution advances an important public interest.”

The motion passed by a vote of 8 to 4.

To impose accountability on federal prosecutors who might invoke the rule, Rachel Brill moved to amend Rule (15)(c)(3)(F) (page 149 of agenda book) to add “the attorney for the government has established” before “that the prosecution.”

The motion passed by a vote of 10 to 2.

With these changes, it was moved that the Rule 15 amendment be approved, as revised, and sent to the Standing Committee.

The Committee voted, with three dissents, to approve the proposed Rule 15 amendment, as revised, and send it to the Standing Committee.

The Committee then discussed amendments to the Committee Note following Rule 15. Professor Coquilletta reminded the Committee of the general principle that cases should not be cited in a Note because of the danger that they could later be overruled. He also stated that a Note should be neutral and not bear the burden of justifying the accompanying Rule. A member suggested that the cases cited in the first full paragraph of the Note on page 150 of the agenda book were outdated.

It was moved that the Note be amended by striking the case citations on page 150.

The motion was approved unanimously.

To state more broadly the purposes underlying the rule, Judge Molloy moved to amend the first sentence of the first full paragraph on page 150 by substituting “other public interests” for “public safety interests.”

The motion was approved unanimously.

To make the Note more concise, Judge Battaglia moved to amend the first sentence of the first full paragraph on page 150 by striking “public policy.” Judge Raggi offered a further amendment to end the sentence after the words “trial court.” It was so moved.

The motion was approved, with one dissent.

Professor Leipold moved to amend the last paragraph in the Note on page 151 by striking the first sentence in its entirety. The sentence was defensive in tone and was unnecessary.

The motion was approved unanimously.

To make it more readable, Judge Zagel offered a complete substitute for the last paragraph on page 151. Following brief discussion, it was moved that the Committee amend the Note by deleting the final paragraph and substituting the following paragraph in its place:

The Committee recognizes that authorizing a deposition under Rule 15(c)(3) does not determine the admissibility of the deposition itself, in part or in whole, at trial. Questions of admissibility are left to the development of the law.

With these changes, it was moved that the Committee Note be approved, as revised, and forwarded to the Standing Committee.

The Committee voted, with one dissent, to approve the proposed Committee Note, as revised, and send it to the Standing Committee.

Judge Rosenthal pointed out that because the amendment to Rule 15 implicated the Rules of Evidence, it might be prudent to refer the amended Rule and accompanying Note to the Advisory Committee on Evidence Rules for review. The Committee agreed.

B. Proposed Amendment to Rule 5 (Initial Appearance)

The Committee discussed the proposed Rule 5 amendment that had been recently published for public comment (page 130 of agenda book). Judge Jones, Chair of the Subcommittee on the Crime Victims' Rights Act ("CVRA"), observed that passage of the CVRA sent a message that victims' interests should be given greater weight. Notwithstanding this observation, several members expressed concern about amending Rule 5 to require a judge to specifically consider the right of a victim to be protected when making a decision on whether to release or detain a defendant. One member stated that the amendment seems redundant and perhaps unconstitutional. Another expressed reservations about whether pressure from Congress should influence the Committee's work in general. A member commented that if the purpose of the amendment is purely to highlight a victim's right to be protected – a right that is already covered through the Rule's incorporation of the Bail Reform Act (18 U.S.C. § 3143) – that such a purpose does not justify changing the Rule.

To incorporate into the rule the principles of the CVRA, Judge Jones moved that Rule 5(d)(3) be amended by adding at the end the following new sentence: "In making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant and the requirements of the Bail Reform Act."

The motion to amend Rule 5 failed by a vote of 3 to 9.

The Committee thus decided to leave Rule 5 unchanged and not to send it to the Standing Committee for amendment.

C. Proposed Amendment to Rule 12.3 (Notice of Public-Authority Defense)

The Committee discussed the proposed Rule 12.3 amendment recently published (page 132 of agenda book). The amendment exempts a victim's name and address from the general disclosure requirements of the Rule. Judge Tallman noted that this amendment mirrors a provision that has already become part of Rule 12.1 (Notice of an Alibi Defense). Recalling the witness Michael Nachmanoff's comment that he could not imagine a scenario in which the amendment would be necessary, Judge Zagel described an actual case of his in which the amendment could have been used. After a brief discussion, Judge Jones moved that the Committee send the proposed Rule 12.3 amendment to the Standing Committee.

The Committee voted unanimously to send the proposed Rule 12.3 Amendment to the Standing Committee.

D. Proposed Amendment to Rule 21 (Transfer for Trial)

The Committee discussed the proposed Rule 21 amendment recently published (page 137 of agenda book). The amendment requires a judge to consider the convenience of victims in deciding whether to transfer a trial to another location. Members observed that although the

CVRA established a victim’s right not to be excluded from a trial, the law did not create a substantive right to attend a trial. In response, other members underscored the discretionary nature of the amendment, which only requires a judge to consider, as one factor, the convenience of the victims. After further discussion, it was moved that the Committee send the proposed Rule 21 amendment to the Standing Committee.

The Committee voted, with two dissents, to send the proposed Rule 21 Amendment to the Standing Committee.

E. Proposed Amendment to Rule 32.1 (Revoking or Modifying Probation or Supervised Release)

The Committee discussed the proposed Rule 32.1 amendment recently published (page 158 of agenda book). The proposed amendment specifies that a Magistrate Judge must apply the provisions of 18 U.S.C. § 3143(a)(1) in deciding whether to release or detain an alleged violator of probation or supervised release conditions. The amendment also clarifies the burden of proof the alleged violator must meet in order to be released. After discussing the amendment, Rachel Brill moved to revise the proposed amendment by adding the “burden-shifting” language suggested by the Federal Public Defenders (page 166 of agenda book). The proposal places the burden of proof on the government in certain cases when imprisonment is an unlikely result of revocation.

The motion failed by a vote of 4 to 7.

It was then moved that the Committee send the proposed Rule 32.1 amendment as published for comment to the Standing Committee.

The Committee voted, with one dissent, to send the proposed Rule 32.1 Amendment to the Standing Committee.

III. REPORTS OF SUBCOMMITTEES

A. Subcommittee on Rule 12 – Proposed Amendment to Rule 12(b)

Judge England, Chair of the Subcommittee on Rule 12, provided some background to the amendment under consideration. Rule 12 currently sets forth a general requirement that defects in an indictment must be raised before trial. However, the Rule exempts from this requirement motions based upon an indictment’s failure to state an offense. *See* Rule 12(b)(3)(B). In 2002, the Supreme Court held in *United States v. Cotton*, 535 U.S. 625 (2002), that defects in an indictment are not jurisdictional and, accordingly, if a defendant fails to raise such a claim at trial, the claim is not necessarily waived and will be subject to only plain error review. In 2006, the Department of Justice asked the Committee to consider amending Rule 12 to eliminate the exemption for claims of failure to state an offense, thereby requiring such a claim to be raised *before* trial and purportedly bringing it into conformity with *Cotton*. The Department submitted

a proposed amendment to this effect. The Federal Defenders oppose the Department’s amendment, which they contend imperils rights of defendants, and urge the Committee to let Rule 12 stand.

Since the October 2008 meeting, the Subcommittee on Rule 12 has revised the Department’s original proposal and has crafted a compromise that seeks to encourage defendants to raise this issue before trial while preserving a limited option to raise it later, upon a showing that the government’s failure to state an offense in the indictment “has prejudiced a substantial right of the defendant.”

The Committee discussed the amendment as revised. One member expressed concern that the amendment was unnecessary because the government had not shown that the present Rule was causing problems. The member further expressed concern that the amendment implicated the Fifth and Sixth Amendments. Another member was troubled by the vagueness of the words “prejudice” and “substantial right.” However, other members thought that the meaning of these words could be developed through case law and that the amendment was needed to clarify how courts should handle such motions after *Cotton*.

After further discussion, Judge England moved that Rule 12 be amended to require that an indictment’s failure to state an offense be raised before trial (as shown on pages 250-251 of the agenda book).

The Committee voted, with four dissents, to send the proposed Rule 12 Amendment to the Standing Committee for publication.

The Committee briefly discussed the proposed amendment to Rule 34 (Arresting Judgment), which conforms the Rule to the amendment approved above to Rule 12(b). It was moved that Rule 34 be amended as shown on page 253.

The Committee voted, with two dissents, to send the proposed Rule 34 Amendment to the Standing Committee for publication.

B. Subcommittee on Technology – Proposed Amendments to Rules 1, 3, 4, 9, 32.1, 40, 41, 43, 47, and 49.

Judge Battaglia, Chair of the Subcommittee on Technology, reported on the Subcommittee’s efforts to incorporate technological advances into the rules. He said that the Subcommittee employed a two-step process: (1) identify those rules which could benefit from advances in technology; and (2) determine whether changing a rule to accommodate new technology would undermine any rights of the parties. Judge Battaglia cited eight rules that the Subcommittee had identified as amenable to technological amendments: Rules 3, 4, 9, 32.1, 40, 43, 47, and 49.

The Committee discussed the Subcommittee’s proposed amendments to Rule 3 (The Complaint) and Rule 4 (Arrest Warrant or Summons on a Complaint). The amendments under

consideration would allow a magistrate judge to consider a complaint or issue an arrest warrant “based on information communicated by telephone or other reliable electronic means.” Judge Battaglia pointed out that in districts such as his (S.D. Cal.), the distance between a law enforcement agent in the field and a magistrate judge can be vast and these amendments would save considerable time and resources. Another member observed that by making it easier to apply for an arrest warrant from a remote location, the amendments would minimize the number of warrantless searches and provide more judicial oversight of the arrest process.

A member asked whether e-mail would qualify under the rule as a “reliable electronic means.” The consensus was that e-mail would qualify but several members pointed out that e-mail alone would not be sufficient under the proposed Rule to obtain an arrest warrant or to have a complaint considered. A live conversation between a judge and an agent would also always be necessary, at a minimum, to place the agent seeking the warrant or consideration of a complaint under oath. Judge Battaglia added that the process would always result in a written document that reflected how the warrant was obtained.

Discussion ensued about whether the Rules should continue to permit a state or local judicial officer to issue a warrant or consider a complaint if a federal judge is unavailable. Given that some districts encompass huge geographic areas and have few federal judges assigned to them, the Committee agreed that keeping state and local judges as a backup if federal judges were not available was a good idea. The Committee recognized that even though the amendment would make it easier to reach a federal judge, occasions would arise when no federal judge would be available. To preserve this option, Judge Zagel moved to retain the language in Rule 3 (lines 20-21 on page 255 of agenda book) that permits a state or local judge to consider a complaint in person.

The motion was approved unanimously.

It was further moved that the “electronic means” option under Rules 3 and 4 be restricted to federal judges.

The motion was approved unanimously.

To facilitate the return of an executed warrant, it was further moved that the proposed amendment to Rule 4(c)(4) providing that an officer may return an arrest warrant to a judge by electronic means (page 258, lines 8-9) be approved.

The motion was approved unanimously.

To allow for the use of a “duplicate original” document, it was further moved that the proposed amendment to Rule 4(c)(3)(A) (page 257, lines 18 and 21), providing that an officer executing an arrest warrant may show a defendant either an original or a “duplicate original,” be approved. Judge Battaglia explained how obtaining a warrant by electronic means creates two different documents that both function as originals, leading to the phrase “duplicate original.”

The motion was approved unanimously.

The Committee turned to the procedures for obtaining a warrant or considering a complaint. The amendment proposed by the Subcommittee incorporated by cross reference the procedures set forth in Rule 41(d)(3) and 41(e)(3). A member pointed out the danger of relying upon a cross-reference, *i.e.*, that if the procedures contained in Rule 41 were later amended or repealed, the same changes would be incorporated into Rule 4. Instead of using a cross reference, the Committee considered the alternative of repeating the Rule 41 procedures in Rule 4. Several members suggested a third alternative: to consolidate the procedures for all electronic applications into one Rule.

Acting on this suggestion, Judges Battaglia and Tallman, with the assistance of Professors Beale and Leipold, drafted a consolidated rule, entitled “Rule X.X” as a placeholder, which was circulated to members of the Committee. Rule X.X consolidates the procedures for using electronic means to obtain search and arrest warrants or to obtain a complaint. In addition, the draft included new versions of Rules 3 and 4, newly-revised to contain a cross reference to Rule X.X.

It was moved that the Committee approve the amended Rule 3, as revised by the group, and send it to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 3 to the Standing Committee for publication.

The Committee briefly discussed the new Rule 4(d), as revised by the group. It was moved that the Rule be approved with two minor changes to make the subdivision more readable: substitution of “A magistrate judge” for “The court,” at the beginning of the sentence, and deletion of “a” before “telephone.” So revised, it was moved that the amended Rule be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 4 to the Standing Committee for publication.

The Committee proceeded to discuss the new, consolidated Rule X.X. After brief discussion, it was moved that to concisely state the purpose of the rule, subdivision (a) of the proposed rule be amended to read as follows:

(a) *In General.* Where a magistrate judge deems it appropriate, he or she may consider information communicated by telephone or other reliable electronic means when deciding whether to approve a complaint or to issue an arrest warrant, a summons, or a search warrant.

The motion was approved unanimously.

Turning to subdivision (b) of the proposed Rule X.X, the Committee discussed the procedures that would apply to the approval of a complaint or the issuance of a warrant or summons under the Rule. A member asked whether the requirement that a judge place an applicant under oath could be fulfilled by e-mail or a means other than by telephone. Another member suggested that the Rule should not limit itself to a specific technological method in this regard. Judge Raggi suggested that this subdivision should be drafted to present judges with a clear checklist that they could easily follow. To that end, it was suggested that the subsequent subdivisions (c) through (f) be redesignated as paragraphs (4) through (7) of subdivision (b). A member observed that amending the rules to embrace technological advances raised the question of whether the rules should actively encourage the use of technology or merely make it available as an option.

After further discussion, it was moved that the Committee approve proposed paragraph (1) of Rule X.X(b), which requires a judge proceeding under the rule to place the applicant for a warrant under oath.

The motion was approved by a vote of 9 to 2.

It was then moved, by individual motions, that the Committee approve proposed paragraphs (2) through (7) of Rule X.X(b). The paragraphs list the procedures applicable to the issuance of warrants under the rule.

The motions were each approved unanimously.

The Committee discussed subdivision (c) of Rule X.X, which limits the suppression of evidence obtained pursuant to an arrest or search warrant to cases when law enforcement officers have acted in bad faith. A member noted that the subdivision is based upon the Supreme Court decision in *United States v. Leon*, 468 U.S. 897 (1984), which was recently extended to evidence seized based upon a defective arrest warrant. *See Herring v. United States*, ___ U.S. ___, 129 S. Ct. 695 (2009). It was moved that subdivision (c) be approved.

The motion was approved by a vote of 10 to 1.

A member noted that through its promotion of the use of technology, Rule X.X might indirectly discourage face-to-face encounters between judges and applicants for warrants. To counterbalance that effect, a member suggested that a new paragraph be added to subdivision (b) that would read as follows:

The magistrate judge may examine the applicant or affiant and any witness that the applicant or affiant produces.

It was moved that the new subdivision be approved and added to Rule X.X(b).

The motion was approved by a vote of 10 to 1.

It was moved that the Committee send the new Rule X.X, as revised, to the Standing Committee for publication. (The placement and number of the rule will be decided at a later time.)

The Committee voted unanimously to send the proposed Rule X.X to the Standing Committee for publication.

The Committee then considered the final part of the group’s draft, which amended Rule 9 (Arrest Warrant or Summons on an Indictment or Information) by adding at the end a new subdivision to permit a judge to consider information communicated electronically. With the deletion of “a” before “telephone,” it was moved that the new subdivision be approved and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 9 to the Standing Committee for publication.

Professors Beale and King pointed out that in light of the creation of Rule X.X, Rule 41 (Search and Seizure) needed to be amended to contain a cross reference to the new rule. Accordingly, it was moved that Rule 41(d)(3) and (e)(3) be amended to read as follows:

Requesting and Issuing a Warrant by Telephone and Other Reliable Electronic Means. A magistrate judge may issue a search warrant based on information communicated by telephone or other reliable electronic means. The procedures in Rule X.X govern the application for and the issuance of such a warrant.

The motion was approved unanimously.

It was further moved that Rule 41, as amended, be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 41 to the Standing Committee for publication.

The Committee then considered two amendments to Rule 47 and 49 (pages 269-70 of agenda book). The proposed amendments clarified that motions can be filed electronically (Rule 47) and that if so filed, the motion will be considered a “written paper” for purposes of the rules (Rule 49). It was moved that the proposed amendment to Rule 47 be approved, and, so revised, the proposed amendment be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 47 to the Standing Committee for publication.¹

The proposed amendment to Rule 49 was revised to correct a typographical error by replacing “or” before “the United States” with “of,” after which it was moved that it be approved and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 49 to the Standing Committee for publication.

The Committee turned to the proposed amendment to Rule 1 (page 272 of agenda book). The amendment adds a definition of “telephone” to the list of definitions that apply to the rules. After revising the Note following the proposed amendment by striking as unnecessary the word “new” on line 9, it was moved that the amendment be approved and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 1 to the Standing Committee for publication.

The Committee discussed the proposed amendment to Rule 32.1 (Revoking or Modifying Probation or Supervised Release) (page 261 of agenda book). The amendment adds a new subdivision (f) at the end of Rule 32.1 to permit a defendant on request to participate in proceedings under the Rule through video teleconferencing. A member noted that this amendment would be very useful in situations when a defendant is alleged to have violated conditions of probation or supervised release while located in a district that lacks jurisdiction over the original sentence. Rather than require the defendant to return to the original district, causing delay and inconvenience for the defendant, the proposed amendment allows the individual to remain where the alleged violation occurred. Another member voiced a concern that although useful, the amendment could become a “slippery slope” towards sentencing by video. Another raised a concern that defendants might be pressured into appearing by video, to save the government transportation costs if the defendant was indigent. Professor King pointed out that the use of video teleconferencing could be triggered only by the defendant’s request, which ensures that it is the defendant’s choice whether to proceed by video or in person.

It was moved that the proposed amendment to Rule 32.1 permitting teleconferencing be approved and sent to the Standing Committee for publication.

The Committee voted with four dissents to send the amended Rule 32.1 to the Standing Committee for publication.

¹ The Committee subsequently voted, by email, to withdraw this amendment after it was deemed unnecessary.

The Committee considered the Note accompanying Rule 32.1 (page 261 of agenda book). Judge Raggi suggested that the language on lines 10-12 be amended to give a judge greater flexibility in choosing how to preserve the defendant's rights. Judge Tallman offered an amendment that substituted the following sentence for the sentence beginning on line 10: "If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel." It was moved that the Note be approved as revised and sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Note to Rule 32.1 to the Standing Committee for publication.

Finally, the Committee considered two conforming amendments that reflect the proposed amendment to Rule 32.1(f), permitting video conferencing. First, it was moved that Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District) (page 261 in agenda book) be amended by adding at the end a new subdivision, permitting video conferencing to be used, and, so revised, be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 40 to the Standing Committee for publication.

Next, it was moved that Rule 43 (Defendant's Presence) (page 268 in agenda book) be amended to include a cross reference to Rule 32.1 and to add video conferencing as an option for a defendant who does not wish to appear in person for a misdemeanor offense, and, so revised, be sent to the Standing Committee for publication.

The Committee voted unanimously to send the amended Rule 43 to the Standing Committee for publication.

With that, the Committee concluded its consideration of the amendments proposed by the Technology Subcommittee. Judge Tallman thanked Judge Battaglia for his diligent efforts and leadership of that subcommittee.

C. Subcommittee on Sentencing – Proposed Amendment to Rule 32(h) and Procedural Rules for Sentencing

Judge Molloy, Chair of the Subcommittee on Sentencing, reported on the two amendments under consideration to Rule 32 (Sentence and Judgment). Under Rule 32(c)(1)(A), a probation officer prepares a presentence report (PSR) for the court's consideration in sentencing. Under Rule 32(h), the court must give the parties reasonable notice if it is contemplating a departure from the applicable sentencing range and the ground for the possible departure is not mentioned in the PSR or in submissions filed by the parties. The first amendment under consideration, which originated in a proposal from the American Bar Association (ABA), would ensure that parties receive the same information as the probation

officer preparing the PSR. The second amendment would require a court to give notice not just of a possible departure but also of a possible “variance” from a sentence under the guidelines.

1. Procedural Rules for Sentencing

To assist the Committee in its deliberations of the first amendment under consideration, two members of the Pretrial and Probation Division of the Administrative Office presented their views. Jim Olsen, Chief of Criminal Law Policy, spoke first and briefly discussed how the proposed amendment would increase the workload of probation officers and might alter a probation officer’s neutral role in the sentencing process. Next, John Fitzgerald, Probation Administrator, expanded on these points. Referring to the ABA’s proposed amendment on page 286, Mr. Fitzgerald described in more detail how the amendment would greatly increase a probation officer’s workload by requiring the officer to distribute to the parties written summaries of interviews conducted by the officer in preparing the PSR. An officer might have 15-20 such interviews to summarize under the ABA amendment. This new duty has the potential to increase a probation officer’s workload tremendously.

Mr. Fitzgerald also cited other concerns with the proposed amendment. The amendment could place probation officers in the middle of disputes between the parties. In addition, the proposed duty to disclose information could conflict with confidentiality restrictions imposed by law. Mr. Fitzgerald suggested that the goal of the proposed amendment – to increase transparency in the preparation of the PSR – could be achieved in other ways, such as revising portions of the manual used by probation officers or making an officer’s sentencing recommendation more available to the parties.

The Committee briefly questioned Mr. Olsen and Mr. Fitzgerald. Mr. Wroblewski pointed out that the Department had prepared an alternative to the ABA proposal that sought to increase the flow of information but with a more modest change to the probation officer’s duties. A member observed that the Federal Defenders had concerns about the Department’s proposal.

Professor Beale noted that at this point, there was no consensus on how to best proceed to make the preparation of PSRs a more transparent process. She suggested that perhaps an academic conference could be arranged to bring together interested parties to further examine the issue. Another member said that many defense attorneys are not able to challenge important information underlying PSRs and the issue needs attention.

Judge Tallman said that although he felt some pressure to address the issue, the sense of the Committee appeared to be to collect more information and become more fully informed before acting. He noted that a study by the Federal Judicial Center on the views of probation officers was being prepared and that the Sentencing Commission was holding regional meetings. Accordingly, he recommitted to the Sentencing Subcommittee consideration of the Rule 32(c) issue, with a request that it prepare a draft amendment for presentation to the Committee at the meeting in October.

2. Rule 32(h)

The Committee turned to the proposed amendment to Rule 32(h), which would require a court to give notice to parties of a possible “variance” from a sentence under the guidelines, in addition to notice of a “departure” from the guidelines. Several members expressed concern about the difficulty of giving such notice, because the information upon which a judge relies may be continually supplemented right up to the time that sentence is pronounced. Therefore, it is hard to predict whether a variance from the guidelines may be imposed. Judge Raggi suggested that perhaps the issue is premature and the Committee might consider waiting until the Supreme Court had provided more clarification on post-*Booker* guidelines sentencing.

Noting that there was no consensus among the members at this point to change Rule 32(h), Judge Tallman said that further consideration of the amendment would be deferred.

D. Subcommittee on Victims’ Rights – Proposed Amendment to Rule 12.4

Judge Jones reported on the Subcommittee’s consideration of a possible amendment to Rule 12.4 (Disclosure Statement). Rule 12.4(a)(2) requires the government to disclose the identity of any organization that is a victim of a crime and, if the organization is a corporation, to make further financial disclosures. The Committee on Codes of Conduct had asked the Committee to look at whether the disclosure requirements should be expanded so that judges would be able to decide more easily whether recusal is advisable. The Subcommittee had considered whether Rule 12.4 should be expanded to include disclosure of individuals’ identity, and also to require organizational victims themselves – as opposed to the government – to make financial disclosures.

Judge Jones reported that after due consideration, the Subcommittee had concluded that no amendment to Rule 12.4 is necessary. Judge Jones stated that the privacy concerns raised by disclosure of an individual’s identity would outweigh any marginal assistance the information would provide to a judge. Therefore, the Subcommittee recommended that no action be taken. It was so moved.

The motion was approved unanimously.

Judge Tallman stated that he would write a letter to Judge Margaret McKeown, Chair of the Committee on Codes of Conduct, informing her of this result.

Mr. Wroblewski reported on efforts by the Department of Justice to communicate with the victims’ rights community. As described more fully in his letter dated March 2, 2009 (page 332), Department representatives have held biannual discussions with victims’ groups. During these discussions, the Department has informed the groups of relevant work being done by the Committee and solicited their concerns, if any, about the Federal Rules of Criminal Procedure. The Department also plans to continue meeting periodically with other victims’ groups to seek their views.

IV. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES**A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure**

Mr. Rabiej reported that bipartisan bills amending 28 statutes that contain time provisions affecting court proceedings had been introduced in the House and Senate. The bills use the exact language proposed by the rules committees. Judge Rosenthal has met with members of Congress as well as staff and prospects for quick passage of the bill seem good.

B. Update on Work of Sealing Subcommittee

Judge Zagel reported that he had no updates on the work of the Sealing Subcommittee, whose next meeting is scheduled for June 2, 2009.

C. Criminal Forms

Mr. Wroblewski reported that the AO's Forms Working Group had requested the Department of Justice to review many of the criminal forms that the Group has been revising. He said that the Group had accepted many of the Department's suggestions but that one disagreement remained regarding AO Form #102, used to apply for a tracking warrant (page 382 in agenda book). The Department is concerned with language in the form that refers to a request to "use the tracking capabilities of" a device such as cell phone. Mr. Wroblewski stated that courts were in disagreement over whether this type of request required probable cause and that the AO form implicitly endorsed a position that probable cause was required. (The full details of DOJ's concerns are contained in the letter from Assistant Attorney General Elisebeth Cook on page 380 of the agenda book).

Mr. McCabe stated that the form in question had been created in response to a request from magistrate judges for a generic form for all tracking devices. He said that Judge Russell Eliason, a member of the Forms Working Group, had addressed Ms. Cook's concerns in a letter to Judge Harvey Schlesinger (page 367 of agenda book). Summarizing Judge Eliason's views, Mr. McCabe said that the form takes no position with regard to whether probable cause is required. He added that the AO decided to post the form on its website, notwithstanding the controversy, due to the requests from magistrate judges. Professor Beale added that the website also had a caveat regarding the legal issue. Judge Battaglia said he thought the form was a good starting point that could be adapted and revised by a local court as the law develops. Mr. Wroblewski concluded the discussion by saying that the Department was not requesting any action by the Committee and that discussion of the form at today's meeting was merely for informational purposes.

Mr. McCabe further reported that the Forms Working Group had removed personal identifiers from forms, consistent with the privacy protections set forth in Rule 49.1 (Privacy Protection for Filings Made with the Court).

D. Memorandum from Judge Rosenthal regarding Privacy Subcommittee

Judge Rosenthal reported that the Executive Committee of the Judicial Conference had revived the Subcommittee that had been formed after passage of the E-Government Act of 2002, and its new name is the Privacy Subcommittee. It will be chaired by Judge Raggi and its first meeting will be in June 2009. The Privacy Subcommittee will examine many issues related to the difficult task of providing public access to court documents while simultaneously protecting the privacy rights of those involved with the judicial process.

Judge Raggi offered two observations: (1) that advances in technology make it increasingly hard to shield sensitive information; and (2) new challenges will likely arise with the advent of computers in prisons. Several members confirmed that prisons in their districts already had computers accessible to prisoners.

Judge Tallman remarked that alien registration numbers are often indispensable to the judicial process. For example, he cited immigration cases that he had worked on that involved individuals with identical names. Without the “A number” assigned to each individual and their respective administrative file, he would not have been able to tell which file pertained to which individual.

Mr. Wroblewski commented that people frequently assume that “publicly available” means “available on the internet.” However, competing values, such as privacy, challenge that assumption and weigh in favor of a distinction between the two. He offered as an example financial disclosure forms, which he said could be available for public inspection, but not posted on line.

Judge Rosenthal asked all judges to keep Judge Raggi informed of any effective measures that they had taken to address these concerns.

E. Criminal Law Committee’s Proposal Regarding Probation/Pretrial Officers

Judge Tallman reported that he had communicated with Judge Julie E. Carnes regarding the Criminal Law Committee’s proposal to authorize Probation and Pretrial Services officers to obtain search warrants. He said that according to Judge Carnes, further consideration of the matter was awaiting completion of a study by the AO.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman advised the Committee that the next meeting was scheduled for October 13-14, 2009, at the newly-renovated William K. Nakamura Courthouse in Seattle, Washington. Judge Tallman thanked Judge Jones and Judge Battaglia, who were leaving the Committee after finishing their terms, for their exemplary contributions. The meeting was adjourned.

TAB 10-12

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

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ROBERT L. HINKLE
EVIDENCE RULES

**Report and Recommended Guidelines on
Standing Orders in District and Bankruptcy Courts**

I. Executive Summary

For years, judges and lawyers have been concerned about the proliferation of “standing orders,” “administrative orders,” and “general orders” in the federal district courts. The term “standing orders” describes orders — including “administrative orders” or “general orders” — adopted by district courts or bankruptcy courts as district-wide or division-wide orders, without an opportunity for notice or public comment. The term includes individual-judge orders that are intended to apply generally. Individual-judge standing orders are not the focus of this report but are included in the guidelines for posting orders so they can be easily located and accessed.

The concerns raised by the proliferation of standing orders are similar to the concerns over local rules that led to congressional attention and launched earlier studies by the Judicial Conference. Like local rules, standing orders are meant to apply generally. Like local rules, standing orders can lead to a lack of uniformity in federal practice, undermining consistency in areas where the national rules were meant to provide it and creating traps for the unwary and even for the wary. But standing orders can raise even more serious problems than local rules for several reasons. First, standing orders are promulgated without the benefit of public comment. Second, standing orders are often harder to find and retrieve than local rules. Third, because standing orders may be entered by individual judges as well as by a division or district, there is significant variation even within the same district or division. Standing orders may raise these and other problems to such a degree as to risk invalidity and to invite congressional scrutiny.

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There is some case law guidance on the limits of using standing orders as opposed to local rules. But no national standards, and very few local standards, define what subjects are appropriately addressed by standing orders and what subjects are best addressed by local rule. The Standing Committee received requests from judges on circuit councils for guidance on delineating between standing orders and local rules. In response, the Committee asked for research on standing orders and asked the Administrative Office to survey the district courts to learn how they were actually using such orders. The Committee also surveyed chief district judges to learn what information and guidance might be most helpful.

The research and survey into the use of standing orders in the district courts showed wide variance in the number of orders and topics addressed and in how lawyers and the public receive notice. The research produced some general criteria for delineating between when standing orders are appropriate and when local rules should be used. Standing orders are most appropriate to address matters that: 1) are of no direct concern to practicing attorneys or litigants; 2) require action for too short a time period to make the use of a local rule practical; or 3) require prompt action to address an emergency. In general, three categories of subjects — internal administration, temporary problems, and emergencies — are the most appropriate for standing orders. Standing orders addressing matters outside these subjects are likely to be in tension with the interest of members of the public in commenting on matters that affect them and risk creating rules that are unnecessarily difficult or even unworkable.

Standing orders are most problematic when they: 1) cover matters in which lawyers and litigants have a substantial interest but are issued without the notice and public comment that accompanies local rules; 2) modify or abrogate local rules; and, of course, 3) conflict with national or local rules. Efforts to modify or abrogate local rules should only be made through local rule, with notice and comment. The research showed that while the majority of courts use local rules, rather than standing orders, to regulate matters that directly affect the public, a small number of courts are using standing orders to address such matters.

The research also showed a wide variation in how district- or division-wide and individual-judge standing orders are made available to the public. In many districts, standing orders are easily retrievable on the district court's website. But in other districts, it is not easy to find standing orders. It is particularly difficult to search for a standing order on a specific topic. Many standing orders are not indexed and most are not searchable by subject or topic.

Finally, the survey showed that courts would find it useful to have guidelines on delineating between matters appropriately addressed in standing orders and those that should be addressed in local rules and on the most effective and consistent way to post standing orders on court websites. Specific guidelines have been developed as to when it is appropriate to use district-wide or division-wide standing orders and when local rules should be used. The guidelines also recommend a consistent approach to posting standing orders on the websites of the district courts and in making such orders searchable.

II. The Use of Standing Orders

The Standing Committee became aware of the increasing use of standing orders through several avenues. The Standing Committee's Local Rules Project, which ended in 2005, uncovered standing orders that addressed the same topics as local rules. The Standing Committee's work on the model rules for electronic filing, approved by the Judicial Conference in 2004, showed that although many districts were regulating electronic filing through local rules, other districts were using standing orders. Work by the Civil Rules Committee to monitor developments in electronic discovery after the December 2006 Civil Rules amendments indicated that in some districts, standing orders are being used for detailed electronic discovery "protocols," while in other districts, local rules address electronic discovery.

The Administrative Office investigated the use of standing orders in eleven district courts. The research involved collecting and reviewing the standing orders in these districts, as well as receiving information directly from clerks and judges. Thereafter the Administrative Office sent a survey to chief judges in all district and bankruptcy courts asking for input in developing guidelines on what matters are appropriately addressed in local rules and those that should be addressed in standing orders. Responses were submitted by 49 district courts and 37 bankruptcy courts. The results of this and related research are summarized below.

1. Varying number of standing orders among the districts

The districts vary widely in their use of standing orders. Some districts have very few standing orders issued by the district or division. Others have standing orders in the hundreds.

2. *Varying subject matters treated by standing orders*

There is no standard approach to whether a particular subject matter is to be treated by standing order or local rule. For every district treating a matter by standing order, there are others treating the same matter by local rule. Examples of subjects that are addressed in local rules in some districts and standing orders in others include:

- regulation of use of electronic devices in the courthouse;
- procedure for filing documents under seal;
- rules governing applications for attorneys' fees;
- redaction of personal identifiers to comply with the E-Government Act;¹
- attorney admissions matters;
- rules governing electronic filing;²
- rules on court appearances by legal interns or law students; and
- rules governing ADR, settlement, or mediation.

3. *Subject matters most likely to be treated by standing orders*

While there is no uniformity in the use of standing orders, certain matters are more likely to be handled by standing orders rather than by local rules. These include rules on:

- court security;
- internal personnel matters such as appointments, EEO procedures, etc.;
- referrals to magistrate judges;
- case allocations between judges and/or divisions;

¹ In one district reviewed, the standing order on redaction of personal identifiers “supersedes and vacates” the local rule on the subject, to the extent the local rule is inconsistent. This report recommends that standing orders not be used to vacate local rules.

² One concern with electronic filing rules is that technological developments may require constant amendment. This concern might lead a court to think about dispensing with the procedural requirements of local rulemaking in favor of using standing orders. As discussed in this memo, the better approach — used in several districts — is to post a user manual on the court’s website that can be changed to accommodate technological developments and other electronic filing problems.

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- juror pools and selection;
- use of nonappropriated funds;
- Criminal Justice Act plans;
- schedules for forfeiture of collateral;
- conditions of probation and supervised release;
- Speedy Trial Act implementation;
- criteria for waiver of PACER fees;
- court reporters and transcripts;
- attorney admissions and discipline matters; and
- naturalization ceremonies.

4. *Attempts by some districts to delineate the proper use of standing orders*

Some districts have, by local rule, defined the type of matters to be covered by standing orders. For example, Local Civil Rule 1.1 of the Northern District of Oklahoma states in part as follows:

General Orders, which are available on the Court’s website, are issued by the Court to establish procedures on administrative matters and less routine matters which do not affect the majority of practitioners before this Court.

As another example, Local Rule 83.1.2(a) of the District of Kansas provides that the court may issue “standing orders dealing with administrative concerns or with matters of temporary or local significance.” Like Oklahoma’s local rule, this rule identifies administrative matters as the most appropriate use of standing orders. But the Kansas local rule also allows standing orders on “matters of temporary or local significance” and does not include “less routine matters which do not affect the majority of practitioners before the court” in the topics that standing orders should address.

The Eastern District of California, in Local Rule 1-102(a), carefully distinguishes between the content of local rules and standing orders:

Outside the scope of these Rules are matters relating to internal court administration that, in the discretion of the Court en banc, may be accomplished through the use of General Orders, provided, however, that no

matter appropriate for inclusion in these Rules shall be treated by General Order. No litigant shall be bound by any General Order.

The Eastern District of California rule is the most limited of the three examples. Its approach restricts standing orders to matters such as funding, PACER fees, evacuation plans, case assignment, personnel appointments, and the like. This local rule specifically states that nothing in the court's standing orders may directly affect a litigant.

5. *Finding standing orders on a court's website*

The AO reports that in the 11 districts reviewed, there was considerable variance in locating general or standing orders on the court's website. A review of a number of other district websites also found a widespread variance in the manner and web location for posting standing orders. Some districts have a link for "general orders" or "standing orders"; others do not. One district has a link entitled "local documents" that then has a sub-link to "administrative orders." Another district has a link entitled "rules." Another district locates standing orders under "general information" but a separate link to "rules" leads only to the local rules.

Once the link to standing orders is found, the question is how to find a particular order or all orders that might be relevant to a case or topic. In many courts, it is not very difficult to review the standing orders for relevance. For example, in one district, there are five standing orders on the website, and they are listed by topic:

- * 06-01 Extending Suspension of Some Requirements of Local Civil Rules 10.1(b); 81.2(b); 501.1
- * 05-04 Suspension of Some Requirements of Local Civil Rule 10.1(b)
- * 05-03 Adoption and Implementation of the Model Third Circuit Electronic Device Policy
- * 05-02 Multiple, Unrelated Defendants in Matters
- * 05-01 Mandatory Electronic Filing
- * Guideline Sentencing

But some districts simply list their standing orders chronologically or by number, with no indication of subject matter. This requires the practitioner to open and review every standing

order to see if it is relevant and to be sure that all relevant orders have been located. Few districts provide a search function for standing orders.

Because one of the major concerns about standing orders is lack of notice, it is particularly important that a practitioner be able to find standing orders and review them for relevance. Those judges responding to the AO survey widely agreed that standing orders should be posted on the same locations on each court's Internet home page (87%, 74 out of 85 respondents). There was even stronger agreement that standing orders should be listed, indexed, and made searchable so that orders on particular topics are easy to locate (94%, 79 out of 84 respondents).

6. *Standing orders of individual judges*

In addition to standing or general orders of the district or division, many judges also issue standing or general orders to apply only to cases in their courts. Under section 205(a) of the E-Government Act of 2002, all such orders must be posted on the court's website. Nonetheless, in some districts, these individual-judge standing orders are not posted on the court's website. In other districts, the individual-judge standing orders are posted as separate documents for each judge; the link is found next to the judge's name, after "Judges" is clicked on the main web page. These individual-judge standing orders are usually long — up to 50 pages — and are in a .pdf format that is not easily searchable. These documents often repeat much of what is also in the district's or division's standing orders or local rules. But these documents also include variations from the district or division standing orders or local rules and from other judges' individual orders, ranging from significant to minor. These variations are usually not highlighted or readily identifiable. Individual-judge orders are also supplemented or revised from time to time, so that a review on one day does not assure complete familiarity on a later day. The results of the research and survey highlighted the importance of consistent posting of individual-judge standing orders as well as district- or division-wide standing orders, and of making orders on particular topics easier to find.

III. Analysis of the Case Law

The case law reviewing the content of standing orders is relatively sparse, but four basic principles can be derived:

1) Standing orders (both by the district and by an individual judge) can be an appropriate exercise of a court's inherent authority over management of its cases and control of the courtroom. *See, e.g., United States v. Ray*, 375 F.3d 980, 993 (9th Cir. 2004) (standing order requiring U.S. Attorney to assemble information required by PROTECT Act to be submitted to the Sentencing Commission was upheld as a proper exercise of "the court's inherent authority to regulate the practice of litigants before it").

2) Standing orders may be found improper if they impose requirements beyond those imposed by (or in some other way conflict with) national rules or statutes. *See, e.g., Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 386 (2d Cir. 2001) (application of standing order on Civil RICO pleading found to be improper because it imposed requirements "in excess of the essential elements of a RICO claim"); *United States v. Zingsheim*, 384 F.3d 867, 871 (7th Cir. 2004) (application of standing order found to be improper because it was used to defer downward departure decisions when deferral was not authorized by Rule 35).

3) Appellate courts have expressed concern about the lack of notice and public participation in the implementation of standing orders and have on occasion suggested that matters addressed in standing orders would be better placed in local rules. *See, e.g., In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 n.1 (1st Cir. 1999) (In response to appellants' claim that they were not aware of the district court's standing order on cost allocation, the court stated: "[W]e urge the district courts to avoid incipient problems of this type by incorporating standing orders into local rules or, at least, making them readily available in the office of the Clerk of the district court."). Judge Easterbrook emphasized the difference between standing orders and local rules in *In re Dorner*:

Adopting local rules through the device of standing orders contravenes the Rules Enabling Act in several ways beyond the vice of inconsistency. First, rules must be reviewed by an advisory committee. Second, rules may be adopted only after public notice and opportunity for comment. Third, rules adopted by district courts must be submitted to the council of the circuit for review. Finally, all local rules must be sent to the Director of the Administrative Office, who ensures their public availability. The [court] violated all of these requirements when

it used a nonpublic standing order to contradict [Bankruptcy] Rules 8006 and 8007....

In re Dorner, 343 F.3d 910, 913 (7th Cir. 2003) (internal citations omitted).

4) Standing orders may be improper to the extent they impose inflexible standards that do not accommodate the particular circumstances of a case. *See, e.g., In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) (concluding that district court's standing order on allocation of costs "raises a core concern: it does not leave sufficient room for individualized consideration of expense requests").

IV. Results of the Research and Surveys

Too many standing orders raise many of the same concerns as too many local rules, as well as problems of lack of notice to, and comment from, the public. These problems are exacerbated by difficulties in finding standing orders on particular topics. The fact that individual judges as well as districts and divisions issue standing orders leads to a large number of orders. These problems can be reduced by using standing orders, as most courts do, to address only a narrow range of topics and by ensuring that the orders are easy to find.

As a general matter, standing orders are most appropriate to address matters that are of no direct concern to practicing attorneys or litigants (internal administration); that require action for too short a time period to make the use of a local rule practical (temporary problems); or that require prompt action to address an emergency (emergencies). When standing orders are appropriate, whether district-wide, division-wide, or individual-judge, they should be easy to find and search. Standing orders should be posted on websites in a consistent way from court to court and have indexes or other features that make it easier for lawyers and litigants to find and retrieve orders on particular topics.

Attached to this report are specific guidelines on distinguishing between matters that are most appropriately addressed by standing orders and those that should be addressed by local rules, and on posting standing orders on websites to make them easier to locate. The Standing Committee can provide guidance, on request, on questions about the appropriate placement of subject matters in standing orders or local rules. In addition, the Standing Committee or AO staff can provide, on request, general advice on posting standing orders on each district's website and making it easier to find orders addressing specific topics.



DRAFT

GUIDELINES FOR DISTINGUISHING BETWEEN MATTERS APPROPRIATE FOR STANDING ORDERS AND MATTERS APPROPRIATE FOR LOCAL RULES AND FOR POSTING STANDING ORDERS ON A COURT'S WEBSITE

I. Guidelines for Using Standing Orders

1. Standing Orders May Be Used for Internal Administration.

Standing orders are most useful and appropriate to address matters of internal administration. For such matters, notice and public comment are not necessary and in some cases not justified. Examples of matters of internal administration properly covered by standing orders include the following:

- Court security¹
- Planning for emergencies²
- Using nonappropriated funds³
- General procedures for funds in court registry⁴
- Directives to court personnel⁵
- Division of workload⁶
- Referral to magistrate judges⁷
- Use of resources⁸
- Juror wheels⁹
- Setting dates for naturalization hearings¹⁰
- Court implementation of judicial resources for initial appearances¹¹
- General scheduling of motions, such as on a particular day of the week¹²
- Appointments, such as to Criminal Justice Act Panel¹³
- PACER fee exemptions¹⁴
- Closing or staffing of courts on or after holidays¹⁵

2. Standing Orders Are Appropriate to Address Problems and Issues That Are Unlikely to Exist Beyond the Time Necessary to Implement a Local Rule.

Because of the procedural requirements for local rulemaking, a standing order may be necessary to address a problem that is anticipated to be of such short duration that it will be resolved by the time a local rule can be implemented. For example, some courts briefly

suspended sentencing proceedings until the impact of *Blakely v. Washington* could be analyzed, which was completed before a local rule suspending proceedings could have been implemented.¹⁶

3. *Standing Orders Are Appropriate to Address Emergencies, During the Time Necessary to Implement a Local Rule.*

A third appropriate use for a standing order as opposed to a local rule is to address what amounts to an emergency. For example, some district courts entered a standing order adopting the Interim Rules to Implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Other courts have used standing orders to deal with unanticipated issues arising from particular kinds of cases, such as cases involving terrorism charges. If, however, the matter addressed is a continuing rather than a temporary one — and it affects members of the public — then a local rule should be developed to address it.¹⁷

4. *Standing Orders May Be Appropriate to Address Rules of Courtroom Conduct as Opposed to Substantive Rules of Practice.*

There are many standing orders that concern conduct in the courtroom. These can be district- or division-wide standing orders or individual-judge standing orders. Standing orders often set rules for “purely” courtroom conduct, such as eating and drinking in the courtroom, courtroom hours, whether lawyers should question witnesses from a podium or from counsel table, and whether lawyers must deliver courtesy copies to chambers.

Each judge of course has the authority to control his or her courtroom in the way that works best for that judge. Individual-judge standing orders may be appropriate if the judge has courtroom-conduct requirements that the local rules do not cover and the requirements govern purely courtroom conduct as opposed to more substantive matters. These Guidelines do not address a judge responding to case-management problems presented in specific cases by issuing orders in those cases as opposed to issuing a standing order that applies generally.

An individual-judge standing order should not repeat the provisions of the local rules or district- or division-wide standing orders. To avoid confusion, where an individual-judge standing order does deviate from district- or division-wide standing orders or local rules that generally apply, the judge’s standing order should clearly identify the deviation and what different approach is required.

Any standing order should be easy to find. The fact that many of the same topics or matters are inconsistently addressed — in local rules in some courts, in district- or division-wide standing orders in other courts, in individual-judge orders in yet other courts, or

repeated with variations in some or all of these categories in some courts — adds to the difficulty lawyers face in figuring out what standards apply and where to look for those standards.

The case law makes one outer limit clear. Whether issued by a district, a division, or an individual judge, a standing order that is inflexible or idiosyncratic may be found improper by an appellate court, particularly if there is a question as to adequate notice of the order. For example, in *In re Contempt Order of Petersen*, 441 F.3d 1266 (10th Cir. 2006), the magistrate judge entered an order of criminal contempt against a government lawyer who was five minutes late to a pretrial detention hearing. The lawyer had violated the judge’s “standing policy” that any lateness would be sanctioned in the amount of \$50, payable to the court — no excuses permitted. The court of appeals vacated the order, reasoning that it failed to take account of the circumstances of a particular case. It noted that the lawyer was in time to argue the motion, and that the judge made no effort to inquire into the reasons for the lawyer’s tardiness. Moreover, the court was concerned that the lawyer had no notice of the “standing policy.”

5. *Rules on Filing, Pretrial Practice, Motion Practice, and Other Matters That Must Be Complied with by Litigants, Should Be Placed in Local Rules.*

There are many standing orders — both district- and division-wide and individual-judge orders — that control such matters as electronic filing; special pleading requirements (such as in civil RICO cases); sealing criteria and procedures; electronic discovery protocols; filing and litigating motions, including summary judgment motions; limits on counsels’ questions during voir dire; time limits on opening statements; transcribing audio recordings entered as evidence; applications for attorney fees; and filing memoranda of law. Many of these orders differ from local or national rules and some are in tension with or even contradict those rules. Issues relating to such matters as filing pleadings and motions, litigating motions, and developing criteria for sealing documents, are so important to the practicing bar that notice and public comment are essential.

With respect to electronic filing, the argument is sometimes made that technology develops so quickly that by the time a local rule can be implemented, it is outmoded and a new local rule is needed. But the prospect of technological development does not justify the placement of all electronic filing rules in standing orders. The model local rules developed by the Judicial Conference are flexible enough to accommodate technological change. It is notable that a number of districts have mandated electronic filing by standing order rather than local rule; but a standing order on such an important (and unchanging) matter is difficult to justify as necessary to accommodate constant changes in electronic filing. Filing

requirements have a significant impact on lawyers and litigants and the local-rules comment process is important to developing workable and effective procedures. It is true, of course, that the details of implementation of electronic filing may need fairly frequent updating, but that can be done by promulgating general local rules that cross reference a user's manual on the court's website, as is the practice in many districts.

6. *Rules for Mediation and Other Forms of ADR, Sentencing, and Related Proceedings Should Be Placed in Local Rules.*

Some districts have standing orders that essentially provide a complete set of rules for such proceedings as ADR (including arbitration and mediation), sentencing (especially standards for probation and supervised release), and attorney disciplinary proceedings. Most districts have implemented such procedures in local rules, showing that standing orders are not necessary for these kinds of proceedings. It is recommended that courts operating under such district-wide standing orders consider transferring these procedures to their local rules. Placing these subject matters in local rules would provide the lawyers and litigants participating in these proceedings an opportunity to comment on them before they are promulgated.

7. *Standing Orders Should Not Duplicate a National or Local Rule.*

Under Civil Rule 83 and Criminal Rule 57, standing orders are not supposed to duplicate a national rule. Duplication must be distinguished from simply referring to a national rule, which is of course permissible. But if a standing order actually duplicates a national rule, it is both unnecessary and improper.

There is no similar prohibition on a standing order duplicating a local rule, but such duplication is problematic. Including the same subject matter in both a local rule and in a standing order is in itself confusing. The potential for confusion increases if one changes and the other does not, or if the standing order is close but not identical to the local rule. Minor variations, poor paraphrasing, or selective duplication will introduce even more confusion. It could be argued that duplicating some local rules in standing orders might increase the likelihood that the lawyers know of the requirements; but the risks of "incomplete" duplication, or a change in one rule but not the other, caution strongly against attempting to duplicate the terms of a local rule in a standing order.

8. *Standing Orders Must Not Abrogate or Modify a Local Rule.*

Some district courts have abrogated or modified a local rule by issuing a standing order, even without the justification of an emergency. Under Civil Rule 83 and Criminal

Rule 57, a court may only regulate practice in a manner consistent with the district's local rules. The use of standing orders to abrogate or modify a local rule is problematic, moreover, because it requires the practitioner to master both the local rule and the standing order and then to determine how they interact. The transaction costs outweigh whatever benefit might be argued to exist from changing a local rule by way of standing order.

II. Guidelines for Posting and Providing Access to Standing Orders

Given the lack of notice and public comment before standing orders are entered, it is critical that members of the public have a ready way to find and access them. Under current practice, members of the public can find this difficult because there is no consistent, predictable approach to posting standing orders on court websites, and most courts do not have indexing or search functions that allow members of the public readily or reliably to find what they are looking for among all the posted standing orders.

In posting standing orders on court websites, the following guidelines should be followed:

1. The home page for each court's website should have a link entitled "Standing Orders."
2. The link should direct the user to a page with a further link to the court's general standing orders, and individual links for the standing orders of each judge on the court.
3. Notice of a new standing order, or a change to a standing order, should be on the court's website for a reasonable period.
4. The posted standing orders for the court and for each individual judge should contain an index and a word-search function that allows the user to locate and access orders on particular topics or subjects and ensure that all relevant orders have been found.

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1. *See* Southern District of Texas, Order 2001-05, In Re: Weapon Possession in Court Facilities (limits individuals who can possess a firearm in courthouses).
 2. *See* Northern District of Oklahoma, General Order 01-05 (adopting Occupant Emergency Plan for occupants of the courthouse).
 3. *See* Southern District of Texas, Order 1995-13, In the Matter of Operations Without Appropriations for Fiscal Year 1996.
 4. *See* Southern District of Texas, Order 1992-10, Authorizing Withdrawal of Excess Securities.

5. *See* Southern District of Texas, Order 1992-22, Order for Docketing Priority (directive to court personnel re importance of prompt docketing).
6. *See* Southern District of Texas, Order 2006-1, In the Matter of the Division of Work Calendar Year 2006.
7. *See* Northern District of Florida, Order dated 5/31/2000, Referral of Civil Cases to Full-time Magistrate Judges (ordering that all new social security cases be randomly assigned, on a rotating basis, to the division's full-time magistrate judges).
8. *See* Northern District of Florida, Order dated 10/2/2006, Authorization for In-District Travel for Clerk of Court and Chief Probation Officer (also authorizing agency-financed travel to FJC or AO training sessions).
9. *See* Southern District of Texas, Order 2005-09, In Re: Refilling the Master Jury Wheels.
10. *See* Southern District of Texas, Order 1990-44, Order Setting Naturalization Hearing Date.
11. *See* Southern District of Texas Order 1991-26, In the Matter of Guidelines for Coordination of Criminal Procedures (guidelines for coordinating criminal procedures in Houston Division to ensure that an apprehended defendant is brought before a magistrate judge as quickly as possible).
12. *See* District of South Carolina, Order of Judge Anderson (providing that civil motions are heard on Mondays at 1:30 p.m., and if Monday is a holiday, the next motion day is the following Monday).
13. *See* Northern District of Florida, Order dated 12/14/2006, Criminal Justice Act Panel (appointing a new member).
14. *See* Northern District of Florida, Order dated 4/7/2006, Exemption from Fees to PACER (authorizing fee exemption for academic researcher).
15. *See* Northern District of Oklahoma, General Order 06-19 (announcing closing of court on Friday, November 24, 2006).
16. *See* Northern District of Oklahoma, General Order 04-07 (stating that it was considering a moratorium on sentencing proceedings until it could study *Blakely*, and directing the U.S. Attorney to identify any case in which a delay might violate the Speedy Trial Act).

17. It could be argued that any “emergency” should be handled by an interim local rule rather than a standing order. *See* 28 U.S.C. § 2071(e) (“If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.”). But so long as there is ultimately a local (or national) rule implemented within a reasonably short time period to deal with the problem on a permanent basis, there is no real distinction between a standing order and an interim local rule — because both are implemented without a period for public comment.

TAB 13

SUBJECT: Judiciary Strategic Planning (Action)

The Ad Hoc Advisory Committee on Judiciary Planning would like the Committee on Rules of Practice and Procedure to review draft judiciary-wide strategic issues that will form the basis for new judiciary strategic plans. Strategic issues are fundamental policy questions or challenges that have the potential to affect how well the judiciary can carry out its mission.

Background

The Ad Hoc Advisory Committee was established in August 2008 to develop an approach to strategic and operational planning appropriate for the judiciary's committee-based policy-making system. It presently includes four members of the Executive Committee, the chairs of seven committees and one subcommittee of the Judicial Conference, two circuit executives, and a district court clerk.

Members of the Ad Hoc Advisory Committee on Judiciary Planning

- **Judge Charles R. Breyer, chair**, District Court, N.D. California (Executive Committee)
- **Chief Judge Paul R. Michel**, Court of Appeals, Federal Circuit (Executive Committee)
- **Judge Lawrence L. Piersol**, District Court, South Dakota (Executive Committee)
- **James C. Duff**, Director of the Administrative Office (Executive Committee)
- **Judge Barbara M.G. Lynn**, District Court, N.D. Texas (Chair, Committee on the Administration of the Bankruptcy System)
- **Judge Julia Smith Gibbons**, Court of Appeals, Sixth Circuit (Chair, Committee on the Budget)
- **Judge Robert C. Broomfield**, District Court, Arizona (Chair, Economy Subcommittee, Committee on the Budget)
- **Judge John R. Tunheim**, District Court, Minnesota (Chair, Committee on Court Administration and Case Management)
- **Chief Judge Julie E. Carnes**, District Court, N.D. Georgia (Chair, Committee on Criminal Law)
- **Judge Rosemary M. Collyer**, District Court, District of Columbia (Chair, Committee on Information Technology)
- **Judge George Z. Singal**, District Court, Maine (Chair, Committee on Judicial Resources)

- **Chief Judge Joseph F. Bataillon**, District Court, Nebraska (Chair, Committee on Space and Facilities)
- **Toby D. Slawsky**, Circuit Executive, Third Circuit
- **Gary H. Wente**, Circuit Executive, First Circuit
- **Michael W. Dobbins**, District Clerk, N.D. Illinois

The Ad Hoc Advisory Committee has been working on two parallel paths to enhance judiciary planning. On one path, the Committee has been considering different approaches to strategic planning, in order to recommend a judiciary planning process that will be sustainable, national in scope, and cross-cutting. At the same time, the Committee has begun to engage in the planning process. It has reviewed the judiciary's vision, mission and core values, considered trends, and has begun to identify strategic issues that affect the judiciary.

Committee on Rules of Practice and Procedure Review of Draft Judiciary Strategic Issues

Attachment 1 includes draft restatements of the judiciary's vision, mission and core values, and a preliminary set of six judiciary strategic issues. The vision, mission and core values drafts are based on similar statements in the 1995 *Long Range Plan for the Federal Courts*. The strategic issues are based on the ideas generated in the planning process, including the Ad Hoc Advisory Committee's January 2009 workshop on strategic issues, and the comments of its members on staff-prepared drafts.

Attachment 1 represents the work of the Ad Hoc Advisory Committee through its March 2009 meeting. Members of the Ad Hoc Advisory Committee are considering additional changes to the draft, but believe that Judicial Conference committee input is essential at this time. **Judicial Conference committees are asked to review the draft planning elements that have been generated thus far, paying particular attention to the draft strategic issues, and share their thoughts and ideas with the Ad Hoc Advisory Committee.**

For this review, a strategic issue is a fundamental policy question or challenge for the federal judiciary that is derived from an interpretation of relevant societal changes and affects the judiciary's mission and mandates. In doing so, committees should consider the following criteria¹:

¹See Bryson, John M., *Strategic Planning for Public and Nonprofit Organizations: A Guide to Strengthening and Sustaining Organizational Achievement*, 3rd ed. (San Francisco: Jossey-Bass, 2004), pp. 43-44.

Judiciary Strategic Issue Criteria

The issues identified for the federal judiciary must be:

- relevant to its mission
- addressable by the federal judiciary, and
- significant and urgent enough to require a timely and meaningful response

The Ad Hoc Advisory Committee believes that identifying strategic issues is critical to successful planning. Committees are encouraged to consider whether each issue is appropriately framed, whether the rationale presents an appropriately compelling case as to why the issue must be addressed, and whether the scope is appropriate.

Continued Committee Involvement

The Ad Hoc Advisory Committee recognizes the importance of committee involvement in Judicial Conference planning, and appreciates your committee giving thoughtful consideration to this matter. The Committee will call upon Judicial Conference committees for further input and guidance as it develops draft plans and proposals.

AD HOC ADVISORY COMMITTEE ON JUDICIARY PLANNING

Draft Restatements of the Judiciary's Vision, Mission and Core Values Drafts of Judiciary Strategic Issues

Vision

The United States courts will remain an independent, national judiciary exercising limited jurisdiction within a federal system. As an equal branch of government, the courts will preserve their core values even as they retain the flexibility to meet changing needs.

Mission

The United States courts provide the nation with a just, timely, accessible, and efficient mechanism for resolving disputes that arise within the jurisdiction conferred on the courts by the Constitution and the Congress.

Core Values

Rule of Law: legal predictability, continuity, and coherence; procedural transparency; decisions based faithfully on the law rather than personal opinion or preference

Equal Justice: fairness and impartiality in the administration of justice; doing equal right to everyone who comes before the court; treating all people with understanding, dignity, and respect

Judicial Independence: the ability to render justice without fear that unpopular decisions may threaten individual livelihood or existence; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management

Excellence: high standards of legal scholarship and administrative competence; strong emphasis on professional development for judges and staff; commitment to innovative management and administration; availability of sufficient financial and other resources

Accountability: leadership; stringent standards of conduct; effective, efficient use of public resources

Drafts of Judiciary Strategic Issues

Strategic Issue 1

Delivering Justice

How can the judiciary preserve its mission and core values, while meeting new and increasing demands on the system?

Rationale

Exemplary and independent judges, high quality staff, well-reasoned and researched orders, and time for deliberation and attention to individual issues are among the hallmarks of federal court litigation. Scarce resources, changes in litigation and litigant expectations, and certain changes in law challenge the federal judiciary's effective delivery of justice. Securing adequate resources, while continuing to identify ways to improve timeliness, efficiency and performance will help to preserve the judiciary's mission.

Scope of Strategic Issue

This issue would encompass, among others, the following topics for planning:

- adequacy of resources
- appropriate judgeship levels
- secure, accessible and appropriate facilities
- attraction and retention of judges and staff
- recognition of the value of senior judge service
- improved timeliness, efficiency and performance

Strategic Issue 2

The Effective and Efficient Management of Public Resources

How can the judiciary manage its resources and programs in a manner that reflects workload variances and funding realities, while providing justice in a manner consistent with its core values?

Rationale

The workload of the federal courts can vary greatly from year to year, and it is an ongoing challenge to ensure that adequate resources are available in each court to meet workload demands. Consequently, whether cases are handled in a timely manner can sometimes be a function of geography. The judiciary can only meet future workload demands if it can continue to recruit, develop and retain highly skilled and competent judges and staff. Developing, publicizing, and implementing innovative practices will also assist courts and other judiciary organizations in addressing workload changes. The continued development of innovative local practices and business processes should be encouraged. At the same time, the judiciary may also need to consider whether and to what extent certain innovative or efficient practices should be adopted judiciary-wide.

Scope of Strategic Issue

This issue would encompass, among others, the following topics for planning:

- recruitment, development and retention of a highly competent and diverse staff
- effective allocation and management of resources
- preparation for a range of funding scenarios
- responses to workload “hot spots”
- business processes reflecting the capabilities of technology
- effective handling of pro se cases
- appropriate balance between the judiciary-wide adoption of innovative practices, and the tradition of local administration of federal justice
- demonstrable results of management and allocation strategies

Strategic Issue 3

The Importance of Court Users

How can the judicial processes meet the needs of the people who use the courts while responding to demographic, socio-economic and cultural changes?

Rationale

Justice requires a court system that remains comprehensible, physically accessible, and affordable to ordinary users. Given the profound changes occurring in American society during recent decades, and in the foreseeable future, the federal courts must consider carefully whether they are continuing to meet the needs of court users. This task is made more difficult because people have been turning more readily to the federal courts to address problems that cannot be solved within their limited jurisdiction, and because claims are often not properly raised or the judicial processes are not well understood. Despite these challenges, the courts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses.

Scope of Strategic Issue

This issue would encompass, among others, the following topics for planning:

- understandable and user-friendly judicial processes
- appropriate direction, assistance and referrals for pro se litigants
- electronic interfaces that meets litigants' needs
- continuing legal education on federal court practice
- identification and elimination of unnecessary barriers to federal practice
- improved grand and petit juror experiences
- demonstrable handling of disputes in an excellent, cost-effective, and timely manner

Strategic Issue 4

The Judiciary as an Equal Branch of Government

How can the judiciary develop and maintain effective partnerships with the other branches of government, yet preserve appropriate autonomy in judiciary governance, management and decision-making?

Rationale

Increasingly, the federal judiciary's ability to deliver justice effectively is dependent on how well it can interact with the legislative and executive branches of government. This is not only true with respect to the judiciary's recurring requests for human and financial resources but also in areas, such as judicial security, facilities management, and employment benefits for judges and staff, where primary administrative or program responsibility rests in another branch. Also, a more coordinated approach may be required on some issues, where the actions of one branch can aid or impede the work of another. The near future may bring new and expanded opportunities to enhance communication and cooperation among the three branches. In taking advantage of such opportunities, the judiciary can strengthen its role as an equal branch of government while improving the administration of justice. At the same time, the judiciary must endeavor to preserve an appropriate degree of self-sufficiency and discretion in conducting its own affairs.

Scope of Strategic Issue

This issue would encompass, among others, the following topics for planning:

- autonomy over internal governance and management
- judicial independence
- effective communication and education efforts on legislation important to the judiciary
- positive working relationships with the executive and legislative branches and other stakeholders

Strategic Issue 5

Harnessing Technology's Potential

How can the judiciary pursue advances in technology, while effectively balancing judiciary-wide approaches and local innovation, and preserving the importance of human interactions?

Rationale

Implementing innovative technology applications can help the judiciary to meet the changing business needs of judges, staff and court users. The judiciary will be challenged to build and maintain effective IT systems in a time of growing usage, and judicial and litigant reliance. A key challenge will be to maintain an appropriate balance between the economies of scale that may be achieved through certain enterprise-wide approaches, and the innovations that may result by allowing and fostering the development of local solutions and applications. Other challenges include the effective delivery of high-quality technology awareness and training programs for judges and staff, and the judiciary will also need to attract, develop and retain highly skilled technology staff. The judiciary also faces questions as it considers whether and how to deploy innovative technology in a manner consistent with judiciary core values. Technology also affects how work is done, how many staff are needed to do that work, what competencies are required, and what physical facilities are needed.

Scope of Strategic Issue

This issue would encompass, among others, the following topics for planning:

- continued development of innovative applications and systems
- reliable service during growing usage and dependence
- appropriate balance between enterprise-wide approaches and local solutions
- meeting the needs of judges, staff and court users
- use of technology in a manner consistent with judiciary core values
- improved technology awareness
- enhanced security and privacy

Strategic Issue 6

Enhancing Public Understanding, Trust and Confidence

How can the judiciary interact with and educate the public about the role of the federal courts as an equal branch of government, in a manner consistent with that role?

Rationale

The ability of courts to fulfill their mission and perform their functions is based upon the public's trust and confidence in the system. However, misunderstandings about the federal courts—including their role and the limitations of their jurisdiction—often arise among members of the public. Decisions of federal courts have been unfairly criticized, and judges are limited in their ability to respond to such criticism. Exploding advances in communications technology have increased the public's access to misinformation and criticism, as well as its expectations of transparency. But such communications advances also provide an opportunity for the judicial branch to expand its reach in appropriate ways and to do so at far less cost than previously possible. Efforts to build the public's understanding of the federal courts—working with the news media, taking advantage of new methods of communication, and improving the public's interaction with the courts—can help to support the trust and confidence the judiciary requires.

Scope of Strategic Issue

This issue would encompass, among others, the following topics for planning:

- enhanced public information
- appropriate mechanisms for communication and education with journalists
- effective use of new methods of communication
- facilitation of public education about the judiciary
- jury service as an opportunity for creating an accurate, positive public perception of the courts and the justice system
- outreach and communication in a manner consistent with judicial independence

TAB 14

December 2009							February 2010							March 2010						
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S
		1	2	3	4	5		1	2	3	4	5	6		1	2	3	4	5	6
6	7	8	9	10	11	12	7	8	9	10	11	12	13	7	8	9	10	11	12	13
13	14	15	16	17	18	19	14	15	16	17	18	19	20	14	15	16	17	18	19	20
20	21	22	23	24	25	26	21	22	23	24	25	26	27	21	22	23	24	25	26	27
27	28	29	30	31			28							28	29	30	31			

January 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1 New Year's Day	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18 Martin Luther King Jr. Day	19	20	21	22	23
24	25	26	27	28	29	30
31						U.S. Federal Holidays are in Red.
December 2009	Printfree.com Main Calendars Page					February 2010